

## ARTICLES

### A RACE TO THE BOTTOM? PRESIDENT OBAMA'S INCOMPLETE AND CONSERVATIVE STRATEGY FOR REFORMING EDUCATION IN STRUGGLING SCHOOLS OR THE PERILS OF IGNORING POVERTY

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The Race to the Top Fund (Fund), a competitive federal grant fund designed to spur educational reform at the state level, exposes the major deficit in President Barack Obama's plan for reforming this country's persistently lowest-achieving schools:<sup>1</sup> a

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1. A persistently lowest-achieving school is defined as:

(i)[a]ny Title I school in improvement, corrective action, or restructuring that (a) [i]s among the lowest-achieving [5%] of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or (b) [i]s a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60[%] over a number of years; and (ii) [a]ny secondary school that is eligible for, but does not receive, Title I funds that (a) [i]s among the lowest-achieving [5%] of secondary schools or the lowest-achieving five secondary schools in

reluctance to acknowledge explicitly the relationship between struggling schools and concentrated poverty. The Fund encourages individual states to implement reforms in four areas: enhancing standards and assessments, improving data use and collection, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around our lowest-achieving schools.<sup>2</sup>

The Fund's framework for reforming struggling schools is narrow; individual states are encouraged to respond to struggling schools primarily by clearing the path for charter schools, replacing teachers and principals, and closing down schools. This approach is largely ineffective as an educational reform strategy and represents a conservative<sup>3</sup> view of the federal government's

the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or (b) [i]s a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60[%] over a number of years.

To identify the lowest-achieving schools, a State must take into account both (i) [t]he academic achievement of the "all students" group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (ii) [t]he school's lack of progress on those assessments over a number of years in the 'all students' group.

Race to the Top Fund Final Rule, 74 Fed. Reg. 59688, 59805–59806 (Nov. 18, 2009). Title I schools are schools that accept funding from the federal government through Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 6301 (2006). A school is eligible for Title I funding if 35% or more of the students in the geographical area served by the school are from low-income households or if the geographical area served by the school has a percentage of low-income students as high as or higher than the "local educational agency as a whole." *Id.* at § 6313(a)(2)(B). Students aged five through seventeen are used for calculating the percentages. *Id.* at § 6313(a)(5). Any one or combination of the following measures can be used to determine the number of low-income students: number of children in poverty as determined by the Census Bureau, number of children eligible for the free or reduced-price lunch program, number of children eligible for Medicaid, and number of children in families receiving certain Social Security benefits. *Id.* In the Department of Education's Notice of Proposed Priorities, "persistently lowest-achieving schools" were referred to as "struggling schools." 74 Fed. Reg. 37804 (July 29, 2009). The term "struggling schools" was also used in the American Recovery and Reinvestment Act (ARRA). Pub. L. No. 111-5, § 14006(a)(2), 123 Stat. 115 (2009). But in the Race to the Top Fund final notice published in the Federal Register, the term "struggling schools" has been replaced with the term "persistently lowest-achieving schools." 74 Fed. Reg. 59836, 59840 (Nov. 18, 2009).

2. Race to the Top Fund Final Rule, 74 Fed. Reg. at 59688.

3. The term "conservative" in this Article is used to describe a political principle that favors equal opportunity over entitlement. At times supported by Republicans and Democrats, political liberals, and conservatives, it is essentially a conservative value. "Although equal opportunity is usually the rallying cry of progressive forces in society, it is a principle that is ultimately conservative." Edward P. Morgan, *Inequality in Classroom Learning: Schooling and Democratic Citizenship* 7 (Praeger Publishers 1977). President Bill Clinton "used education to emphasize the New Democratic commitment to opportunity

role with respect to the social and economic issues impacting low-income children and their families' trajectories through the educational pathway. The Fund's framework for reforming struggling schools perpetuates the essentially conservative myth that persistently lowest-achieving schools can be "fixed" on the cheap and in isolation from issues of poverty reduction.<sup>4</sup>

Public support for out-of-school resources that assist low-income families and their children will only grow if the link between such programs and education outcomes is explained. Children whose families struggle with poverty, homelessness, unemployment, mental health issues, substance abuse, domestic violence, and other challenges find it difficult to receive the support and resources they need to flourish in the classroom. If President Obama is serious about helping all children succeed in the classroom, then he must fight for social programs that assist those at the bottom of the socioeconomic ladder with the same intensity with which he is currently fighting to reform schools. The current debate on education and school reform is taking place in a vacuum, leaving no room for discussions on poverty, urban blight, or rural isolation. Ultimately, public support for early childhood programs, affordable housing, and a more robust safety net generally could increase if the President reframed the national conversation about struggling schools to encompass a broader federal role. Thus far, he has failed to pursue such a course.

The Fund, when viewed within a historical framework, is revealed as the latest politically expedient maneuver, this time by Democrats, to secure votes by making pronouncements on educa-

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over entitlement and to distance his party from the discredited policies of the welfare state." Patrick J. McGuinn, *No Child Left Behind and the Transformation of Federal Education Policy, 1965–2005* 4–5 (U. Press Kan. 2006).

4. Many scientific studies find a link between poverty and cognitive ability in children, indicating that economic disadvantage correlates with a cognitive disadvantage even before school innovation can equalize the opportunity of poor and wealthy children. See generally Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 106 *Procs. Natl. Acad. Sci.* 6545 (2009) (available at <http://www.pnas.org/content/early/2009/03/27/0811910106.full.pdf+html>) (discussing the impact of working memory impairments caused by stress-related damage to the brain during childhood on the income-achievement gap); Jake M. Najman et al., *The Impact of Episodic and Chronic Poverty on Child Cognitive Development*, 154 *J. Pediatrics* 284 (2009) (discussing the reduction of cognitive development in children that experience family poverty at the developmental stage in early life).

tion while largely steering clear of any talk of redistribution, welfare, or entitlement. The bottom that President Obama appears intent on racing toward is a fundamentally conservative platform. Unless the Fund's plan for reforming struggling schools is altered to encompass a broader role for the federal government—one that includes a greater share of fiscal responsibility for those living at the margins of our society—it is likely that the Fund's most significant achievement will be to shift the national debate around issues of poverty even further to the Right.

This Article is organized as follows: Part I discusses President Obama's plan for turning around persistently lowest-achieving schools under the Race to the Top Fund. The Fund's plan for accomplishing this goal is premised upon giving states financial incentives to implement "what works"<sup>5</sup>—a set of school reforms that include, among others, leadership and staff replacement, the conversion of struggling schools into charter schools, the closing of struggling schools and the reassignment of students to high-performing schools, and contracting out a school's operation to education management organizations. Part I also discusses the manner in which the economic crisis and the passage of the American Recovery and Reinvestment Act of 2009<sup>6</sup> (ARRA) conferred on President Obama an opportunity to promote the above set of school reforms. Part II demonstrates that the reform strategies promoted under the Fund are largely unproven and borrow heavily from policies advanced under the No Child Left Behind Act<sup>7</sup> (NCLB). Part III situates the Fund within a historical context and demonstrates that both Democratic and Republican politicians have prioritized a narrow education agenda to the

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5. President Obama has stated that he is committed to supporting only "what the data and the science and the studies and the research show actually make a big difference in terms of school improvement." Barack Obama, Speech, *Remarks by the President on Strengthening America's Education System* (James C. Wright Middle Sch., Madison, Wis., Nov. 4, 2009) (available at <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-americas-education-system>).

6. ARRA, commonly referred to as the Stimulus Package, was signed into law by President Obama on February 17, 2009. It was intended to create jobs and promote consumer investing and spending during the recession, and affected many areas of the American economy, including healthcare and education. Worth an estimated \$787 billion, ARRA includes federal tax cuts, expansion of social programs such as welfare, and increased domestic spending in education, healthcare, and the infrastructure. Lisa M. Fairfax, *The Legal Origins Theory in Crisis*, 2009 B.Y.U. L. Rev. 1571, 1596 (2009); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115 (2009).

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

detriment of a broader federal role in poverty reduction. Increasingly, as the Fund illustrates, education policy is working against a progressive view of the federal government's role in the reduction of poverty. Finally, Part IV demonstrates the manner in which the Fund could instead utilize the current economic crisis to educate the American electorate about the significant challenges faced by high-poverty schools and the need for a stronger federal role in the creation of a tightly woven social safety net targeting low-income children in this country.

### I. THE PERFECT STORM

At an Education Stakeholders Forum held in August 2009, Deputy Secretary of Education Tony Miller explained the impetus behind the Obama team's decision to focus its attention on improving the education received by children in the Nation's lowest-achieving schools. He indicated that even with a strong education plan in place, "there will be schools that run the risk of falling through the cracks."<sup>8</sup> Deputy Secretary Miller stated that closing the achievement gap requires that the capacity to turn around these struggling schools<sup>9</sup> be developed at the school, district, and state levels with the support of the United States Department of Education.<sup>10</sup> Secretary of Education Arne Duncan also told members of the United States Senate that close scrutiny needs to be placed on our "bottom" schools, which he described as "dropout factories" and places with "low gains," with "students not learning," and "where it's just simply not working."<sup>11</sup>

The dropout factories Secretary Duncan referenced are those schools in which a student's chances of leaving with a diploma are only one in two.<sup>12</sup> Students who graduate from these schools in

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8. Tony Miller, Dep. Sec. U.S. Dept. Educ., Panel Remarks, *U.S. Department of Education: Education Stakeholders Forum* (D.C., Aug. 4, 2009) (available at <http://ed.gov/policy/gen/leg/recovery/presentation/08042009-transcript.doc>).

9. The term "struggling schools" was used in ARRA. 123 Stat. at 115.

10. Miller, *supra* n. 8.

11. Sen. Subcomm. Lab., Health & Human Servs., Educ. & Related Agencies, *Hearing on the Administration's FY 2010 Budget Request for the Department of Education*, 111th Cong. 32 (June 3, 2009) (testimony of Arne Duncan, Secretary of Education for the United States Department of Education).

12. Robert Balfanz & Nettie Legters, *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Where Are They Located? Who Attends Them?* 3 (Ctr. Research on Educ. of Students Placed at Risk Sept. 2004) (available at <http://www.csos.jhu>

four years will do so in the company of just half the number of students with which they began their freshman year.<sup>13</sup> The data shows that these dropout factories are disproportionately majority-minority high schools, with almost half of the Nation's African-American and Latino students attending such schools.<sup>14</sup> In addition, schools with low graduation rates are more likely to be present in districts with high poverty, located in central cities, with high percentages of students with disabilities, or with high percentages of English language learners.<sup>15</sup> Under the Fund, these schools are referred to as "persistently lowest-achieving"; specifically, the term refers to a state's lowest-achieving schools as measured through NCLB-mandated state assessments, or to any high school that has had a graduation rate of less than 60% over multiple years.<sup>16</sup>

The Race to the Top Fund represents the ambitious federal blueprint for reforming the Nation's "bottom schools," as described by Secretary Duncan.<sup>17</sup> The Secretary has not so modestly described the Fund as "education reform's moon shot,"<sup>18</sup> and has even stated publicly that the Obama Administration has sufficient resources to spur innovation through the Fund.<sup>19</sup> While it may be unusual for a member of the President's Cabinet to so readily concede that his department has been provided with an appropriate budget, Secretary Duncan's comment can best be

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.edu/crespar/techReports/Report70.pdf).

13. *Id.*

14. *Id.* at 5. "Only 3% of high schools in the United States that enroll 90% or more white students have weak promoting power compared to 49% of majority-minority schools, and a stunning 66% of high schools that enroll 90% or more minority students." *Id.* "[I]n 2001, only 50% of all black students, 51% of Native American students, and 53% of all Hispanic students graduated from high school." Gary Orfield, Daniel Losen & Johanna Wald, *Losing Our Future: How Minority Youth Are Being Left behind by the Graduation Rate Crisis 2* (Civ. Rights Project at Harvard U. 2004) (available at [http://www.urban.org/UploadedPDF/410936\\_LosingOurFuture.pdf](http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf)). "[A]pproximately 46% of the nation's African[-]American and 39% of its Latino students attend high schools in which graduation is not the norm." Balfanz & Legters, *supra* n. 12, at 6.

15. Orfield et al., *supra* n. 14, at 5.

16. *See supra* n. 1 (providing the text of 74 Fed. Reg. at 59805–59806, defining "persistently lowest-achieving schools").

17. The Obama Administration's goal is to "build a framework to support innovation for years to come." Arne Duncan, Speech, *From Compliance to Innovation* (America's Choice Superintendent's Symposium, D.C., Aug. 20, 2009) (available at <http://ed.gov/news/speeches/2009/08/08202009.html>).

18. *Id.*

19. *Id.*

understood within a historical context. The \$4.3 billion<sup>20</sup> Fund allocated through ARRA far exceeds the discretionary funding for education reform made available to all of Duncan's predecessors combined.<sup>21</sup> Duncan is poised to become perhaps the single most influential secretary of education in our Nation's history, all the more surprising perhaps for a man who has never worked as a teacher, and whose own legacy as a school administrator in Chicago is rife with controversy and scandal.<sup>22</sup>

The Fund, of course, represented only a small fraction of the more than \$100 billion allocated for education under ARRA, which channeled billions of dollars to students through such pro-

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20. 74 Fed. Reg. 37804 (July 29, 2009). The \$4.3 billion is referred to as the State Incentive Grant Fund in the statute. *Id.* "Race to the Top will reward States for having created the conditions for reform . . . and for increasing student achievement." *Id.* at 37805.

21. Duncan, *supra* n. 17. Grover Whitehurst, former director of the Institute of Education Sciences, the research arm of the United States Department of Education, commented on the magnitude of the Fund:

Prior secretaries of education presided over largely formula-funded federal education programs wherein state and local education agencies received their apportionment of federal funds based on population and demographics. At best they had a few million dollars annually to dole out for reforms they favored. In contrast, Secretary Duncan has billions to work with as a result of the American Recovery and Reinvestment Act of 2009.

Grover Whitehurst, Panel Remarks, *A Discussion with Secretary of Education Arne Duncan* (D.C., May 11, 2009) (available at [http://www.brookings.edu/~media/Files/events/2009/0511\\_duncan/20090511\\_education.pdf](http://www.brookings.edu/~media/Files/events/2009/0511_duncan/20090511_education.pdf)).

22. "[United States] Education Secretary Arne Duncan, who oversees a federal agency that spent \$134.8 billion in fiscal 2009, tutored kids as a young student but has never professionally taught inside a classroom." Edwin Mora, *CNSNews.com, U.S. Secretary of Education Has No Professional Classroom Teaching Experience*, <http://www.cnsnews.com/news/article/59578> (Jan. 11, 2010). In addition, there were no improvements for most students in Chicago Public Schools during Duncan's tenure; the "miracle turnaround" can be traced to the replacement of neighborhood schools with charter schools with selective enrollment. Michael Klonsky, *Chicago's School Reform: No "Miracles" Here*, 14 Pub. Int. L. Rep. 255, 259 (2009). In early 2010, the Chicago Tribune exposed that, during his tenure running the Chicago public schools, Duncan's office kept a secret list of persons of influence who asked for assistance in getting certain children into the top-tier public schools in Chicago. Azam Ahmed & Stephanie Banchemo, *How VIPs Lobbied Schools: Duncan's Office Tracked Politicians and Others Who Sought Help for Applicants to Elite Schools*, Chicago Trib. C1 (Mar. 23, 2010). Diane Ravitch writes that "the Civic Committee of the Commercial Club of Chicago released a study demonstrating that the city's claims of dramatic test score gains [during Duncan's tenure] were exaggerated." Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* 158 (Basic Bks. 2010). These gains were cited by President Obama when he announced Duncan's appointment, even though they have since been shown to be the result of changes in tests and testing procedures as opposed to real gains in student learning. *Id.*

grams as Title I and the Individuals with Disabilities Education Act (IDEA), among others.<sup>23</sup> Because ARRA was intended as a response to the Nation's economic crisis, President Obama defended the expenditures on education by linking the quality of our education system to the health of the national economy:

American prosperity has long rested on how well we educate our children. But this has never been more true than it is today. In the 21st century, when countries that out-educate us today will out-compete us tomorrow, there is nothing that will determine the quality of our future as a nation and the lives our children will lead more than the kind of education that we provide them. *Nothing is more important.*<sup>24</sup>

But President Obama's message is diluted by the fact that the federal government's share of the overall cost of public education in this country remains a mere 10.5%, even with such an unprecedented infusion of federal resources.<sup>25</sup> The federal infusion of resources under ARRA did little to transform the fundamental reality of school funding in this country; it left primary fiscal responsibility for public education in the hands of the resource-starved municipality.<sup>26</sup> Although the Administration's official

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23. ARRA "provides billions of dollars to strengthen education through the State Fiscal Stabilization Fund (SFSF); Title I, Part A of the *Elementary and Secondary Education Act (ESEA)*; Part B of the *Individuals with Disabilities Education Act (IDEA)*; Pell Grants; Federal Work-Study; and other programs." U.S. Dept. of Educ., *American Recovery and Reinvestment Act of 2009: Using ARRA Funds to Drive School Reform and Improvement 1*, [http://www.doe.in.gov/stimulus/docs/Using\\_Stimulus\\_Funds\\_to\\_Drive\\_School\\_Reform\\_and\\_Improvement.pdf](http://www.doe.in.gov/stimulus/docs/Using_Stimulus_Funds_to_Drive_School_Reform_and_Improvement.pdf) (Apr. 24, 2009) [hereinafter *Using ARRA Funds*].

24. Obama, *supra* n. 5 (emphasis added).

25. An estimated \$1.1 trillion is spent nationwide on public education, and 89.5% of that total cost is borne by non-federal sources. U.S. Dept. Educ., *The Federal Role in Education*, <http://www2.ed.gov/about/overview/fed/role.html> (modified Jan. 29, 2010).

26. The municipal sector loss from 2010 to 2012 is projected to range from \$56 billion to \$83 billion. Christopher W. Hoene, *City Budget Shortfalls and Responses: Projections for 2010-2012*, [http://www.nlc.org/ASSETS/5A4EFB8CF1FE43AB88177C808815B63F/BudgetShortFalls\\_10.pdf](http://www.nlc.org/ASSETS/5A4EFB8CF1FE43AB88177C808815B63F/BudgetShortFalls_10.pdf) (Dec. 2009). In Oregon, the national recession has caused legislators to reduce spending by \$2 billion, with education cuts forcing some districts to implement four-day school weeks. The Pew Center on the States, *Beyond California: States in Fiscal Peril* 35, 37, <http://downloads.pewcenteronthestates.org/BeyondCalifornia.pdf> (Nov. 2009). Florida lawmakers are "struggling to find the funds needed to reduce class sizes to levels mandated by a 2002 constitutional amendment." *Id.* at 7. Michigan, facing "today's problems on a 1960s-sized budget," has dropped school funding up to \$600 per student in some districts. *Id.* at 23-24. Nationwide, the recession has resulted in elementary and secondary schools employing around 70,000 fewer educators in October 2009 than the previous year, despite student enrollment increases. Chair of the Council of Economic

position is that sufficient funds were allocated through ARRA to transform public education, the still unanswered question is whether this transformation will result in the improvement of conditions for children in our poorest schools.

The political strategy behind this education plan has been described by award-winning journalist Naomi Klein as “disaster capitalism,” a concept borrowed from the conservative ideology of economist Milton Friedman.<sup>27</sup> Klein notably utilized this term to describe the manner in which the Hurricane Katrina disaster was used to virtually dismantle the New Orleans’ public school system.<sup>28</sup> Secretary Duncan has also made reference to the Hurricane Katrina disaster, describing it as the best thing that could have happened to education in New Orleans.<sup>29</sup> In a similar manner, the economic crisis that led to the passage of ARRA has been described by Duncan as “the perfect storm for reform.”<sup>30</sup>

Secretary Duncan has also discussed the Obama Administration’s hopes regarding what will ultimately be created through

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Advisers, *2010 Economic Report of the President* 224–225, [http://www.gpoaccess.gov/eop/2010/2010\\_erp.pdf](http://www.gpoaccess.gov/eop/2010/2010_erp.pdf) (Feb. 2010).

27. Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* 5–6 (Henry Holt & Co. 2007).

28. *Id.* at 6.

29. During an interview with ABC News, Secretary Duncan said the New Orleans “education system was a disaster. And it took Hurricane Katrina to wake up the community to say that we have to do better. And the progress that it made in four years since the hurricane, is unbelievable.” Jake Tapper, *Duncan: Katrina was the “Best Thing” for New Orleans School System*, <http://blogs.abcnews.com/politicalpunch/2010/01/duncan-katrina-was-the-best-thing-for-new-orleans-schools.html> (Jan. 29, 2010).

30. Secretary Duncan stated,

I have said recently that we are at a unique moment in the history of education reform. We have what I call “the Perfect Storm for Reform.” And that starts with, for the first time, truly having the resources to spur innovation. As many of you are aware, our recently announced \$4.35 billion Race to the Top [F]und dwarfs the combined sum of discretionary reform funding available to all of my predecessors as education secretary.

Duncan, *supra* n. 17. “Before this bill was signed into law, we were facing a potentially devastating situation: thousands of education jobs lost, vast increases in class sizes, and massive cuts to state and district education programs and capital improvement projects.” Arne Duncan, Speech, *Secretary Arne Duncan Speaks at the National Science Teachers Association Conference* (New Orleans, La., Mar. 20, 2009) (available at <http://www2.ed.gov/print/news/speeches/2009/03/03202009.html>) [hereinafter Duncan, *Science Teachers*]. Duncan’s recipe for “the perfect storm for reform” includes the stimulus bill’s provision of more than \$100 billion for education funding, bipartisan leadership on Capitol Hill, “proven strategies that work in the classroom,” and the “Obama Effect,” which he describes as “the combination of having a president and a first lady whose extraordinary lives reflect the immense opportunity that hard work and education can bring.” *Id.*

this perfect storm for reform. He has stated that although ARRA's primary goal was to save jobs, "the larger goal is to drive a set of reforms that we believe will transform public education in America."<sup>31</sup> As evidence of its Machiavellian design, the Fund has caused the loss of some of the very jobs it was intended to save, *teacher jobs*, the first casualties of the educational industrial complex promoted by President Obama under the Fund.<sup>32</sup> The \$4.3 billion Fund is being utilized to reward *and punish* those states moving the "fastest and furthest" in adopting misguided education reforms in the areas of higher standards, data systems, teacher quality, and turning around underperforming schools.<sup>33</sup>

It is not premature to recognize that President Obama's administration has been very astute in leveraging its discretionary income to greatest advantage. The Race to the Top does not guarantee any funding to competing states. As with any competition, participants accept that they have only a small chance of emerging victorious. Despite this, state education officials have rushed to secure regulatory and legislative changes in their states' education policies, all for a chance to receive financial resources from the Fund. Although the funds allocated through ARRA are inadequate to provide meaningful assistance to the children who need it most, they have proven sufficient to secure a wholesale transformation of public education in America. By transforming the federal government's funding paradigm from equity to competition, President Obama's Race to the Top has

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31. Duncan, *Science Teachers*, *supra* n. 30.

32. In Central Falls, Rhode Island, the entire staff of the community's only high school—nearly 100 teachers—was fired. Monica Teixeira de Sousa, *Providence Journal*, *In Central Falls, It's a Race to the Bottom*, [http://www.projo.com/opinion/contributors/content/CT\\_sousa5\\_03-05-10\\_6EHKEK2\\_v11.3f8d796.html](http://www.projo.com/opinion/contributors/content/CT_sousa5_03-05-10_6EHKEK2_v11.3f8d796.html) (Mar. 8, 2010). South Carolina is still tallying its job losses. Carolyn Click, *The State*, *Total Teacher Job Losses Still Being Tallied*, <http://www.thestate.com/2010/06/07/1320739/total-teacher-job-losses-still.html> (June 7, 2010). So is California, which handed pink slips to 26,000 teachers in 2009–2010 alone. Cal. Dept. of Educ., *State Schools Chief Jack O'Connell Warns State Budget Cuts are Leading to Future Teacher Shortage, Hurt State's Ability to Produce Educated Workforce*, <http://www.cde.ca.gov/nr/ne/yr10/yr10rel34.asp> (Apr. 6, 2010). On average, even with the current reform policies in place, "[s]tates will spend about \$36 billion of the stimulus money in the next fiscal year [(2010–2011)], leaving their budgets short by some \$144 billion" and likely leading to additional teacher cuts. Tamar Lewin & Sam Dillon, *N.Y. Times*, *Districts Warn of Deeper Teacher Cuts*, <http://www.nytimes.com/2010/04/21/education/21teachers.html> (Apr. 20, 2010).

33. Duncan, *Science Teachers*, *supra* n. 30.

created a mad scramble for dollars and concomitant bragging rights.<sup>34</sup>

#### A. The Framework for Turning around Struggling Schools

Perhaps the most ambitious goal set by President Obama in the Race to the Top Fund is turning around 5,000 of this Nation's lowest-performing schools in the next five years.<sup>35</sup> The framework is simple enough: in exchange for an opportunity to compete for a share of the \$4.3 billion Fund, states were asked to provide assurances that they would make a set of comprehensive reforms that the administration has deemed to comprise "promising solutions" and "what works."<sup>36</sup>

President Obama intends to reward states that are implementing what his Administration considers to be "innovative"<sup>37</sup> educational reforms across four areas: (1) enhancing standards and assessments, (2) improving data use and collection, (3) increasing teacher effectiveness and achieving equity in teach-

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34. Richard Trumka, president of the AFL-CIO, says that while "the stimulus was big enough to make a real, positive impact" there has not been enough investment in fundamental components of the economy, particularly education; the country "cannot continue to skimp on the quality of education." Richard L. Trumka, Speech, *Remarks by Richard L. Trumka, President of the AFL-CIO* (Natl. Press Club, D.C., Jan. 11, 2010) (available at <http://www.aflcio.org/mediacenter/prspmtm/sp01112010.cfm>).

35. H.R. Comm. Educ. & Lab., *Secretary Arne Duncan Testifies before the House Education and Labor Committee*, 111th Cong. (May 20, 2009) (available at <http://www2.ed.gov/news/speeches/2009/05/05202009.html>). Secretary Duncan offered this strategy for turning around 5,000 low-performing schools by 2014:

I want states and districts to take bold actions that will lead directly to the improvement in student learning. I want local leaders to find change agents who can fix these schools. I want them to provide incentives for their best teachers to take on the challenge of teaching in these schools. And where appropriate, I want them to create partnerships with charter[-]school operators with a track record of success. I want superintendents to be aggressive in taking the difficult step of shutting down a failing school and replacing it with one they know will work.

Arne Duncan, Prepared Remarks, *Secretary Arne Duncan Testifies before the House Education and Labor Committee* (D.C., May 20, 2009) (available at <http://www2.ed.gov/news/speeches/2009/05/05202009.html>).

36. Duncan, *supra* n. 17.

37. *Id.* Secretary Duncan's vision is that through the Fund's financial incentives, the Department of Education will become an "engine of innovation." *Id.* In sum, the Fund represents "a once-in-a-lifetime opportunity for the federal government to create incentives for far-reaching improvement in our nation's schools." Arne Duncan, Speech, *The Race to the Top Begins—Remarks by Secretary Arne Duncan* (D.C., July 24, 2009) (available at <http://www2.ed.gov/news/speeches/2009/07/07242009.html>).

er distribution, and (4) turning around struggling schools.<sup>38</sup> Each state was asked to submit an application agreeing to implement these four comprehensive reforms, a process the Department of Education referred to as the “state competition”<sup>39</sup> for federal resources. States were given two opportunities to compete and were told at the outset by Secretary Duncan that very few winners would be announced.<sup>40</sup> Despite the slim odds, the vast majority of states decided to compete for the federal money.<sup>41</sup>

### 1. Eligibility Requirements

In keeping with President Obama’s goal to demand more education reform from states, the application process was very rigorous.<sup>42</sup> A framework of eligibility requirements, priorities, and selection criteria governed the review process the Department of Education utilized in weighing the relative merits of each application.<sup>43</sup> States were eligible to compete only if their applications for

38. 74 Fed. Reg. at 59688.

39. Joanne Weiss, Dir. Race to the Top, Panel Remarks, *U.S. Department of Education Stakeholders Forum* (D.C., Aug. 4, 2009) (available at <http://ed.gov/policy/gen/leg/recovery/presentation/08042009-transcript.doc>). Eligible applicants are the fifty states, the District of Columbia, and Puerto Rico. 74 Fed. Reg. at 59841.

40. “[W]e anticipate very few winners in phase 1 . . . .” U.S. Dept. Educ., *16 Finalists Announced in Phase 1 of Race to the Top Competition*, <http://www2.ed.gov/news/pressreleases/2010/03/03042010.html> (Mar. 4, 2010).

41. Forty-seven states applied to the program—forty-one in the first phase and thirty-five in the second phase. U.S. Dept. Educ., *35 States and D.C. Seek Share of \$3.4 Billion in Race to the Top Fund*, [www.ed.gov/news/press-releases/35-states-and-dc-look-share-34-billion-race-top-fund](http://www.ed.gov/news/press-releases/35-states-and-dc-look-share-34-billion-race-top-fund) (June 1, 2010).

42. Barack Obama, Speech, *Remarks by the President to the NAACP Centennial Convention* (N.Y.C., July 17, 2009) (available at [http://whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-the-NAACP-Centennial-Convention-07/16/2009/](http://whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-NAACP-Centennial-Convention-07/16/2009/)) (stating that “we, all of us in government, have to work to do our part by not only offering more resources, but also demanding more reform.”). The \$4.3 billion Race to the Top Fund

is the largest competitive education grant program in [United States] history. The Race to the Top Fund (referred to in the ARRA as the State Incentive Grant Fund) is designed to provide incentives to States to implement large-scale, system-changing reforms that result in improved student achievement, narrowed achievement gaps, and increased graduation and college enrollment rates.

74 Fed. Reg. at 59688. Funding will be used to reward those states implementing “ambitious plans in four core education reform areas”: “adopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace”; recruiting, developing, retaining, and rewarding effective teachers and principals; “building data systems that measure student success and inform teachers and principals how they can improve their practices”; and “turning around our lowest-performing schools.” *Id.*

43. U.S. Dept. Educ., *Race to the Top Program Guidance and Frequently Asked Ques-*

the State Fiscal Stabilization Fund (SFSF)<sup>44</sup> under ARRA had been approved and they had no legal barriers at the state level preventing data on student achievement or student growth from being linked to teacher and principal evaluation.<sup>45</sup> The former hurdle proved far easier to clear than the latter.

It is important to note that the SFSF provided states with financial resources in exchange for the state's commitment to advance education reform in the same four areas prioritized under the Fund.<sup>46</sup> Additional resources under the competitive Race to the Top Fund were made available only to those states whose governors submitted assurances when they applied for the SFSF in summer 2009 that they would act to improve teacher effectiveness, establish a statewide longitudinal data system, enhance the quality of the academic assessments administered to

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tions 5, <http://www2.ed.gov/programs/racetothetop/faq.pdf> (Nov. 2009) [hereinafter *FAQ*].

44. U.S. Dept. Educ., *Application for Funding for Phase II of the Education Fund under the State Fiscal Stabilization Fund Program*, <http://www2.ed.gov/programs/statestabilization/stateapps/phase-ii/ga-sub-phase-2.pdf> (accessed Sept. 2, 2010) [hereinafter *Funding Application*]. The SFSF is a one-time appropriation under ARRA that provides states with approximately \$48.6 billion in grants to help stabilize state and local budgets and to minimize and avoid reductions in education and other essential services. *Id.* at 3; U.S. Dept. Educ., *State Fiscal Stabilization Fund*, <http://www.ed.gov/print/policy/gen/leg/recovery/factsheet/stabilization-fund.html> (Mar. 7, 2009). In exchange, states must commit to advancing education reform in four areas: achieving equity in teacher distribution, improving collection and use of data, standards and assessments, and supporting struggling schools. *FAQ*, *supra* n. 43, at 3.

45. 74 Fed. Reg. at 59841. Student achievement means[.]

- (a) For tested grades and subjects: (1) [a] student's score on the State's assessments under the ESEA; and, as appropriate, (2) other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.
- (b) For non-tested grades and subjects: Alternative measures of student learning and performance such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

*Id.* at 59840. "*Student growth* means the change in student achievement (as defined [above]) for an individual student between two or more points in time. A State may also include other measures that are rigorous and comparable across classrooms." *Id.* (emphasis in original). The fact that no legal barriers must exist at the *state* level has significance: If "a teacher or principal contract or collective bargaining agreement at the local level prohibited the use of student achievement or student growth data for evaluation purposes," a state would still be eligible to apply for a Race to the Top Fund grant. 74 Fed. Reg. at 59720.

46. The four key education reform areas are achieving equity in teacher distribution, improving collection and use of data, standards and assessments, and supporting struggling schools. *FAQ*, *supra* n. 43, at 3.

students as required under NCLB, and commit to supporting struggling schools.<sup>47</sup>

The SFSF provides an example of the “perfect storm for reform” strategy described by Secretary Duncan. These commitments were made in the context of dire financial straits. Indeed, without the resources made available under ARRA, states would likely have made additional and severe cuts to services such as healthcare, public safety, and, of course, education.<sup>48</sup> It is not surprising, then, that all fifty states applied for Phase I of the SFSF.<sup>49</sup> Furthermore, all fifty states were approved for initial SFSF funding.<sup>50</sup> As a result, this eligibility requirement did not act as a very significant bar to the receipt of a Race to the Top Fund grant. At least on paper, all states had committed themselves to the education reform strategy furthered by the Fund by virtue of their application for and receipt of funds under the SFSF.

The second eligibility requirement was the more controversial of the two and emphasized the Administration’s belief that teacher evaluations and decisions about promotion and retention should be based, at least in part, on student assessment data.<sup>51</sup> President Obama described any legal barriers to such linkages as firewall laws and indicated they did not send “a good message in terms of accountability.”<sup>52</sup> Secretary Duncan explained that this

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47. *Id.* at 5.

48. Phil Oliff, Jon Shure & Nicholas Johnson, *Ctr. Budget & Policy Priorities, Federal Fiscal Relief Is Working as Intended 1*, <http://www.cbpp.org/files/5-26-09sfp.pdf> (updated June 29, 2009). ARRA “provides substantial money for state governments that includes roughly \$140 billion to help alleviate budget shortfalls through funding for education, [healthcare], and other government services.” Nicholas Johnson, Andrew Nicholas & Steven Pennington, *Ctr. Budget & Policy Priorities, Tax Measures Help Balance State Budgets: A Common and Reasonable Response to Shortfalls*, <http://www.cbpp.org/cms/index.cfm?fa=view&id=2815> (updated July 9, 2009). Moreover, with “state revenues plummeting and demand for public programs, including Medicaid, growing . . . [ARRA] proved to be critical in helping states address budget shortfalls, preserve Medicaid eligibility[,] and soften cuts.” Kaiser Commn. Medicaid & the Uninsured, *Medicaid and State Budgets: From Crunch to Cliff 1*, <http://www.kff.org/medicaid/upload/8001.pdf> (Oct. 2009).

49. U.S. Dept. Educ., *State Stabilization Fund Update*, <http://www.ed.gov/blog/2009/04/state-stabilization-fund-update/> (accessed Sept. 2, 2010).

50. *Id.* Phase II applications were due January 11, 2010. 74 Fed. Reg. 59142, 59143 (Nov. 17, 2009).

51. This requirement is described as implementing a “fair and reliable teacher evaluation system that provides ongoing feedback to teachers about their performance based on objective measures of student achievement outcomes . . . .” *Using ARRA Funds, supra* n. 23, at 4.

52. Obama, *supra* n. 5.

requirement under the Fund was integral to furthering the Administration's goal of encouraging and rewarding states for increasing teacher effectiveness.<sup>53</sup>

The controversial dimension of the Administration's interpretation of teacher effectiveness is its focus on assessment data. Student growth is defined under the Fund as any change in student achievement between two or more points in time, as measured by state assessments required under NCLB or through other measures such as students' scores on pre-tests and end-of-course tests.<sup>54</sup> This test-centric approach to teacher effectiveness has alienated many progressive educators and led to a very high level of discomfort with President Obama's education policies among some liberals.<sup>55</sup> Despite the many criticisms voiced during the notice and comment period,<sup>56</sup> however, the final version of the Fund adopted a very narrow definition of a highly effective teacher as one "whose students achieve high rates . . . of student growth."<sup>57</sup> As one of only two eligibility requirements, *and the only one with any teeth*, the Fund's emphasis on removing legal barriers to linking student test data to teacher and principal evaluations conveys the importance President Obama attached to the Fund's assessment-driven definition of teacher and principal quality.

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53. 74 Fed. Reg. at 59836–59839. Under the Fund, student growth is considered a significant factor in evaluating teacher performance. *FAQ*, *supra* n. 43, at 21.

54. *FAQ*, *supra* n. 43, at 22.

55. Henry A. Giroux & Kenneth Saltman, *truthout.org*, *Obama's Betrayal of Public Education? Arne Duncan and the Corporate Model of Schooling*, <http://www.truth-out.org/121708R> (Dec. 17, 2008).

56. In its Comment to Duncan, the National Education Association (NEA) criticized the Fund's requirement that states link student achievement to principal and teacher evaluation. Natl. Educ. Assn., *NEA's Response to Race to the Top*, <http://www.nea.org/home/35447.htm> (Aug. 21, 2008). The NEA complained that test-based measuring of the effectiveness of teachers is "too unstable and too dependent on a range of factors that cannot be adequately disentangled to be used for teacher evaluation." *Id.* These factors "include the non-random assignment of students with different characteristics, student attendance and parent support, differentials in school and classroom resources, the specific tests used, and the influences of other teachers." *Id.* Furthermore, the NEA worried that evaluating teachers based on student achievement would create disincentives for educators choosing to work with the students with the greatest need—those learning English and enrolled in special education. *Id.*

57. 74 Fed. Reg. at 59839 (indicating that teacher effectiveness is measured "in significant part, by student growth").

## 2. Priorities

In addition to these two eligibility requirements, each state application was assessed in relation to three types of priorities: absolute, competitive, and invitational. The single absolute priority required states to demonstrate, *at least on paper*, that they were undertaking a systemic approach to education reform;<sup>58</sup> without such a demonstration, states' applications would not be read by the reviewers.<sup>59</sup> The single competitive priority encouraged states to discuss their plans for improving delivery of science, technology, engineering, and mathematics (STEM) instruction.<sup>60</sup> Although not required, plans for STEM education earned applicants extra points.<sup>61</sup>

The last of the three priorities, invitational priorities, earned no points.<sup>62</sup> The invitational priorities merely signaled areas of interest to the Department of Education.<sup>63</sup> As such, they carried little weight in the selection process and were regarded as hortatory or aspirational.<sup>64</sup> The invitational priorities included innovations for improving early learning outcomes; expansion of statewide longitudinal data systems; improved coordination among various state entities and community partners; and the creation of school-level conditions for reform, innovation, and learning.<sup>65</sup>

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58. 74 Fed. Reg. at 59836. It is important to emphasize that what states indicated in their applications may not accurately represent the reality of what is happening on the ground. The *New York Times* reported that, with extra funding at stake, and student test scores as the primary measure for fund receipts, there has been an incentive for teachers in several states to tamper with and alter student test scores in order to receive the additional funding. Trip Gabriel, *N.Y. Times*, *Under Pressure, Teachers Tamper with Tests*, <http://www.nytimes.com/2010/06/11/education/11cheat.html> (June 10, 2010).

59. A state had to meet this absolute priority in order for its application to be considered. 74 Fed. Reg. at 59836.

60. *Id.* President Obama has expressed his desire to see American students outperforming children in other nations on math and science assessments. The White House, Office of the Press Secretary, *President Obama Launches "Educate to Innovate" Campaign for Excellence in Science, Technology, Engineering & Math*, <http://www.whitehouse.gov/the-press-office/president-obama-launches-educate-innovate-campaign-excellence-science-technology-en> (Nov. 23, 2009).

61. U.S. Dept. Educ., *Appendix B: Scoring Rubric* 1, 16, <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf> (accessed Sept. 2, 2010) [hereinafter *Scoring Rubric*].

62. *FAQ*, *supra* n. 43, at 5.

63. *Id.*

64. *Id.* (establishing that an application meeting an invitational priority will not earn additional points or be preferred over other applications).

65. 74 Fed. Reg. at 59836.

### 3. Selection Criteria

A total of nineteen selection criteria, primarily organized by reform area, comprised the bulk of the Race to the Top Fund competition.<sup>66</sup> It was largely through the selection criteria that states earned points from the reviewers.<sup>67</sup> Reviewers had the discretion to award states points for what they had already accomplished as well as for what they planned to accomplish in the future.<sup>68</sup> A majority of the total points available were awarded based on states' past accomplishments in increasing student achievement, reducing disparities in achievement, and enlisting a wide array of community support for the state's application, among others.<sup>69</sup> Points were also awarded under a "State Success Factors" section that called upon states to provide a clear statement of their reform agenda. A "General" section served to award points for past efforts or future plans to implement such reforms as prioritizing education funding and spurring charter school growth.<sup>70</sup>

This Article spotlights the selection criteria utilized to assess a state's framework for turning around its lowest-achieving schools, one of the four reform areas prioritized by the Fund.<sup>71</sup> President Obama himself has placed a strong emphasis on this fourth assurance, stating that "even with stronger standards, better assessments, [and] outstanding teachers," some schools will need some extra help.<sup>72</sup> In fact, increasing the academic achieve-

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66. *FAQ*, *supra* n. 43, at 5. The four areas of reform included (1) "[a]dopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy"; (2) "[b]uilding data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction"; (3) "[r]ecruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most"; and (4) "[t]urning around our lowest-achieving schools." U.S. Dept. Educ., *Race to the Top Fund*, <http://www2.ed.gov/programs/racetothetop/index.html> (modified June 25, 2010).

67. *Id.* According to the Fund's scoring rubric, the nineteen criteria and the one competitive priority add up to 500 points. *Scoring Rubric*, *supra* n. 61, at 2.

68. 74 Fed. Reg. at 59698.

69. "[O]ver half the points . . . are based on [s]tates' accomplishments prior to applying—their successes in increasing student achievement, decreasing the achievement gaps, increasing graduation rates, enlisting strong statewide support and commitment to their proposed plans, and creating legal conditions conducive to education reform and innovation." *Scoring Rubric*, *supra* n. 61, at 1.

70. 74 Fed. Reg. at 59691, 59804.

71. *Id.* at 59688.

72. Obama, *supra* n. 5.

ment of students in struggling schools is touted as a “central purpose of ARRA funds.”<sup>73</sup>

In order to receive the financial help provided under the Fund for turning around lowest-achieving schools, an applicant state is asked to demonstrate its past efforts and success in building its capacity to intervene in its lowest-achieving schools and districts, and its future plans to identify its persistently lowest-achieving schools and to support its school districts in turning around these schools.<sup>74</sup> The state’s future plans in this reform area were judged, in large part, on the state’s capacity and plan to implement one or more of the four school intervention models prioritized under the Fund.<sup>75</sup>

The first criterion asked the states to discuss whether they had the capacity to intervene in their persistently lowest-achieving schools and districts.<sup>76</sup> State intervention can take a variety of forms, including the reconstitution of schools by contracting with private or nonprofit agencies to run the school, implementing new curriculum, providing professional development, or creating charter schools.<sup>77</sup> Another approach to state intervention is that of individual school or district takeovers, which involve replacing staff, administration, or school board members.<sup>78</sup> States lacking this intervention power are only able to take such steps if asked to do so by the school or district,<sup>79</sup> of course, it is very unlikely that a school or district would volunteer for this type of intervention.<sup>80</sup> Because a state’s capacity to intervene in its schools and districts lies at the heart of the Fund’s framework for turning around struggling schools,<sup>81</sup> states earned

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73. 74 Fed. Reg. at 59763.

74. *Id.* at 59803.

75. *Id.* The four intervention models are described as the turnaround model, the restart model, the school closure model, and the transformation model. *Id.* See *infra* nn. 87–122 and accompanying text for additional information on each of the four school intervention models.

76. 74 Fed. Reg. at 59803.

77. Jessica Ganet, *Wash. State Bd. Educ., The National Picture of State Intervention Authority in Low Performing Schools and Districts 2*, [http://www.sbe.wa.gov/documents/NationalPictureofStateInterventionAuthorityinLowPerformingSchoolsFINAL\\_000.pdf](http://www.sbe.wa.gov/documents/NationalPictureofStateInterventionAuthorityinLowPerformingSchoolsFINAL_000.pdf) (Oct. 25, 2008).

78. *Id.*

79. *Id.* at 1.

80. *Id.* “Research shows that districts are not likely to voluntarily solicit state help.” *Id.*

81. *Scoring Rubric, supra* n. 61, at 13. Without the legal authority to intervene in local

up to ten points if they had no legal barriers preventing such intervention.<sup>82</sup>

## B. The Four School Intervention Models

The second set of criteria was forward-looking and asked the states to discuss their *plans* to identify their persistently lowest-achieving schools and to support their school districts in turning around these schools.<sup>83</sup> President Obama has stated that he is committed to doing only “what the data and the science and the studies and the research show actually make a big difference in terms of school improvement.”<sup>84</sup> With that in mind, the Fund described four separate intervention models emphasizing those education reforms the Administration believes will have the greatest impact.<sup>85</sup> A maximum of forty points were awarded to applicant states based on how well their plans mirrored one or more of the four intervention models described in the Fund.<sup>86</sup> The four models are the turnaround model, the restart model, the school closure model, and the transformation model.<sup>87</sup>

### 1. *The Turnaround Model*

Under the turnaround model, the school district must replace the principal and at least half of the school staff; provide the new principal with flexibility over staff hires, budget, and school schedule; implement strategies designed to recruit and retain staff with the requisite skills to meet student needs; provide ongoing professional development to school staff; adopt a new governance structure; implement a research-based instructional program that is aligned with state standards and “vertically

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schools or districts, it becomes very difficult to undertake many of the steps prioritized under the Fund, such as reconstituting schools. School reconstitution can take a variety of forms, but most often refers to the replacement of the principal and a large percentage of the teachers with the underlying assumption that a new staff will enable the school to improve. “[T]he aim of reconstitution is to enhance the human capital in a school.” Jennifer K. Rice & Betty Malen, *The Human Costs of Education Reform: The Case of School Reconstitution*, 39 *Educ. Admin. Q.* 635, 635 (2003).

82. *Scoring Rubric*, *supra* n. 61, at 13.

83. 74 *Fed. Reg.* at 59803.

84. Obama, *supra* n. 5.

85. *Id.*

86. 74 *Fed. Reg.* at 59813.

87. *Id.* at 59803.

aligned”<sup>88</sup> from one grade to the next; promote the use of student assessment data in differentiating instruction; provide increased learning time; and provide social-emotional and community-oriented services and supports for students.<sup>89</sup>

The turnaround model described in the Fund is based in large part on what Secretary Duncan implemented in Chicago when he was CEO of the Chicago Public Schools.<sup>90</sup> The idea behind this model is that the school must be remade from top to bottom—the children are permitted to stay at the school but a large portion of the staff leaves.<sup>91</sup> President Obama stated long before the Fund’s final rules were published that not only the principal but at least half the school’s staff must be replaced under this model.<sup>92</sup> The Administration’s view is that it otherwise may be very difficult to obtain the culture change needed for a successful turnaround.<sup>93</sup>

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88. Vertical alignment refers to “the degree to which expectations and assessments are in agreement and serve in conjunction with one another to guide an education system toward students learning what they are expected to know and do. Alignment describes the match between expectations and assessment” and vertical refers to the tracking of learning from one grade to the next. Lauress L. Wise & Meredith Alt, *Ore. Dept. Educ., Assessing Vertical Alignment*, in *Aligning Assessment to Guide the Learning of All Students* 57, 61–62, <http://www.ode.state.or.us/teachlearn/subjects/science/curriculum/ccsso2006reports.pdf> (Sept. 2005).

89. 74 Fed. Reg. at 59828–59829.

90. Kathleen, Kingsbury, *Time.com, Will Arne Duncan Shake up America’s Schools?* <http://www.time.com/time/nation/article/0,8599,1866783,00.html> (Dec. 16, 2008).

91. Obama, *supra* n. 5.

92. *Id.*

93. Arne Duncan, Speech, *Turning around the Bottom Five Percent* (Natl. Charter Schs. Conf., D.C., June 22, 2009) (available at <http://www2.ed.gov/news/speeches/2009/06/06222009.html>). This turnaround model is premised upon the recruitment of new school principals and teachers. Secretary Duncan stated as much in his speech at the National Charter Schools Conference:

But over the coming years, America needs to find 5,000 high-energy, hero principals to take over these struggling schools—and they will need a quarter of a million great teachers who are willing to do the toughest work in public education. We will find them in the union ranks and the charter community, the business world and the nonprofit sectors. We won’t find them overnight. I don’t expect a thousand to show up next fall. We can start with one or two hundred in the fall of 2010, and steadily build until we are doing 1,000 per year.

*Id.* The Race to the Top Fund Final Rule further clarifies the Secretary’s position:

The Secretary understands that replacing leadership and staff is one of the most difficult aspects of the school intervention models required by criterion (E)(2). However, he also believes that in our lowest-achieving schools, many of which have failed to improve despite repeated earlier interventions, dramatic changes in leadership and staffing can be the key to creating the new climate and culture needed to break the cycle of educational failure.

74 Fed. Reg. at 59767.

The turnaround model is also widely referred to as “reconstitution” and has long been a polarizing topic in the field of school reform.<sup>94</sup>

## 2. *The Restart Model*

The second school intervention option is the restart model. Under this model, a school district converts a persistently lowest-achieving school to a charter school or closes and then reopens the school under the management of a charter school operator, a charter management organization (CMO), or an education management organization (EMO).<sup>95</sup> This intervention model came under heavy criticism in the notice and comment period.

The Department initially included an additional criterion under the “turning around the lowest-achieving schools” assurance area that asked states to discuss what steps they had already taken to lift caps on charter school growth or otherwise ease restrictions on student enrollment in charter schools in their states.<sup>96</sup> Public comments expressed concern over the Department’s promotion of charter schools as a solution to the issues faced by persistently lowest-achieving schools.<sup>97</sup> The Department attempted to respond to these concerns in the final version of the rules, not by eliminating the criterion encouraging charter school growth but by simply shifting it from the “Turning Around the Lowest-Achieving Schools” section to the “General” section.<sup>98</sup> The

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94. Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?* 1998 B.Y.U. Educ. & L.J. 103, 104 (1998). “[Reconstitution] is like open heart surgery. . . . It [is] a very, very dramatic kind of intervention, the most radical form of urban education reform there is.” *Id.* at 103 (quoting Gary Orfield).

95. 74 Fed. Reg. at 59829. “A CMO is a non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools. An EMO is a for-profit or non-profit organization that provides ‘whole-school operation’ services to a [local school district].” *Id.* Under the restart model, a newly converted or reopened school “must enroll, within the grades it serves, any former student who wishes to attend the school.” *Id.* See also *id.* at 59764 (discussing the restart model).

96. *Id.* at 59691. The proposed rule containing the charter school criterion under the assurance area of turning around the lowest-achieving schools can be found in the Department’s Notice of Proposed Priorities. 74 Fed. Reg. 37804, 37809–37810 (July 29, 2009).

97. 74 Fed. Reg. at 59691. “Some commenters concluded that by placing the charter school criterion in the school turnaround section, the Department was advancing charter schools as the chief remedy for addressing the needs of the persistently lowest-achieving schools.” *Id.*

98. *Id.*

Department contends that this revision more accurately reflects its stance on charter schools—not as the “only or preferred solution to turning around struggling schools” but merely as one of many school reform tools.<sup>99</sup>

Despite this change, the revised criteria continued to prioritize a state’s capacity to increase the number of charter schools. Specifically, each state was asked to address in its application whether it had any laws in place that imposed limitations on the ability to increase the number of high-performing charter schools in the state, whether it held its charter schools accountable, and whether it treated its charter schools comparably to traditional public schools in terms of funding and a few other related matters.<sup>100</sup> A state could earn a total of forty points for this criterion.<sup>101</sup> By comparison, an applicant earned only fifteen points for the other two criteria in the “General” section combined,<sup>102</sup> and only fifty points for the entire assurance area of “Turning Around the Lowest-Achieving Schools.”<sup>103</sup> The large number of points available for the single charter school criterion clearly signal the great emphasis placed thereon by President Obama and Secretary Duncan.

Secretary Duncan has stated on several occasions that the Department’s policy on charter schools is not intended to “let a thousand flowers bloom” but to ensure the quality of the charter schools created through the Fund.<sup>104</sup> Despite this seemingly restrained approach, Secretary Duncan has also made a personal appeal for more charter schools and EMOs<sup>105</sup> to become involved in the Department’s effort to turn around struggling schools.<sup>106</sup> The Secretary explained that under the restart model, charter

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99. *Id.*

100. *Id.* at 59804.

101. *Id.* at 59813.

102. *Id.*

103. *Id.*

104. Sam Dillon, *N.Y. Times*, *Few Specifics from Education Pick*, [http://www.nytimes.com/2009/01/14/us/politics/14webduncan.html?\\_r=2](http://www.nytimes.com/2009/01/14/us/politics/14webduncan.html?_r=2) (Jan. 14, 2009).

105. “An EMO . . . is a private organization or firm that directly or indirectly receives public funds to manage schools, whether district schools or charter schools. Education management organizations emerged in the early 1990s in the context of widespread interest in so-called market-based school reform proposals.” Gary Miron et al., *Schools without Diversity: Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System 2* (EPIC/EPRU Feb. 2010) (available at <http://epicpolicy.org/files/EMO-Seg.pdf>).

106. Duncan, *supra* n. 93.

schools and EMOs have an incentive to become involved because they would be provided with a school filled with children, eliminating the need to recruit students.<sup>107</sup> They are also provided with a school building, the lack of which has been an obstacle for charter school operators in the past.<sup>108</sup> In other words, the opportunity is there for the taking, and the Secretary is not only courting the participation of charter schools and EMOs but counting on it to deliver improved educational outcomes.

### *3. The School Closure Model*

The third intervention model is referred to as the school closure model. Under this model, the local school district closes a persistently lowest-achieving school and places the school's students in high-performing schools within the district.<sup>109</sup> The Fund's language recommends that students be reassigned to a school "within reasonable proximity" to the school closed by the district, but also states that the students may be enrolled in "charter schools or new schools for which achievement data are not yet available."<sup>110</sup> Despite this language, and the fact that it would be impossible under the Fund's rubric to accurately assess the quality of a new school, President Obama has described the school closure model as allowing students to be sent to a "better school nearby."<sup>111</sup>

The school closure model cannot be characterized as innovative. Under NCLB's school choice provision, elementary and secondary school students may already transfer to another public school within their school district if their original school fails to make adequate yearly progress (AYP) for two consecutive years.<sup>112</sup> The Fund's continuation of this policy is premised upon the unfounded belief that transferring to a high-performing school, as gauged through the mechanism of assessment, will "instantly [improve] the learning conditions for those kids and [bring] a failing school to a swift and thorough conclusion."<sup>113</sup> Under the Fund,

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107. *Id.*

108. *Id.*

109. 74 Fed. Reg. at 59829.

110. *Id.*

111. Obama, *supra* n. 5.

112. 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

113. Duncan, *supra* n. 93.

even the NCLB requirement that the receiving school be deemed high-performing is discarded.<sup>114</sup>

#### 4. *The Transformation Model*

The three models discussed above are prioritized under the Fund. A fourth option, the school transformation model, may not be used by a school district with more than nine persistently lowest-achieving schools for more than 50% of its schools.<sup>115</sup> The transformation model includes both required and permissible strategies. Many of the required strategies are borrowed from the other intervention models: replacing the principal; linking teacher and principal evaluations, promotion, and retention decisions with data on student growth and achievement; using research and student data to drive instruction; and aligning instruction with state standards.<sup>116</sup> In addition, the transformation model requires districts to increase learning time and support family and community engagement.<sup>117</sup>

The range of permissible activities in the transformation model is quite broad. It includes providing additional compensation to attract and retain qualified staff; enabling the principal to make decisions about staffing without being limited by issues of seniority; offering increased opportunities for students to enroll in advanced coursework such as Advanced Placement courses at the high school level; offering summer programs to ensure a smooth transition from middle to high school; implementing credit-recovery programs and other strategies to increase graduation rates; and partnering with parents, faith-based organizations, health clinics, and community-based organizations, among others, “to create safe school environments that meet students’ social, emotional, and health needs.”<sup>118</sup>

Under the transformation model, most of the school’s staff remains in the building (a notable exception being the principal), but a strong effort is made to change the school’s culture through

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114. 74 Fed. Reg. at 59804.

115. *Id.* at 59770.

116. *Id.* at 59829.

117. *Id.* at 59829–59830.

118. *Id.* at 59830.

the above list of strategies.<sup>119</sup> The approach, as described by Secretary Duncan, is to “use everything we know about how to create a successful school culture—but do it all at once—with enough resources to get the job done.”<sup>120</sup> However, the Secretary has explained that the transformation model is primarily intended for “smaller communities where there isn’t a ready supply of new teachers and leaders, and where the current staff won’t have other job options.”<sup>121</sup> Duncan has made it clear that this model is not to be used as an easy way out for districts.<sup>122</sup>

In sum, the Fund represents President Obama’s aggressive plan for turning around this Nation’s lowest-achieving schools. Leveraging the economic crisis that enabled passage of ARRA with its massive infusion of resources for education, the Administration has taken advantage of “the perfect storm for reform.”<sup>123</sup> President Obama is using the Fund to promote a set of school reform strategies that he and Secretary Duncan have described as innovative and proven to work.

However, the reform strategies promoted under the Fund are largely unproven and representative of failed school reform efforts. A careful analysis reveals that the promoted strategies cannot be expected to succeed in turning around schools in any way that will have meaningful benefit to the students currently attending those schools. Despite President Obama’s call for innovation and scaling up what works,<sup>124</sup> the reform efforts featured

119. Duncan, *supra* n. 93.

120. *Id.*

121. *Id.*

122. *Id.* The Secretary did announce in the Final Rule that the proposed restrictions permitting the use of the transformation model only as a last resort had been removed. 74 Fed. Reg. at 59691. Nevertheless, the transformation model remains under a limitation that is applied to any of the other intervention models. *Id.*

123. Duncan, *Science Teachers*, *supra* n. 30.

124. Obama, *supra* n. 42. President Obama said,

We also have to explore innovative approaches such as those being pursued here in New York City; innovations like Bard High School Early College and Medgar Evers College Preparatory School that are challenging students to complete high school and earn a free associate’s degree or college credit in just four years . . . .

That’s why I’ve issued a challenge to America’s governors: If you match the success of states like Pennsylvania and develop an effective model for early learning; if you focus reform on standards and results in early learning programs; if you demonstrate how you will prepare the lowest income children to meet the highest standards of success—then you can compete for an Early Learning Challenge Grant that will help prepare all our children to enter kindergarten all ready to learn.

*Id.*

under the Fund are neither innovative nor capable of reforming educational institutions.

## II. PRESIDENT OBAMA'S PLAN FOR TURNING AROUND STRUGGLING SCHOOLS

Under President Obama's plan for turning around struggling schools, individual states are told that their lowest-performing schools can be fixed primarily by increasing the supply of charter schools, replacing teachers and principals, contracting with EMOs, and closing down schools. President Obama has described these approaches as both innovative and proven to work. In reality, however, they are largely ineffective policies recycled from previous administrations. In addition, the Fund's relentless focus on standards and assessments, coupled with its avoidance of a poverty-conscious strategy, helps define President Obama's school reform effort as a fundamentally conservative one.<sup>125</sup>

### A. Assessing the Merits of Race to the Top

The Fund represents a continuation of the standards and assessment approach to school reform that gained increased visibility and prominence under NCLB, but that can be traced back to earlier school reform efforts.<sup>126</sup> The standards and assessment approach seeks to obviate the complexity and expense associated with educational inputs through a narrow emphasis on perfunctory and digestible outputs. In this light, the Fund represents a narrow approach to education reform in the manner it defines the problem of struggling schools: primarily by reference to students' performance on standardized assessments.<sup>127</sup> The Fund has

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125. *Supra* n. 3.

126. See Norvella P. Carter, *Diversity and Standards: Defining the Issues*, in *Convergence or Divergence: Alignment of Standards, Assessments and Issues of Diversity* 9, 10 (Norvella P. Carter ed., AACTE Publications 2003) (noting that the 1983 publication of *A Nation at Risk* by the National Commission on Excellence in Education was the inspiration of the standards and assessment movement); Robert J. Marzano & John S. Kendall, *The Fall and Rise of Standards-Based Education* 4–5 (NASBE 1997) (acknowledging that some critics even trace the standards and assessment movement to failed reforms of the early 1900s); Natl. Commn. Excellence Educ., *A Nation at Risk: The Imperative for Educational Reform* 9–10 (U.S. Dept. Educ. 1983) (stating that the problems with the education system uncovered by the National Commission on Excellence in Education were largely based on public perception and test scores).

127. 74 Fed. Reg. at 59688. Prof. Mindy Kornhaber believes that

already been criticized for its embrace of the standards and assessment movement.<sup>128</sup>

President Obama has on occasion acknowledged that struggling schools are beset by a wide range of socioeconomic problems.<sup>129</sup> Under the Fund, however, states are asked to identify their persistently lowest-achieving schools almost exclusively by reference to scores on standardized assessments.<sup>130</sup> The result is that the Fund shines a spotlight on Title I or Title I-eligible schools whose students are not performing in accordance with the AYP mandates of NCLB.<sup>131</sup> The spotlight is welcome, but the pro-

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[u]ltimately, our education system must abandon the push for equal and gap-free scores and should instead strive to produce cognitive equity. That is, it should enable people, regardless of their ascriptive characteristics, to understand, use, and contribute to an array of disciplinary knowledge in the wider world. Accountability systems that rely almost exclusively on high-stakes tests cannot produce this outcome; such systems invariably work to advance scores more so than actual disciplinary competence, and in the process, they undermine instruction. Thus, improving disciplinary competence requires moving beyond standardized tests to other forms of assessment.

Mindy L. Kornhaber, *Beyond Standardization in School Accountability*, in *Holding NCLB Accountable: Achieving Accountability, Equity & School Reform* 43, 49 (Gail L. Sunderman ed., Corwin Press 2008).

128. Henry A. Giroux, *truthout.org*, *Obama's View of Education Is Stuck in Reverse*, <http://www.truthout.org/072409A> (July 24, 2009). "The discourse of standards and assessment dominate the Obama-Duncan language of reform, and in doing so erase more-crucial issues such as the iniquitous school-financing schemes, the economic disinvestment in poor urban schools." *Id.* Because of concern in the 1980s and 1990s about the global competitiveness of United States workers produced by the education system, many states and school districts adopted the policy of setting achievement goals for students and teachers to meet, usually gauged by standardized testing. Carter, *supra* n. 126, at 9–10. The trend of schools, states, and the Nation setting up standards and assessment schemes has been called the "standards and assessment movement" and is often interlinked with school reform. *Id.*

129. President Obama has acknowledged that "many of these schools are in very tough neighborhoods, and kids are coming to school already with some significant problems." Barack Obama, Speech, *Remarks by the President on Education* (D.C., July 24, 2009) (available at [http://www.whitehouse.gov/the\\_press\\_office/remarks-by-the-president-at-the-department-of-education/](http://www.whitehouse.gov/the_press_office/remarks-by-the-president-at-the-department-of-education/)).

130. 74 Fed. Reg. at 59805. The Fund encourages states to identify and support districts in turning around their persistently lowest-achieving schools, which are defined as "the lowest-achieving [5%] [or five] Title I schools in improvement, corrective action, or restructuring . . . whichever number of schools is greater." The rate of achievement at any given school is to be measured by reference to the students' performance on NCLB-mandated assessments. *Id.* at 59805–59806. At the high school level, the definition is broader and encompasses a school with a graduation rate "that is less than 60[%] over a number of years." *Id.* at 59806.

131. *Id.* A school meets or fails its AYP target based on the performance of its students on a standardized assessment. 20 U.S.C.A. § 6311(b)(2)(B), (b)(3)(A) (West 2009). NCLB is designed to "ensur[e] that all local educational agencies, public elementary schools, and

posed remedies fail to acknowledge the fact that many of the schools identified as the lowest-achieving have been asked to work under a very challenging set of circumstances—concentrated poverty and insufficient resources at the federal and state levels to mitigate the impact of poverty on a child’s educational attainment.<sup>132</sup> Instead of seeking ways to support the work of these public schools, the Fund appears to place the primary emphasis on securing their demise.<sup>133</sup>

NCLB already facilitates the imposition of a number of sanctions on schools and districts failing to make AYP.<sup>134</sup> The Fund provides the added financial incentive for states to implement

public secondary schools make adequate yearly progress.” *Id.* at § 6311(b)(2)(A). AYP is defined to include the separate achievement improvement of the following subgroups of students: students who are economically disadvantaged, students from major racial and ethnic groups, students who have disabilities, and students who are limited in English proficiency. *Id.* at § 6311(b)(2)(C)(v)(II)(aa)–(dd). The AYP target has to be met not only by all students in the school, but also by each identified subgroup. *Id.* at § 6311(b)(2)(I).

132. In response to similar concerns expressed by commenters to the Notice of Proposed Priorities, Secretary Duncan wrote that “while broader societal problems such as the lack of affordable housing or access to healthcare certainly make the jobs of schools serving disadvantaged students more challenging, they should not be used to excuse the lack of achievement in high-need schools.” 74 Fed. Reg. at 59703.

133. Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools through Public School Choice* 79 (Brookings Instn. Press 2003). According to Kahlenberg,

[t]he standards movement has not only been fairly ineffective for students in poor schools, when applied to economically segregated schools, it can even create new inequalities. . . . The logic, of course, is to provide incentives for improvement. The result, however, is that the schools that are already doing well and making the biggest improvements get more money to make further improvements, while the students unlucky enough to be stuck in schools that have leveled out or are in decline lose out.

*Id.* at 79. President Obama has stated that it is important to provide struggling schools with “extra help”:

There are some schools that are starting in a tough position—a lot of kids coming from impoverished backgrounds, a lot of kids coming in that may have not gotten the kind of head start that they needed; they start school already behind. And even though there are heroic teachers and principals in many of these schools, the fact is that they need some extra help.

Obama, *supra* n. 5.

134. For instance, NCLB requires school districts that fail to make AYP for three consecutive years to set aside 20% of their Title I, Part A, allocation to pay for supplemental services and transportation costs under the school transfer option. 20 U.S.C.A. § 6316(e)(6)(A), (B). Under the school choice provision, elementary and secondary students may transfer to another public school within the same district if their original school fails to make the AYP for two consecutive years. *Id.* at § 6316(b)(1)(E)(i). Indeed, it could be argued that 5,000 school closings in the next five years would be considered a success under President Obama’s plan. Struggling schools that are converted to charters, turned over to EMOs, or simply closed to have their students reassigned to higher-performing schools are deemed to have been turned around under the Fund. 74 Fed. Reg. at 59829.

such aggressive sanctions as the wholesale replacement of staff and the permanent closure of schools.

### B. State Interventions

The Fund's faith in the power of state intervention in lowest-achieving schools provides a second example of its recycled policies. One of the criteria in the assurance area of turning around lowest-achieving schools asks whether states have the legal authority to intervene directly in their persistently lowest-achieving schools.<sup>135</sup> Of course, this bit of "innovation" preceded even NCLB, which merely provided more leverage for intervention by states.<sup>136</sup>

The effectiveness of this approach is sharply contested.<sup>137</sup> Furthermore, most states already have these intervention tools

135. 74 Fed. Reg. at 59803. "*Intervening in the lowest-achieving schools and LEAs: The extent to which the State has the legal, statutory, or regulatory authority to intervene directly in the State's persistently lowest-achieving schools . . . and in LEAs that are in improvement or corrective action status.*" *Id.*

136. Gail L. Sunderman & Gary Orfield, *Massive Responsibilities and Limited Resources: The State Response to NCLB*, in  *Holding NCLB Accountable: Achieving Accountability, Equity & School Reform*, *supra* n. 127, at 121, 133. Dr. Sunderman and Professor Orfield wrote about states taking over schools before NCLB:

The idea of state takeovers blossomed in the reform era in the late 1980s and became widespread in the following decade. It often began in cases of financial collapse where the state was forced to step in; in court orders; in cases of massive corruption; or, as the standards-based reform movement became more intense, in cases of persistent academic disaster.

*Id.* at 133.

137. *Id.* Sunderman and Orfield criticize state takeovers:

A study by the Education Commission of the States . . . concluded in a 2004 report that takeovers were "yielding more gains in central office activities than in classroom instructional practices" by helping to straighten out accounts and business practices and upgrading facilities. Little progress was noted on academic gains, certainly nothing like the gains required by NCLB: "Student achievement still oftentimes falls short of expectations . . . . In most cases, academic results are usually mixed at best, with increases in student performance in some areas . . . and decreases in student performance in other areas."

*Id.* Dr. Mintrop also questions the value of states intervening in schools:

State takeovers of entire districts have also produced uneven outcomes. Financial management is often cited as the most promising area for potential success by states. However, equally dramatic *academic* success has been much harder to achieve. Academic gains have been mixed at best, most often occurring only after multiple years of intervention.

Heinrich Mintrop, *Low-Performing Schools' Programs and State Capacity Requirements*, in  *Holding NCLB Accountable: Achieving Accountability, Equity & School Reform*, *supra* n. 127, at 137, 143 (internal citation omitted).

securely in place.<sup>138</sup> It is therefore unclear that any great gains will come from the Fund's emphasis on a state's capacity for intervention. This is especially true given that the resources being awarded through the Fund are finite and to be spent within a limited timeframe.<sup>139</sup> States whose applications are successful stand to receive awards ranging from \$20 million to \$700 million, based in part on the size of their student populations.<sup>140</sup> Delaware and Tennessee already succeeded in securing \$100 million and \$500 million, respectively, as the only winners to be declared in the Fund's first round of competition, but these states are being asked to spend their grant money within a four-year time period.<sup>141</sup> This places great doubt on the long-term sustainability of any effort undertaken under the Fund. Furthermore, it is simply not clear that individual state departments of education possess the requisite expertise to intervene in such a manner as to have a lasting impact on the achievement of children.<sup>142</sup> This is particularly

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138. A 2006 study conducted by the Education Commission of States reveals that "twenty-nine states have the authority to take control of a district and simply override local authorities under specified circumstances, and about a third of states also have the authority to cease local control of individual schools and impose changes." Sunderman & Orfield, *supra* n. 136, at 133.

139. 74 Fed. Reg. at 59840.

140. *Id.*; FAQ, *supra* n. 43.

141. U.S. Dept. Educ., *Delaware and Tennessee Win First Race to the Top Grants*, <http://www2.ed.gov/news/pressreleases/2010/03/03292010.html> (Mar. 29, 2010).

142. Sunderman and Orfield question states' capacities to help students:

Since state agencies traditionally rely on regulatory mechanisms to control education, they lack the expertise to effectively intervene in schools and districts and the organizational networks that would facilitate a cooperative relationship between state and local authorities. Rather than require states to take on new responsibilities, it may be better to build on their current roles and develop the infrastructure to improve current functions. Indeed, that is the approach states took when they continued to use conventional approaches to implementing Title I instead of using the new powers they have under the law.

Sunderman & Orfield, *supra* n. 136, at 136. According to the American Institutes for Research (AIR), in 2008, sixteen states had "moderate capacity" and thirty-three had "limited capacity" to support improvement, to say nothing of full intervention and restructuring, in their schools. Kerstin Carlson Le Floch, Andrea Boyle & Susan Bowles Therriault, *Help Wanted: State Capacity for School Improvement* 1 (Amer. Insts. Research 2008). Many heads of state education agencies felt they had insufficient "staff, funding, and technology." *Id.* To make matters worse, those states most likely to have to intervene in failing schools have the least capacity to do so. *Id.* Paul Reville criticized the execution of NCLB's accountability:

[L]ittle effort is made through NCLB to build state capacity. This leaves [understaffed, underfunded] education agencies, with a history and culture of compliance monitoring, to suddenly reinvent themselves into leadership agencies. Cast in this new role, they are now expected to provide in-depth support to schools and districts

implausible today, given the dire economic straits faced by most states and their reduced capacity.<sup>143</sup>

### C. The Truth about Charter Schools

The Fund heavily promotes charter schools both as a viable alternative for students in underachieving schools and as a strategy to turn around struggling schools. States were asked to demonstrate in their applications that they had no legal prohibitions or restrictions on charter school growth, or on student enrollment in charter schools.<sup>144</sup> In addition, two of the four turnaround strategies expressly encourage the use of charter schools. Under the restart model, states are asked to convert their lowest-achieving schools into charter schools.<sup>145</sup> The school closure model asks states to close a school and then enroll the students in higher-achieving schools nearby, which may include charter schools.<sup>146</sup>

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that are striving to achieve policymakers' ambitious proficiency goals for all students.

Paul Reville, *A Mountain Beyond Mountains*, in *Handbook on Statewide Systems of Support* 15, 16 (Sam Redding & Herbert J. Walberg eds., Acad. Dev. Inst. 2007).

143. The AIR study was based on surveys administered in February 2008, before the worst of the financial crisis. Le Floch et al, *supra* n.142, at 2. See also Council State Govts., *State Fiscal Stabilization Fund*, <http://www.staterecovery.org/Websites/staterecovery/Images/1-22-09bud-sfsf.pdf> (accessed Sept. 2, 2010) (stipulating the impact of the American Recovery and Reinvestment Act of 2009 on each state); Elizabeth McNichol & Iris J. Lav, *New Fiscal Year Brings No Relief from Unprecedented State Budget Problems* 1 (Ctr. Budget & Policy Priorities 2009) (available at [http://governor.mt.gov/news/docs/Center\\_on\\_Budget\\_Policy.pdf](http://governor.mt.gov/news/docs/Center_on_Budget_Policy.pdf)) (noting that the State Fiscal Stabilization Fund was thought necessary to keep states solvent and functional, indicating that states had trouble making ends meet and so might have minimal capacity to fix schools). This is exemplified by recent proposed cuts to New York's Department of Education. Anna Phillips, *Gotham Schools, Cuts Could Shrink New York's Education Department to Historic Low*, <http://gothamschools.org/2010/05/10/cuts-could-shrink-new-yorks-education-department-to-historic-low/> (May 10, 2010).

144. 74 Fed. Reg. at 59804. The Fund does limit this emphasis on charter school growth and student enrollment in charter schools only to those charter schools described as *high-performing*, defined as "a charter school that has been in operation for at least three consecutive years and has demonstrated overall success, including (a) substantial progress in improving student achievement . . . and (b) the management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school." *Id.* at 59805.

145. *Id.* at 59829. "A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process." *Id.*

146. *Id.*

Charter schools were also embraced under NCLB,<sup>147</sup> which directed additional funding toward the support of charter schools.<sup>148</sup> Secretary Duncan has publicly stated that the reform measures he is encouraging states to adopt, charter schools among them, have been proven effective when implemented on a small scale.<sup>149</sup> It has not been shown, however, that charter schools will be any more effective when called upon to educate the majority, rather than a minority, of students currently attending this Nation's struggling schools.

The impact of charter schools on the educational achievement of children currently attending "bottom schools" and "dropout factories," as described by Secretary Duncan, is overrated for several reasons. It significantly overlooks the fact that charter schools have thus far been called upon to educate a highly self-selected group of students.<sup>150</sup> Furthermore, such a strategy ignores the fact that persistently struggling schools—and the charter schools that may be called upon to educate the students currently attending those struggling schools—will still face the challenge of educating a student body contending with concentrated poverty. In addition, most charter schools claim success almost exclusively on the basis of their students' performance on standardized assessments.<sup>151</sup>

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147. See Paul T. Hill, *NCLB School Choice and Children in Poverty*, in *Standards-Based Reform and the Poverty Gap: Lessons for No Child Left Behind* 229, 235–236 (Adam Gamoran ed., Brookings Instn. Press 2007) (noting that NCLB identifies charter schools as a possible alternative for students attending schools that consistently fail to meet AYP).

148. See McGuinn, *supra* n. 3, at 181 (indicating that while "[a]uthorized at \$300 million in 2002, the program provides aid to help states and localities support charter schools, including money to help with the planning and design of charter schools, the evaluation of their effectiveness, and facilities costs.").

149. See Sen. Comm. Health, Educ., Lab. & Pensions, *Testimony of Education Secretary-designate Arne Duncan*, 111th Congress (Jan. 13, 2009) (citing examples of successful local programs and expressing a desire to "scale up what works"); Clay Burell, *change.org*, *Ed Sec Duncan Tips a Troubling Hand*, [http://education.change.org/blog/view/ed\\_sec\\_duncan\\_tips\\_a\\_troubling\\_hand](http://education.change.org/blog/view/ed_sec_duncan_tips_a_troubling_hand) (Feb. 10, 2009) (noting Duncan's remarks in a speech to the American Council on Education in which he stated that "we have proven strategies ready to go to scale.").

150. Robert Bifulco & Helen F. Ladd, *The Impacts of Charter Schools on Student Achievement: Evidence from North Carolina*, 1 *Educ. Finance & Policy* 50, 64 (2006) (available at [http://mitpress.mit.edu/journals/pdf/EDFP0101\\_pp050-90.pdf](http://mitpress.mit.edu/journals/pdf/EDFP0101_pp050-90.pdf)).

151. James E. Ryan, *Charter Schools and Public Education*, 4 *Stan. J. Civ. Rights & Civ. Liberties* 393, 396 (2008). Professor Ryan explained,

The fight, in other words, is over the validity of comparing some test scores with others. It is not over the validity of test scores themselves or their relevance to the quality of charter schools. Legislators, school officials, and advocates trot out test scores and use them to make their case that charter schools are succeeding or that

Again, the Fund's framework recycles priorities and strategies from President Obama's predecessors, and opts for "solutions" that are not proven to work.

Converting a persistently lowest-achieving school into a charter school is particularly problematic. Already under NCLB, after five consecutive years of failing to meet the AYP benchmark, a struggling school can be reconstituted with a new governance structure, which can be accomplished by closing the school and reopening it as a charter school.<sup>152</sup> Research shows that converting district schools into charter schools has had uneven results.<sup>153</sup> In fact, some believe it is one of the least-effective school reform initiatives.<sup>154</sup> After all, charter school conversion operates under the assumption that a student body can simply be transplanted into a "good" school and all of the attendant obstacles that had impeded educational achievement will somehow recede into the background.

The school closure model is also misguided. Shutting down persistently struggling schools, only to replace them with charter schools, does not guarantee any improvements in student achievement. Such a change may turn out to be cosmetic. Politically, there may be some benefit to announcing to the public that a large number of "failing" schools have been closed, but in terms of helping our most vulnerable citizens, this may not be the best approach. Closing down struggling schools is a high-profile way to persuade the public that progress is being made, but at the end of the day, students will likely face the same challenges as before.<sup>155</sup>

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they are failing, all along implying that test scores constitute sufficient proof of success or failure.

*Id.* at 396–97.

152. McGuinn, *supra* n. 3, at 180.

153. Heinrich Mintrop states,

While the research base on charter schools is expanding, little is known about charter school conversion as a means of corrective action and school redesign. Available data seem to suggest that converting district-administered schools into charter schools has had uneven results. Charter schools also tend to show up on states' lists of failing schools in larger proportions than regular public schools. Anecdotal evidence collected through interviews from Philadelphia suggests that charter school conversion without the benefit of an external provider model may be the least successful conversion of the ones tried there.

Mintrop, *supra* n. 137, at 143 (internal citations omitted).

154. *Id.*

155. See James E. Ryan, Panel Remarks, *Separate But Unequal: The Status of America's Public Schools* (U. Mich. L. Sch., Feb. 9, 2002), in 8 U. Mich. J. Race & L. 249, 332

The broader vision associated with a strategy favoring charter schools is also linked to the school reform framework advanced by President Obama's predecessors. Professor James E. Ryan describes school choice generally and charter schools specifically as the "handmaiden of the standards and testing movement."<sup>156</sup> He states that this is demonstrated in part by the fact that the most draconian sanction reserved for failing schools under NCLB is that these schools can be closed down and reopened as charter schools.<sup>157</sup> The same critique can be applied to the Fund's reliance upon charter schools to step in as substitutes when struggling schools fail to make the grade under NCLB-mandated assessments. Despite the disproportionate amount of attention directed at charter schools by policymakers and the media, these schools currently serve only a very small percentage of the public school population.<sup>158</sup> The primary question we must ask is whether the track record of charter schools, limited and mixed as it is,<sup>159</sup> contributes much to the question of how to educate the students currently left behind<sup>160</sup> in our persistently struggling schools. In other words, it is not clear that the population of students currently enrolled in most charter schools,

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(2002) (remarking that "[t]he risk is that you can mistake the illusion of change for real change.").

156. Ryan, *supra* n. 151, at 398.

157. *Id.*

158. *See id.* at 394 (stating that "[c]harter schools educate a little more than one million students. This number, while large, only represents about [2%] of the total public school enrollment."); U.S. Dept. Educ., *The State of Charter Schools 2000: Fourth-Year Report* 18, <http://www2.ed.gov/PDFDocs/4yrrpt.pdf> (Jan. 2000) (noting that in 2000 "[o]nly three states had 2% or more of their public school enrollment in charter schools, with the District of Columbia enrolling the greatest percentage of students in charter schools.").

159. Hill, *supra* n. 147, at 236–237. Dr. Hill, the Director of the Center on Reinventing Public Education, gave a sample of researchers' inconsistent conclusions of the effects of charter schools on students:

[The available] studies reported mixed results, with charter school students apparently benefiting in some subjects at some grade levels and doing worse than comparison groups in others. All studies with longitudinal data showed that charter school test scores were lower in the first year of operation than in later years and that charter school students eventually caught and in some cases outpaced the comparison groups.

*Id.*

160. Dr. Hill warned of additional social costs incurred by charter schools offering more educational options, stating that "[t]here is a further social risk: as families re-sort themselves into options, more advantaged students might be separated from less advantaged ones. This separation could worsen racial and class segregation and have negative school quality effects for the poorest children." *Id.* at 238.

on average, is similar to the population of students, on average, enrolled in those traditional public schools labeled as “persistently lowest-achieving.”<sup>161</sup> The reason for this is that students in charter schools, for the most part, have had to self-select into such an educational offering.

Education researcher Richard Rothstein has written about the issue of self-selection in the educational setting. Rothstein noted that some researchers can be surprised by the fact that there are differences in the achievement levels of children from low-income backgrounds who share similar levels of academic ability as measured on standardized tests. The missing variable, in his view, is that factors such as “the aspirations of parents for their children to rise in the social structure, and the pressure these parents placed on their children to do so,” can help determine which of these children will actually make it to college.<sup>162</sup>

“Family status variables”—including income, education, ethnicity, and marital status—are not determinative of a parent’s involvement in the education of his or her child.<sup>163</sup> “Process variables”—including “the value parents put on education, their wishes to be involved or their involvement in children’s school progress, their interest in having their children succeed in school, or their aspirations for their children’s achievement”—also appear to play a key role.<sup>164</sup> A parent’s actions or beliefs have been found to impact a child’s progress in school across similar family status groups.<sup>165</sup> Children in families where positive process variables

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161. Education researcher Richard Rothstein has noted,

In some cases, the claim fails because it rests on the misinterpretation of test scores; in other cases, the claim fails because the successful schools identified have selective student bodies. Remember that the achievement gap is a phenomenon of averages—it compares the average achievement of lower- and middle-class students. In both social classes, some students perform well above or below the average performance of their social class peers. If schools can select (or attract) a disproportionate share of lower-class students whose performance is above average for their social class, those schools can appear to be quite successful. Many of them are excellent schools and should be commended. But their successes provide no evidence that their instructional approaches would close the achievement gap for students who are average for their social class groups.

Richard Rothstein, *Class and Schools: Using Social, Economic and Educational Reform to Close the Black-White Achievement Gap* 5–6 (EPI 2004).

162. *Id.* at 31.

163. Kathleen V. Hoover-Dempsey & Howard M. Sandler, *Why Do Parents Become Involved in Their Children’s Education?* 67 *Rev. Educ. Research* 3, 7 (1997).

164. *Id.* at 7–8.

165. *Id.*; see also Cheryl Fields-Smith, *Social Class and African-American Parental*

are present are likely to do better in school than their peers in the same socioeconomic group. On the other hand, numerous studies show that the presence of certain family status and process variables can make it less likely that a parent will request a voluntary educational opportunity, such as enrollment at a charter school.<sup>166</sup>

Even Professor James Forman, Jr., of the Georgetown University Law Center, a strong charter school proponent, points to a recent study finding that “parents of students in . . . charter schools are more likely to have college degrees and less likely to be high school dropouts than district school parents.”<sup>167</sup> Professor Forman concedes that this may be because “among a relatively disadvantaged population (blacks), the more educationally advantaged seek charter schools.”<sup>168</sup>

One study examining the choice behavior of parents also found that “[p]oor and working-class parents choose failing schools at a much higher rate than do middle-class parents.”<sup>169</sup> Another study documented a “two-stage choice process” that takes place when parents are informed of such options as transferring their child to another school or a charter school in addition to the “default of sending one’s child to the neighborhood school.”<sup>170</sup> “First, the parent must decide to exercise the option—[he or ]she must choose to choose. Second, the parent must choose a school from the available choices.”<sup>171</sup> At both stages, certain parents (and their children) are disadvantaged.

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*Involvement*, in *Late to Class: Social Class and Schooling in the New Economy* 179, 179 (Jane A. Van Galen & George W. Noblit eds., SUNY Press 2007) (noting that “working-class parents with positive learning experiences in childhood were more likely to value education than working-class parents with negative experiences.”).

166. Monica Teixeira de Sousa, *The Politics of Supplementing Failure Under NCLB: How Both Left and Right Are Forcing Low-Income Children to Choose Between a Deficient Education and Working Overtime*, 10 Nev. L.J. 118, 127–128 (2009).

167. James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. Ill. L. Rev. 839, 861.

168. *Id.*

169. Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 Geo. J. Pov. L. & Policy 1, 18 (2008). Courtney “Bell’s study demonstrated that [parents] rely on their social networks for information about schools to consider. This means that differently situated parents are not actually choosing from the same set of schools. The parents’ existing social capital constrains them in identifying schools as available to their children.” *Id.*

170. *Id.* at 25.

171. *Id.*

In this study, the researchers set up a Web site to provide information on all traditional and charter schools in Washington, D.C., and launched an extensive campaign to inform low-income communities about the site.<sup>172</sup> Despite these efforts, the parents who used the site were “better educated than the typical [D.C.] public school parent.”<sup>173</sup> The researchers concluded that these parents are representative of those most likely to take advantage of school choice programs.<sup>174</sup> In addition, parents’ perceptions of their child’s academic success have an impact on which school they will select if they take the initial step of choosing to choose. The studies show that poor and working-class parents are more likely to reject schools that they perceive to be too challenging for their children.<sup>175</sup>

The research clearly demonstrates that by not taking socio-economics into account, the charter school movement largely ignores the reality that “an island of success in the middle of [an] ocean of failure”<sup>176</sup> is most likely successful because it has attracted a student body with different characteristics, *on average*, than those present in other schools in its community. Unfortunately, this evidence has also been ignored by President Obama and Secretary Duncan. Despite the significant problems involved with the promotion of charter schools as an answer to the many ills faced by struggling schools, charter school expan-

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172. *Id.* at 24. “Schneider and Buckley describe the campaign as including posters on bus lines primarily serving low-income communities; a slide show in the Union Station movie theater; posters in stores; a telephone hotline; radio and television spots; and personal outreach to community meetings, church groups[,] and the like.” *Id.*

173. *Id.*

174. *Id.* “Schneider and Buckley argue that this group of parents ‘are the most relevant group to study because it is their preferences and behavior that may matter most in school choice programs . . . .’” *Id.*

175. *Id.* at 33. “The poor and working-class parents were more likely to reject tuition-based and selective schools they perceived to be too challenging or too competitive, which might set the child up for failure.” *Id.*

176. Paul Tough, *Whatever It Takes: Geoffrey Canada’s Quest to Change Harlem and America* 162 (Houghton Mifflin Harcourt 2008). Reformer Geoffrey Canada, developer of the Harlem Children’s Zone (HCZ) program, has been especially passionate about avoiding this sort of scenario:

As [Geoffrey] Canada often said, he was tired of programs that helped a few kids “beat the odds” and make it out of the ghetto; his goal was to *change* the odds, and to do it for all of Harlem’s kids. The idea that Promise Academy might stand as an island of success in the middle of Harlem’s ocean of failure—that felt entirely wrong to him.

*Id.* See *infra* nn. 344–359 and accompanying text for a discussion of the HCZ.

sion has been facilitated by the Fund in states that had previously resisted such efforts. Indeed, the promise of additional resources, or the waving of the carrot under the Fund, has already prompted charter school growth at the state level.

This has been the case in Illinois, which earned the dubious distinction of becoming the first state Secretary Duncan called upon to lift its cap on the creation of charter schools. A mere two months after Secretary Duncan visited his home state with this message, Illinois lawmakers answered his call by doubling the number of charter schools permissible in the state.<sup>177</sup> A similar story unfolded in Tennessee. Secretary Duncan called the governor, a Democrat, in late spring and in June the legislature approved a measure to expand the number of students eligible to attend charter schools.<sup>178</sup> After Indiana was identified by the Administration as unfriendly to charter schools, Indiana legislators made the decision to remove their cap on the expansion of charter schools.<sup>179</sup> The Rhode Island General Assembly had eliminated \$1.5 million in funding for two charter schools, but restored it after Secretary Duncan commented that such a step would be important for the State to remain competitive for the Fund.<sup>180</sup>

#### D. The Mirage of a “Better School Nearby”

The Fund’s school closure model encourages states not only to close persistently lowest-achieving schools but to consider placing the students formerly attending struggling schools in higher-achieving schools nearby, including charter schools.<sup>181</sup> The obvious problem with this approach is that it ignores the fact that many persistently struggling schools are located within districts in which no high-performing schools exist. This has been evi-

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177. Michele McNeil, *Racing for an Early Edge*, 28 Educ. Week 22–23 (July 15, 2009).

178. *Id.*

179. *Id.*

180. *Id.* Rhode Island also increased its charter school cap from twenty to thirty-five on March 16, 2010. Jennifer D. Jordan, *Providence Journal, R.I. Delegation Heads to Washington to Seek Education Funds*, [http://www.projo.com/news/content/race\\_to\\_the\\_top\\_rally\\_03-17-10\\_TCHQ84I\\_v18.37cee6b.html](http://www.projo.com/news/content/race_to_the_top_rally_03-17-10_TCHQ84I_v18.37cee6b.html) (Mar. 17, 2010). Tennessee raised its cap on charter schools from fifty to ninety schools, Illinois from sixty to 120 schools with an allotment for up to seventy-five in Chicago alone, and Louisiana eliminated its cap entirely. Erin Dillon, *Designing Smart Charter School Caps*, 4 J. School Choice 74, 75 (2010) (available at <http://www.informaworld.com/smpp/section?content=a919682902&fulltext=713240928>).

181. 74 Fed. Reg. at 59829.

denced, in part, by the proven futility of the limited intra-district transfer option under NCLB.<sup>182</sup> In many communities, providing students with such an option would require neighboring districts with high-performing schools to open their doors to additional students.

Unfortunately, an honest appraisal of the politics surrounding education indicates that states would not likely ever freely select this approach. Not only can strong political resistance be expected, but logistical issues would also prevent many districts from employing this strategy, even if approved by the electorate. It is simply unrealistic to assume that all persistently lowest-achieving schools are located within a reasonable distance of high-achieving schools.<sup>183</sup> This is particularly true in rural areas.<sup>184</sup> As such, the more probable implementation of this option will be to send children to a high-achieving school within their district, but only in the limited cases where such a school exists.

#### E. The Human Capital Approach

President Obama has indicated that the most important factor in a child's educational success, other than his or her parents, is the child's teacher.<sup>185</sup> President Obama wants to ensure that states place not only effective teachers but also effective principals in their struggling schools.<sup>186</sup> This is echoed in the Fund, which promotes turning around struggling schools through the replacement of leadership, staff, and governance.

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182. "Since the No Child Left Behind Act was passed, less than 2[%] of parents nationwide have transferred their children to other public schools." Lisa Snell, *The No Child Left Behind Act Provides Only the Illusion of School Choice*, <http://reason.com/archives/2004/10/01/no-way-out> (Oct. 2004).

183. See Erin Dillon, *Plotting School Choice: The Challenges of Crossing District Lines* 1 (Educ. Sector 2008) (available at [http://www.educationsector.org/usr\\_doc/Interdistrict\\_Choice.pdf](http://www.educationsector.org/usr_doc/Interdistrict_Choice.pdf)) (using Geographic Information Systems (GIS) mapping studies to find that "factors such as long distances to higher-achieving schools and limited capacity in such schools can sharply limit the ability of students to take advantage of interdistrict opportunities.").

184. In many rural areas, the distances between school districts would make it impossible to integrate middle- and lower-class schools even if the political will were present. See Angela Ciolfi, *Shuffling the Deck: Redistricting to Promote a Quality Education in Virginia*, 89 Va. L. Rev. 773, 794 (2003) (noting that district consolidation would be most effective in urban areas).

185. Obama, *supra* n. 5.

186. *Id.*

NCLB also relied on this approach to school reform. In fact, under NCLB, schools that fail for four consecutive years to hit the AYP target face corrective actions including the replacement of staff or the adoption of new curriculum.<sup>187</sup> But wholesale staff replacement and the closing of schools<sup>188</sup> are drastic measures that perhaps exceed what a reasonable observer would believe to comprise behavior supportive of public schools. The extent to which these measures in concert may signal a combative stance toward the schools themselves—and certainly toward educators in each of the states—has been made apparent in the rhetoric and actions prompted by the Fund.<sup>189</sup>

Although ensuring the presence of highly qualified teachers and administrators in schools with high concentrations of poverty is certainly an important goal, the means through which President Obama seeks to achieve such a result is both simplistic and arbitrary. The first problem, of course, is that the Fund's assessment-focused definition of effective teaching is very narrow.<sup>190</sup> A student's test score is incapable of capturing the many factors that may be guiding the student's educational progress; these may include home, community, ability level, and prior experiences (educational and otherwise), among others.<sup>191</sup> Effective

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187. 20 U.S.C. § 6316(b)(7)(C).

188. *Id.* at § 6316(b)(8)(B).

189. See Sen. Subcomm. Lab., Health & Human Servs., Educ. & Related Agencies, *supra* n. 11, at 35 (stating that “we’re not looking for a fight, but we’re prepared to have that if need be.”); *id.* at 41 (arguing that “[w]e have to attack these dropout factories.”); see also H.R. Comm. Educ. & Lab., *The Obama Administration’s Education Agenda*, 111th Cong. 3 (May 20, 2009) (prepared remarks of George Miller, Chairman) (noting that “Secretary Duncan and President Obama know that to make the change our students need, you have to be willing to break some china.”) (emphasis added). This echoes the quote often attributed to Stalin but written by *New York Times* reporter Walter Duranty that “you can’t make an omelette without breaking eggs.” Askold Krushelnycky, *The Observer*, *Ukrainians Want Pro-Stalin Writer Stripped of Pulitzer*, <http://www.guardian.co.uk/world/2003/may/04/russia.usa/> (May 4, 2003).

190. Diane Ravitch has noted,

[T]he debate about teacher effectiveness is far from simple. It is not easy to identify the “best teachers.” Some economists believe . . . that the best teachers are those who produce the biggest test score gains, so little else matters. Other economists say that a teacher who is “great” one year may not be great the next. Some social scientists question whether student test scores are reliable when used for high-stakes personnel decisions . . . .

Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* 219 (Basic Bks. 2010).

191. Discussing a report issued by the National Commission on Teaching and America’s Future entitled *What Matters Most: Teaching for America’s Future*, Diane Ravitch notes,

teaching is both science and art, and no single assessment can adequately label an instructor as either effective or ineffective.

In addition, the Fund's turnaround model, the one most focused on a human capital approach, calls for arbitrary decisions to be made regarding which teachers must be allowed to remain, and which must be terminated. Under this model's arbitrary and inflexible rules, the school is required to dismiss all the teachers and rehire no more than half of them.<sup>192</sup> Secretary Duncan insists that this approach is necessary if the culture of the school is to be changed.<sup>193</sup> Presumably he means that it is the negative attitude of the adults that impedes the students' learning, and once the lot of them has been dismissed, the culture along with the students' learning will experience exponential growth. Scapegoating the teachers while doing little to address the host of socioeconomic issues impeding a child's ability to learn is misguided and futile.<sup>194</sup>

The Administration's purported focus on teacher and principal quality is also jeopardized by the Fund's shortsighted funding

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The commission . . . specifically rejected schemes to connect teacher pay to students' test scores. The scores, the report warned, are only "crude measures" that "do not take into account the different backgrounds and prior performances of students, the fact that students are not randomly distributed across schools and classrooms, the shortcomings in the kinds of learning measured by current standardized tests, and the difficulty in sorting out which influences among many—the home, the community, the student him- or herself, and multiple teachers—are at play."

*Id.* at 178.

192. In an announcement on August 26, 2009, Secretary Duncan said that the turnaround model would include, among other actions, "replacing the principal and at least 50[%] of the school's staff, adopting a new governance structure[,] and implementing a new or revised instructional program." U.S. Dept. Educ., *Obama Administration Announces Historic Opportunity to Turn around Nation's Lowest-Achieving Public Schools*, <http://www2.ed.gov/news/pressreleases/2009/08/08262009.html> (Aug. 26, 2009).

193. Secretary Duncan proposed that one possible way to change the culture of "our chronically low-achieving schools" is "simply to close underperforming schools and reenroll the students in better schools." Arne Duncan, Speech, *Turning Around the Bottom Five Percent*, (Natl. Alliance for Pub. Charter Schools Conf., D.C., June 22, 2009) (available at <http://www.ed.gov/news/speeches/turning-around-bottom-five-percent>).

194. Diane Ravitch stated the following in an interview:

Teachers are being blamed for all the ills of society. They are being blamed for the achievement gap. We can't fire poverty; we can't fire families; we can't fire students; so we fire teachers. This mindset will discourage good people from becoming teachers. It will destroy the teaching profession. Whenever we meet a teacher, we should say two simple words, "Thank you."

Bobby Tanzilo, *OnMilwaukee.com*, *Ravitch's Book Has Lessons for Milwaukee Schools*, <http://onmilwaukee.com/family/articles/dianeravitch.html?viewall=1> (May 11, 2010).

stream.<sup>195</sup> Although the proposed 2011 budget earmarks \$1.35 billion to maintain the Race to the Top Fund and \$9.3 billion over the next ten years for competitive grants to help states improve their early learning programs,<sup>196</sup> this infusion of resources is simply too small and too brief to make a significant difference in the lives of low-income children in struggling schools. As such, it can only be viewed as another policy “based on short-term political considerations.”<sup>197</sup>

President Obama would stand to do greater good by endorsing a plan such as the one proposed by Senator Tom Harkin, which ties significant increased funding for the preservation of teacher jobs based on need rather than states’ willingness to implement untested and unsound reforms. Senator Harkin introduced a bill this year that would provide \$23 billion to extend the SFSF program.<sup>198</sup> Under Harkin’s proposal, states would stand to receive considerably more money than even the victors in Race to the Top, highlighting the inadequacy of President Obama’s key education policy.

For example, California, eligible to receive \$700 million under Race to the Top only if declared a winner in the second phase of competition, would receive close to \$3 billion through Senator Harkin’s bill; this influx of funds would make a significant difference in a state facing approximately 26,000 educator layoffs due to a lack of resources.<sup>199</sup> Illinois would receive a maximum of \$400 million under Race to the Top, but \$978 million through Senator Harkin’s jobs package.<sup>200</sup> In stark contrast to the teacher-blaming tactics employed in the Fund, Senator Harkin’s proposal would

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195. 123 Stat. at 182.

196. U.S. Dept. Educ., *President’s Education Budget Signals Bold Changes for ESEA*, <http://www2.ed.gov/news/pressreleases/2010/02/02012010.html> (Feb. 1, 2010).

197. William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* 30 (U. Chi. Press 1987).

198. The Keep Our Educators Working Act was introduced by Senator Harkin on April 14, 2010. The \$23 billion plan “will create an Education Jobs Fund modeled after the State Fiscal Stabilization Fund” and aims to “put Americans back to work educating the next generation.” *Sen. Tom Harkin, Harkin Introduces Bill to Keep Educators on the Job*, <http://harkin.senate.gov/press/release.cfm?i=323822> (Apr. 14, 2010); see *Funding Application*, *supra* n. 44 (discussing ARRA’s State Fiscal Stabilization Fund).

199. Will Potter, *neatoday.org*, “Race to the Top” v. Jobs Money: Which Offers More? <http://neatoday.org/2010/04/21/rtt-grants-vs-jobs-package/> (Apr. 21, 2010).

200. Natl. Educ. Assn., *Harkin Bill Would Provide Relief for Education Jobs Being Cut across Country*, <http://www.nea.org/home/39019.htm> (Apr. 21, 2010).

provide concrete support to schools and the children in need of it most.

#### F. A Narrow Focus

The broad framework for turning around persistently lowest-achieving schools under the Fund deemphasizes the importance of the world outside the school environment, as well as the federal government's role in providing the panoply of resources necessary to ensure increased academic achievement on the part of all students. Although the turnaround model calls upon school districts to provide "appropriate social-emotional and community-oriented services and supports for students,"<sup>201</sup> the requirement is still one that is ultimately imposed upon the schools with no support from the federal government beyond the one-time grant awarded under the Fund. And although the transformation model discusses the need for schools to partner with parents, community- and faith-based organizations, and health clinics in order to meet students' social, emotional, and health needs, such a strategy is merely suggested as a *permissible* approach, as opposed to being *required* under the Fund.<sup>202</sup> The same is true for offering full-day kindergarten or prekindergarten, and structuring a school funding formula that is weighted based on student needs.<sup>203</sup> The Department of Education decided that these interventions were not important enough to warrant requirement under the Fund. In contrast, replacing the school principal, replacing at least half of a school's staff, closing a school, and reopening a school as a charter school or under the operation of a different organization were all viewed as sufficiently important to warrant their inclusion as requirements under their respective intervention models.<sup>204</sup>

Although the turnaround model does at least provide the flexibility to expand early childhood programs and provide social-emotional and community-oriented services and supports for students, its applicability is limited under the Fund. This school intervention model may not be used by a school district with more than nine persistently lowest-achieving schools for more than half

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201. 74 Fed. Reg. at 59829.

202. *Id.* at 59830.

203. *Id.* at 59828–59829.

204. *Id.* at 59829.

of its schools.<sup>205</sup> Before the final rules were promulgated, Secretary Duncan provided some insight into the Administration's thinking about the transformation model. It was viewed as the model of last resort,<sup>206</sup> to be availed of by districts in which "there isn't a ready supply of new teachers and leaders, and where the current staff won't have other job options."<sup>207</sup>

Instead of devoting more time and attention to concrete steps that can be taken to support low-income students attending schools with high concentrations of poverty, the selected criteria under the Fund primarily recycle many of the reforms already implemented under NCLB.<sup>208</sup> The education reform strategies prioritized by President Obama under the Fund reveal a very conservative and narrow approach to aiding the children currently attending struggling schools. The abbreviated version of the plan is that states need to "do the right thing," and the right thing is defined as the implementation of the recycled, conservative, and largely unproven reforms promoted under the Fund.

Secretary Duncan has made it clear that the federal government's role is one of providing financial incentives and sanctions to individual states based upon their willingness to engage in specific efforts to improve their academically lowest-achieving schools.<sup>209</sup> The general premise of this idea is that the federal gov-

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205. *Id.* at 59770.

206. Duncan, *supra* n. 93. "But we should also be crystal clear: This model cannot be a dodge to avoid difficult but necessary choices. This cannot be the easy way out. It has to work and show results—quickly—in real and measurable ways in terms of attendance, parent involvement, and student achievement." *Id.*

207. *Id.* In response to comments made by members of the public, the Secretary removed the restriction, contained in the Notice of Proposed Priorities, "that permitted the 'transformation' model to be used solely as a last resort. Instead, we simply specify that an LEA with more than nine persistently lowest-achieving schools may not use the transformation model for more than 50[%] of its schools." 74 Fed. Reg. at 59691. Nevertheless, the transformation model is the only intervention model under a numerical limitation.

208. Diane Ravitch, *The Arena, Obama's Heavy-Handed Education Plan*, [http://www.politico.com/arena/perm/Diane\\_Ravitch\\_883E9B5B-B107-44AA-BF62-458A13C5C223.html](http://www.politico.com/arena/perm/Diane_Ravitch_883E9B5B-B107-44AA-BF62-458A13C5C223.html) (July 25–26, 2009).

209. Sen. Subcomm. Lab., Health & Human Servs., Educ. & Related Agencies, *supra* n. 11, at 35. The Secretary said,

Where states are acting in bad faith, they're playing shell games or doing something, we have the ability to withhold that money. And further, beyond that—so that's the stick. And we're prepared, don't want to use it, but we're prepared to use it if we need be . . . . The carrot . . . is we have these unprecedented discretionary resources. You know, \$4.35 billion Race to the Top, \$650 million, you know, Invest in What Works, Innovation Fund. . . . And so we're trying to work with both carrots and sticks to encourage states to do the right thing by their children.

ernment's task is simply to dangle financial incentives in front of states, provide a framework for reform, and then sit back while the states "fix" the schools.<sup>210</sup> And if the states fail to do the pre-determined amount of "fixing," they do not receive the benefits of additional resources with which to conduct their school reform efforts.<sup>211</sup> A broader and more progressive vision for the federal government is needed, one that directly addresses the link between concentrated poverty and struggling schools.

### III. THE PROBLEM: NO "PERSISTENTLY LOWEST-ACHIEVING SCHOOL" IS AN ISLAND

The vision and plan put forth thus far by President Obama and Secretary Duncan on the matter of raising student achievement rates in our lowest-achieving schools is very disappointing to those who hoped this Administration would take a more expansive view of the federal government's role—one that acknowledges the relationship between the educational achievement of an individual child and the federal government's involvement in resource distribution and the provision of safety-net programs and services.<sup>212</sup> President Obama has acknowledged in his speeches that many of the struggling schools he hopes to turn around are located in "very tough neighborhoods," and he has noted that the children in these schools are "coming to school already with some significant problems."<sup>213</sup> But despite briefly discussing the role that structural inequalities play in thwarting the dreams of children of color,<sup>214</sup> President Obama has made few statements

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*Id.*

210. *Id.* at 6–8.

211. *Id.*

212. Dr. Henry Giroux lamented that "[t]he discourse of standards and assessment dominate the Obama-Duncan language of reform, and in doing so erase more-crucial issues such as the iniquitous school-financing schemes, [and] the economic disinvestment in poor urban schools." Giroux, *supra* n. 128.

213. Obama, *supra* n. 129.

214. Barack Obama, Remarks, *Remarks by the President at the Congressional Black Caucus Foundation's Annual Phoenix Awards Dinner* (D.C., Sept. 27, 2009) (available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-At-The-Congressional-Black-Caucus-Foundations-Annual-Phoenix-Award-Dinner](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-At-The-Congressional-Black-Caucus-Foundations-Annual-Phoenix-Award-Dinner)). President Obama said,

Bringing hope and opportunity to places where they're in short supply—that's not easy. It will take a focused and sustained effort to eradicate the structural inequalities in our communities—structural inequalities that make it difficult for children of

regarding the need for a poverty-conscious, comprehensive approach to the problem of struggling schools. Instead of utilizing every opportunity—including that provided by the Fund—to educate the public about the role played by poverty and socioeconomics in the creation of persistently lowest-achieving schools, the President and his team have instead chosen to recycle a number of NCLB policies that perpetuate the myth that schools alone can “fix” the problem if they “do the right thing.”<sup>215</sup>

Prior to securing the Democratic nomination, Senator Obama appeared to favor a comprehensive approach to education reform, one in which poverty reduction was a key component.<sup>216</sup> As such, it appeared likely that Senator Obama would promote a broader role for the federal government in addressing the persistent achievement gap in education. Senator Obama referred *then* to “failing schools” as a symptom of a disease—the disease of poverty.<sup>217</sup> In sharp contrast to statements Senator Obama made when he was still vying for the Democratic ticket,<sup>218</sup> the Fund’s framework for “turning around” failing schools reveals a very narrow and conservative strategy that in no way depicts persistently

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color to make a success of their lives, no matter how smart or how driven or how talented they are.

*Id.*

215. The rhetoric that has accompanied the announcement of President Obama’s plan for education reform under the Fund demonstrates that his vision of the federal government’s role in this matter is a narrow one:

Our agenda from early childhood through [twelfth] grade is focused on helping states do the right thing. And that’s appropriate because States are responsible for establishing systems of education through the [twelfth] grade. It’s our role to make it a national priority to reform schools and help states and districts do that.

Duncan, *supra* n. 35.

216. Tough, *supra* n. 176, at 265. Tough noted Senator Obama’s apparently holistic approach:

That July, Barack Obama, then a rising presidential candidate, gave a speech in Washington, D.C., on urban poverty, in which he held up the Harlem Children’s Zone as a model for the strategy he would follow as president. “The philosophy behind the project is simple,” Obama explained. “If poverty is a disease that infects an entire community in the form of unemployment and violence, failing schools and broken homes, then we can’t just treat those symptoms in isolation. We have to heal that entire community. And we have to focus on what actually works.”

*Id.*

217. *Id.*

218. Barack Obama, Remarks, *Renewing American Competitiveness* (Flint, Mich., June 16, 2008) (available at <http://my.barackobama.com/page/community/post/stateupdates/gG5nQB>).

lowest-achieving schools as a symptom of poverty. Instead, struggling schools are now depicted as a cause of poverty.<sup>219</sup>

Perhaps this change should not come as a surprise given the broader political context; it is simply more politically expedient for a politician, particularly a president, to trumpet a reform model based on policies of opportunity over costlier—and perhaps politically less palatable—policies of entitlement. Nevertheless, this approach does not honor the rhetoric that accompanied President Obama’s candidacy, and it furthers an inherently conservative political agenda.

#### A. The Role of Education Policy in National Politics

Education has acquired an increasingly important role on the national stage, while many Americans regard the role of the federal government in their lives as having diminishing importance. Although many Americans at the turn of the last century viewed social institutions as instrumental to their health and well-being, there has been a steady attack on this philosophy and the government’s role as a provider of benefits and services.<sup>220</sup> This effort has been undertaken by Republicans and Democrats alike.<sup>221</sup>

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219. In a campaign speech in 2008, Senator Obama said,

This agenda starts with education. Whether you’re conservative or liberal, Republican or Democrat, practically every economist agrees that in this digital age, a [highly educated] and skilled workforce will be the key not only to individual opportunity, but to the overall success of our economy as well. We cannot be satisfied until every child in America—and I mean every child—has the same chances for a good education that we want for our own children.

*Id.* Secretary Duncan has also stated that “America’s economic security tomorrow is directly tied to the quality of education we provide today.” Duncan, *Science Teachers*, *supra* n. 30. It is important to note that the Fund was first announced in ARRA.

220. Dorothy H. Evensen, Patrick Shannon & Jacqueline Edmondson, *Where Have You Gone, John Dewey? Locating the Challenge to Continue and the Challenge to Grow As a Profession*, 108 Penn. St. L. Rev. 19, 27 (2003) (noting that “[d]uring the Progressive Era at the turn of the last century, many Americans believed that reformed social institutions could improve the lives of all citizens.”). Progressive ideals have been undermined by the growing emphasis on economics:

[S]ince the notion of competition for scarce resources is the core of neo-liberal economic theory (now fully the property of neo-conservatives), and this is the primary direction of America’s future, schools, conforming to socialization imperatives must abandon the family-welfare state model of society and embrace the adage that it’s a jungle out there.

Stanley Aronowitz & Henry A. Giroux, *Education Under Siege: The Conservative, Liberal and Radical Debate Over Schooling* 191 (Bergin & Garvey Publishers 1985).

221. The politics of Democrats behaving conservatively is described by Drew University

The Administration's plan for turning around struggling schools as described in the Fund, along with the manner in which President Obama and Secretary Duncan discuss education, convey a message to the American people about the proper role of the federal government in the field of education. In the Fund's framework, the role of the federal government is narrow; the federal government is there to provide financial incentives and to tell the states which reform efforts are worth implementing. This approach can be best understood within a historical context.

"Once upon a time there was a great nation [that] became great *because of its public schools.*"<sup>222</sup> Colin Greer considered this topic at length in the 1970s and concluded that, in our society, there exists a collective faith that schools possess the capacity to improve not only the life chances of an individual child but also to ameliorate most social problems.<sup>223</sup> This collective, societal belief in the power of a good public school is quite remarkable given the data.<sup>224</sup> In fact, the question of education in this country has become more a matter of faith than policy; the data is strategically bolstered or ignored to suit those in power. We live in a country with "some of the highest rates of income and wealth inequality in the industrialized world," but we approve of the status quo because we believe in the power of the schools to equalize those factors at the starting line.<sup>225</sup> Our society is one in which the provision of equal opportunity is regarded widely as a sufficient

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Professor Patrick McGuinn:

In 1985, after [President] Reagan's second election victory, southern governors and other moderates who felt threatened by the liberalism of the national party formed the centrist Democratic Leadership Council (DLC). Offering a vision of limited government, public investment, and fiscal prudence, the DLC leadership—including such rising figures as Arkansas governor Bill Clinton and Tennessee senator Al Gore—sought to refashion the New Deal-era Democratic commitment to redistribution. Focused on finding a new way to balance responsibility and opportunity, the New Democrats found education and welfare reform to be areas of pressing need and political opportunity. They began to call for active federal leadership in education reform and increased spending but also new standards and accountability measures.

McGuinn, *supra* n. 3, at 47.

222. Colin Greer, *The Great School Legend* 3 (Basic Bks. 1972) (emphasis added).

223. *Id.*

224. Peter Schrag, *Final Test: The Battle for Adequacy in America's Schools* 85 (New Press 2003). "No other developed country," said the liberal Education Trust in its subsequent defense of [NCLB], "allows family wealth to be more predictive of educational achievement than America . . . . But these achievement gaps are not inevitable." *Id.*

225. Kahlenberg, *supra* n. 133, at 1.

step toward “freeing individuals from the accidents of birth and wealth.”<sup>226</sup>

Greer captured the fabled nature of education in his work and alerted his readers to the fact that there is a realpolitik dynamic at work as well. When individuals are not in fact freed from the accidents of birth and wealth, and significant achievement gaps persist, blame is placed on the schools and on the individuals who “failed” to improve their life chances through a good education. Politicians are freed from having to create a larger and perhaps politically unpopular role for the federal government, one that actively seeks to support the most disenfranchised members of society through the provision of a strong safety net.

Such a myth, as aptly described by Greer,<sup>227</sup> works to the advantage of politicians who can direct attention away from the federal government and its coffers and instead place the blame squarely on the shoulders of local schools and districts, as well as individuals. This approach has been used by politicians to their benefit in the past. President Ronald Reagan notably used such a strategy to shift the priorities of the Elementary and Secondary Education Act<sup>228</sup> (ESEA) from those of equity and entitlement to those of accountability and standards.<sup>229</sup> President Reagan was able not only to undermine the original intent of ESEA but also to erode the electorate’s support of the welfare state promoted under both President Franklin D. Roosevelt’s New Deal and President Lyndon B. Johnson’s Great Society.<sup>230</sup> Indeed, the 1988 reauthorization of ESEA is regarded as a first step away from its initial equity approach. It did so by requiring districts to assess the effectiveness of programs intended to assist low-income children and by developing frameworks for improving underperforming schools.<sup>231</sup> Of course, these accountability and school reform measures are now ubiquitous in education policy and are featured in Republican and Democratic platforms alike. The primary reason is that such a strategy has become politically expedient.

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226. Morgan, *supra* n. 3, at 10.

227. Greer, *supra* n. 222, at 3.

228. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified at 20 U.S.C. § 6301–6600 (2006)).

229. McGuinn, *supra* n. 3, at 47.

230. *Id.*

231. *Id.*

President William Jefferson “Bill” Clinton also notably used education policy to his political advantage. In fact, a contingent of Democrats, President Clinton among them, was able to use education policy as a vehicle to gain broader support for their candidacies. In the process, they also set aside what had been until then a core policy position in their party. In essence, by repositioning themselves as the party of opportunity rather than entitlement, politicians such as President Clinton and Vice President Al Gore distanced themselves and their party from those welfare and entitlement policies previously discredited by President Reagan. Instead of seeking to shift public sentiment on these issues in the same manner as President Reagan, they allowed the Republican Party to set their agenda.<sup>232</sup>

Historian Patrick McGuinn recounts these events and concludes that education was used by President Clinton and the New Democrats<sup>233</sup> for their political gain.<sup>234</sup> No longer promoting redistribution, these New Democrats sought instead to offer their platform of “limited government, public investment, and fiscal prudence” through the increasingly politically popular vehicle of education.<sup>235</sup>

Focused on finding a new way to balance responsibility and opportunity, the New Democrats found education and welfare reform to be areas of pressing need and political opportunity. They began to call for active federal leadership in education reform and increased spending but also new standards and accountability measures.<sup>236</sup>

The race to the bottom perpetuated by President Obama in his Race to the Top Fund is rooted in this history.<sup>237</sup>

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232. See Aronowitz & Giroux, *supra* n. 220, at 1 (noting that “[a]s has been the case with most public issues in American society, the conservatives have seized the initiative and put liberals and progressives on the defensive.”).

233. President Clinton and other moderates formed the centrist Democratic Leadership Council (DLC). McGuinn, *supra* n. 3, at 47.

234. *Id.* at 4–5.

235. *Id.* at 47. “[E]ducation has held a central position in partisan conflict—both in the electorate and in government—since 1983 because the issue resonated powerfully with key constituent groups in both parties and with the public at large.” *Id.* at 4.

236. *Id.* at 47.

237. See Aronowitz & Giroux, *supra* n. 220, at 1 (arguing that “conservatism has become dominant in the ideological realm”).

Of course, as our elected officials have set the tone, others in the education field have followed their lead. It is now almost impossible to distinguish the Left from the Right in the field of education policy. Andrew Smarick of the American Enterprise Institute<sup>238</sup> recently wrote that “[i]n education policy, yesterday’s right is today’s center. Reforms advocated by conservatives for years are now official priorities for the center and substantial segments of the left.”<sup>239</sup>

President Obama has made several speeches during his time in office that demonstrate the truth of the above statements and analysis. In a speech delivered to the NAACP Centennial Convention, for example, President Obama turned his attention to the topic of education, only to undermine the role of government programs in helping African-American children, who are disproportionately disadvantaged economically and socially.<sup>240</sup>

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238. The American Enterprise Institute is a conservative think tank. See Bob Kemper, *usnews.com*, *A New Leader for a Key Conservative Think Tank*, <http://www.usnews.com/articles/news/national/2009/01/29/a-new-leader-for-a-key-conservative-think-tank.html> (Jan. 29, 2009) (describing American Enterprise Institute as a conservative think tank).

239. Andrew Smarick, *The Enterprise Blog*, *About the Education ‘Moon Shot’*, <http://blog.American.com/?p=3388> (July 24, 2009); see also Greg Toppo, *USA Today*, *Teachers’ Pay Would Be Tied to Test Scores under Obama Plan*, [http://www.usatoday.com/news/education/2009-07-23-racetop\\_N.htm](http://www.usatoday.com/news/education/2009-07-23-racetop_N.htm) (updated July 27, 2009) (writing that “Mike Petrilli of the Fordham Institute, a Washington think tank, says the plan is ‘every dream of every education reformer . . . put into one package. They’ve gone for the whole enchilada.’”). The Fordham Institute is also a conservative think tank.

240. While one in thirteen white children has no health insurance, one in six Latino children, one in five Native American children, one in nine African-American children, and one in nine Asian-Pacific-American children are uninsured. Children’s Defense Fund, *Racial and Ethnic Disparities*, <http://www.childrensdefense.org/helping-americas-children/childrens-health/racial-ethnic-disparities.html> (accessed Sept. 2, 2010). A Latino child is 50% more likely and an African-American child twice as likely to be in “fair” or “poor” health as a white child. *Id.* African-American babies are almost twice as likely to be born underweight and twice as likely to die before their first birthdays as white babies. *Id.* Low socio-economic status correlates generally with poorer health. See World Health Organization, *Social Determinants of Health: The Solid Facts* 7–9 (Richard Wilkinson & Michael G. Marmot eds., WHO 2003). Mental health also correlates to the disadvantages of minorities in that the chronicity of depressive episodes is higher in African-American and Latino people than in white people. Elizabeth Crown, *Observer Online*, *Depression Factors: Poor Health, Poverty, Minority Status*, <http://www.northwestern.edu/observer/issues/2006/02/09/depression.html> (Feb. 9, 2006). Researchers found that the poverty rates of students in minority-dominated schools is 31% higher than the poverty rates of the area served by the school, twice the gap in white-dominated areas. Salvatore Saporito & Deenesh Sohoni, *Mapping Educational Inequality: Concentrations of Poverty among Poor and Minority Students in Public Schools*, 85 *Soc. Forces* 1227, 1235–37 (2007). Minority students are more likely than white students to get lower-quality educations from less-effective teachers. John Charles Boger, *Education’s “Perfect Storm?” Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 *N.C. L. Rev.* 1375,

Instead of discussing the responsibility of the federal government toward the disadvantaged, the President placed the spotlight on individual citizens—their mindsets, attitudes, and lowered expectations.<sup>241</sup> He blamed parents for lack of parental involvement, for not getting their children to bed on time, for not reading to their kids, and for failing to turn off the television.<sup>242</sup>

The speech appeared designed to deflect attention *away* from the federal government and toward other actors: school administrators, school board presidents, local union leaders, business leaders, parents, children, and teachers.<sup>243</sup> Notably, given the speaker's position as president, there was not even a single mention of the federal programs and benefits that might be necessary to help parents perform all the duties President Obama chastised them for failing to accomplish. In fact, President Obama preemptively struck out against such programs by decrying what he described as government “handouts” and “favors.”<sup>244</sup> Ultimately, and in sharp contrast to what has been promoted under the Fund, President Obama depicted the federal government as incapable of

1445–47 (2003).

241. President Obama said,

Government programs alone won't get our children to the Promised Land. We need a new mind set, a new set of attitudes—because one of the most durable and destructive legacies of discrimination is the way we've internalized a sense of limitation; how so many in our community have come to expect so little from the world and from themselves.

Obama, *supra* n. 42.

242. President Obama said that telling children to perform in school without providing support at home will not work. He called for greater involvement by parents in the lives of children—even the children of others—by participating in parent-teacher conferences, assisting with homework assignments, and reading. *Id.* In another speech he said,

But as I've said before, fixing the problem in our schools is not a task for Washington alone. It will take school administrators, board presidents, and local union leaders making collective bargaining a catalyst, and not an impediment, to reform. It will take business leaders asking what they can do to invest in education in their communities. It will take parents asking the right questions at their child's school, and making sure their children are doing their homework at night.

And it will take students . . . showing up for school on time and paying attention in class. Ultimately, their education is up to them. It's up to their parents. It's up to their teachers. It's up to all of us.

Obama, *supra* n. 129.

243. President Obama said, “Yes, government must be a force for opportunity. Yes, government must be a force for equality. But ultimately, if we are to be true to our past, then we also have to seize our own future, each and every day.” Obama, *supra* n. 42.

244. *Id.* President Obama said, “And that's what the NAACP is all about. The NAACP was not founded in search of a handout. The NAACP was not founded in search of favors.” *Id.*

arriving at either effective or innovative solutions to any of the problems faced by struggling schools across this country.<sup>245</sup>

### B. Meritocracy and Other Myths

It is disappointing to see the manner in which President Obama has chosen to trumpet the equal opportunity model as opposed to focusing his energies on providing material conditions and resources to low-income children and their families. In a recent speech to our Nation's schoolchildren, President Obama placed the lion's share of the burden squarely on the little shoulders of his listeners.<sup>246</sup> President Obama acknowledged that many of the children listening to his address are facing challenges such as unemployed parents, few financial resources, unsafe neighborhoods, and a lack of supportive adults in their lives.<sup>247</sup> The President's main solution to these various challenges? Hard work, no excuses, and a positive attitude.<sup>248</sup> President Obama stated in his address that he and First Lady Michelle Obama had overcome various challenges through hard work, and pointed to examples set by three young people who had also overcome great odds to achieve educational success.<sup>249</sup> One did not speak English when she first started school, and had parents who had not gone to college, but she nevertheless earned a scholarship to Brown

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245. See Obama, *supra* n. 129 (explaining that "the most effective and innovative approaches will be developed outside of Washington in communities across this country.").

246. President Obama said,

Now I've given a lot of speeches about education. And I've talked a lot about responsibility. I've talked about your teachers' responsibility for inspiring you, and pushing you to learn. I've talked about your parents' responsibility for making sure you stay on track, and get your homework done, and don't spend every waking hour in front of the TV or with that Xbox. I've talked a lot about your government's responsibility for setting high standards, supporting teachers and principals, and turning around schools that aren't working where students aren't getting the opportunities they deserve. But at the end of the day, we can have the most dedicated teachers, the most supportive parents, and the best schools in the world—and none of it will matter unless all of you fulfill your responsibilities. Unless you show up to those schools; pay attention to those teachers; listen to your parents, grandparents and other adults; and put in the hard work it takes to succeed.

Barack Obama, Speech, *Prepared Remarks of President Barack Obama: Back to School Event* (Arlington, Va., Sept. 8, 2009) (available at <http://www.whitehouse.gov/mediaresources/preparedschoolremarks/>).

247. *Id.*

248. *Id.*

249. *Id.*

University and is now in the process of earning a graduate degree. Another student overcame brain cancer and its affect on his memory and, by putting “hundreds of extra hours” into his schoolwork, he is headed to college this year. The third example was set by a young person who grew up in foster homes in very tough neighborhoods, gave back to her community by starting a program to help keep kids away from gangs, and is expected to graduate from high school with honors this academic year. The President’s bottom line? If they can do it, so can every child.<sup>250</sup>

The truth is that without additional help from the government, only a trickle of students will ascend to the levels of academic and professional success cited by President Obama in his speech. President Obama’s claim that *all* of the children listening to his address can “do the same” despite the challenges they face rings hollow. The paradigm of equal opportunity, advanced in the President’s address, ultimately shifts attention away from the federal government and encourages individual students to “internalize their own responsibility for success or failure.”<sup>251</sup> Sadly, this discourse is focused most intensely on children from lower socioeconomic backgrounds and students living in the inner city.<sup>252</sup> Under the equal opportunity paradigm put forth by the Fund, the buck stops with the individual rather than the federal government.<sup>253</sup> The myth encourages individuals to believe that the success or failure they experience in life is primarily, if not solely, attributable to their own “merit and motivation.”<sup>254</sup>

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250. *Id.*

251. Aronowitz & Giroux, *supra* n. 220, at 165.

252. Secretary Duncan said,

I went to a high school on an Indian reservation in Montana where 80[%] of the adults are unemployed. They could name just one student from their school who had completed college in the past six years. I talked to the ninth-graders and they begged to be challenged. They think everyone’s given up on them. No one expects them to succeed. *Yet, despite bleak conditions, they still believe in the redeeming power of education.*

Duncan, *supra* n. 93 (emphasis added).

253. Of course, “the buck stops here” is associated with President Harry S. Truman. “In his farewell address to the American people given in January 1953, President Truman referred to this concept very specifically in asserting that, “The President—whoever he is—has to decide. He can’t pass the buck to anybody. No one else can do the deciding for him. That’s his job.” Harry S. Truman Library & Museum, *Truman: The Buck Stops Here*, <http://www.trumanlibrary.org/buckstop.htm> (accessed Sept. 2, 2010).

254. Morgan, *supra* n. 3, at 7.

In so doing, a “cruel hoax” is perpetrated on children living in poverty.<sup>255</sup> First, they have not been provided with equality in terms of material conditions and other resources scientifically demonstrated to enable children to grow into successful middle-class adults.<sup>256</sup> Second, they are blamed for failing to take advantage of the vehicle for opportunity that ostensibly has been provided: the schools. This framework has the additional “benefit” of helping to free the victors from any responsibility they might feel to aid those unable to secure the same spoils.<sup>257</sup> It also stems the tide of criticism and anger that may otherwise be placed at the doorstep of the government.

Little children, of course, are not the only ones to be blamed for their failure. Using the same approach to shame schools into better performance, President Obama and Secretary Duncan have chosen to trumpet the successes of the few model schools that have achieved impressive results despite purportedly facing the same challenges as persistently lowest-achieving schools. The claim put forth in this context is that “we know what works,” and what we need is for schools to “do the right thing” and implement “what works.”<sup>258</sup> This claim is also at odds with reality. Nevertheless, President Obama and Secretary Duncan have adopted this rhetoric wholesale in their description of the Fund’s strategies for turning around struggling schools: “[W]hy I’m optimistic, is we have in every rural community that’s poor, in any inner-city urban community, while we have these, quote/unquote, ‘dropout factories,’ we also have schools where 95[%] of students are

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255. *Id.* at 14.

256. Tough, *supra* n. 176.

257. Edward Morgan notes,

This tendency [to rigidify class differences] is brilliantly portrayed in [Michael] Young’s vision of the perfected meritocracy: as society perfects the mechanisms of equal opportunity, it achieves a “golden age of equality,” in which “all the advantages for the deserving” becomes the guiding norm. Such a society remains hierarchical, and the hierarchy becomes more rigid. Those in the upper classes know that they “deserve” their social standing; they know they are “better.” Those in the lower classes are resigned to their inferior position. They know they deserve their low standing because they know they have had a fair chance, a true test of their abilities.

Morgan, *supra* n. 3, at 8 (referring to British politician and sociologist Michael Young, who coined the term “meritocracy” in a satirical essay).

258. Sen. Subcomm. Lab., Health & Human Servs., Educ. & Related Agencies, *supra* n. 11 at 26, 35.

graduating. And 90[%] of those that graduate are going on to college.”<sup>259</sup>

Secretary Duncan has also discussed his version of the touted “what works” formula, claiming to know of “proven strategies” to turn around struggling schools. Similar claims have been articulated by others as well. One of the more prominent groups on the right to make such claims is the Heritage Foundation, which published a widely disseminated report entitled “No Excuses” that celebrated twenty-one “high-performing, high-poverty” schools.<sup>260</sup> On the Left, the liberal Education Trust has provided similar stories of success.<sup>261</sup> The intent is to demonstrate that irrespective of “the kids, their families, and their communities,” ultimately it is “school policy and practice” that will “determine school outcomes.”<sup>262</sup>

### C. Dispelling the Myths

The data provides the necessary context in which to consider these few successes, as well as the truth behind the education miracles claimed by the Heritage Foundation, the Education Trust, Secretary Duncan, and President Obama. For example, at the same time the Heritage Foundation released the “No Excuses” report, the Department of Education was disseminating a similar document highlighting opposite findings.<sup>263</sup> The government’s report documented the fact that there were “7,000 underperforming high[-]poverty schools.”<sup>264</sup> In other words, the few shining

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259. *Id.* at 26. According to the Education Trust, a nonprofit organization dedicated to closing opportunity gaps separating low-income and minority students from others, the wide differences in [National Assessment of Educational Progress] scores—from district to district and state to state—indicate clearly that what schools and school systems do, matters. The excuses about the effects of racism and poverty simply [do not] hold up against data like this. In the face of this data, we must look inside the schools and school systems—at instructional policy and practice—not outside of them, in order to explain the achievement gap.

The Education Trust, *Yes We Can: Telling Truths and Dispelling Myths about Race and Education in America* 5, <http://www.edtrust.org/sites/edtrust.org/files/publications/files/YesWeCan.pdf> (Sept. 2006) [hereinafter *Yes We Can*].

260. Samuel Casey Carter, *No Excuses: Lessons from 21 High-Performing, High-Poverty Schools* (Heritage Found. 2000).

261. Rothstein, *supra* n. 161, at 5.

262. *Yes We Can*, *supra* n. 259, at 4.

263. Ryan, *supra* n. 155, at 312.

264. *Id.*

examples highlighted by the Heritage Foundation were wholly unrepresentative of the challenges faced, *and largely lost*, by most high-poverty schools.

Some argue that the practices in effect at these highly successful schools simply need to be brought to scale. And, in essence, that is precisely the approach the Administration is taking in its promotion of the Fund. Richard Kahlenberg, Senior Fellow at The Century Foundation, discusses these examples of success and demonstrates why they have either been debunked or would be very difficult to replicate or bring to scale in the manner President Obama intends under the Fund.<sup>265</sup> Richard Rothstein has also shown that past claims of success by groups such as the Heritage Foundation have proven to be unfounded.<sup>266</sup> He explains that the model teachers and schools spotlighted as “solutions” are in fact unrepresentative of the majority of schools and teachers targeted by reform efforts. “[They are] actually engaged in something like affirmative action. They select from the top of the ability distribution those lower-class children with innate intelligence, well-motivated parents, or their own personal drives, and give these children educations they can use to succeed in life.”<sup>267</sup>

#### D. Blaming Schools and Other Distractions

Ultimately, the false claim that “we know what works” largely operates as a distraction from the more challenging work that needs to be accomplished by the federal government in providing adequate resources to support the work of public schools and a targeted safety net for low-income children and families. Claiming that “we know what works” also shifts responsibility to the schools, and away from the government, to implement what works. What is most disturbing is that Secretary Duncan pretends or perhaps even *believes* there is a simple and inexpensive solution—a formula perhaps—that can be applied to failing schools.<sup>268</sup> Given a little more time, a few more studies, we will figure it out.<sup>269</sup> But preparing our young people for participation

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265. Kahlenberg, *supra* n. 133, 86–87.

266. Rothstein, *supra* n. 161, at 5.

267. *Id.* at 82.

268. Duncan, *supra* n. 93.

269. Sen. Subcomm. Lab., Health & Human Svcs., Educ. & Related Agencies, *supra*

in a democracy is not simple. It is a process, a constant struggle faced every day by individual teachers, students, and parents. It should also be a daily task for our government.

Unfortunately, the Democratic Party and left-leaning think tanks and policy makers have lost their way on education. Instead of fighting for increased resources for poor children both in and out of schools, they have taken to blaming the victims: the under-resourced and overworked schools, the teachers, the parents, and even the children. They are blaming schools facing very difficult challenges for failing to provide children with the “golden ticket” out of poverty.

The following quotes from publications of the Education Trust, a liberal non-profit organization devoted to closing the achievement gaps that separate low-income students and students of color from other youth,<sup>270</sup> illustrate the Left’s rhetoric on this issue:

The most pressing question for those of us concerned with the academic achievement of students of color is: How should *schools* respond to racism and poverty?<sup>271</sup>

The real *culprit* here is an educational system that does not prepare children of color for all the tests real life will throw at them—whether [it is] getting into college or getting in the door for a job interview, passing the bar exam[,] or earning a promotion.<sup>272</sup>

And [it is] time that we demand radical change of the school systems that *hurt* our kids.<sup>273</sup>

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n. 11, at 32. Assistant Secretary for Elementary and Secondary Education Thelma Melendez has also used this rhetoric:

We need the innovation and the system design and data systems and the kind of visibility and use of data, and particularly in a research and development way, so that we can figure out who is beating the odds . . . [a]nd then build those into our systems of reform.

Thelma Melendez, Panel Remarks, *Education Stakeholders Forum: College- and Career-Ready Graduates* (D.C., Dec. 8, 2009) (available at <http://www2.ed.gov/news/events/1208transcript.doc>).

270. The Education Trust, *About the Education Trust*, <http://www.edtrust.org/dc/about> (accessed Sept. 2, 2010).

271. *Yes We Can*, *supra* n. 259, at 3 (emphasis added).

272. *Id.* (emphasis added).

273. *Id.* (emphasis added).

The message is clear: the schools are the culprit and they are hurting low-income children. Progressive critics of this approach point to the fact that schools are now even being blamed for our economic crisis.<sup>274</sup> Never mind that many children attending persistently lowest-achieving schools may lack adequate healthcare, stable housing, electricity or heat at various points throughout the year, or a safe and quiet place to do their homework. Forget the fact that many of their parents cannot find decent-paying jobs and their communities and home lives are often devoid of resources, safety, and stability. The problem, according to the Education Trust and many like-minded liberals, is that the schools have not done their job. Again, the solution lies in motivating them to “do the right thing.”

Just what is the job of the public school? However defined, this job has steadily expanded over the years and far too little thought and planning have gone into providing adequate resources at the state and federal levels to adequately support this work.<sup>275</sup> A comprehensive and effective approach to turning around persistently lowest-achieving schools requires the federal government to shift from a narrow focus on holding schools accountable to a broader focus on providing high-poverty schools, as well as the low-income children and families they serve, with the resources they need to succeed. A federal acknowledgment of the challenges faced by high-poverty schools is a necessary first step.

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274. See Aronowitz & Giroux, *supra* n. 220, at 199 (quoting the National Commission on Excellence in Education, which said that “we are a ‘nation at risk’ because of the poor quality of our education system.”). There are two primary viewpoints in the debate correlating the United States economy with school performance: “In some cases it is argued that schools are in fact responsible for this crisis; in other instances more restrained voices have claimed that although schools may not have caused the economic crisis, they can ameliorate it by promoting excellence and educational leadership.” *Id.* at 200. “[T]he new public philosophy . . . misrepresents the problems . . . [and] advocates the wrong solutions. The current economic crisis this country faces has not been caused by public education, though the economic crisis has had a significant effect on the problems schools are experiencing.” *Id.* at 201.

275. Supreme Court Justice Stephen Breyer has discussed the expansion of the public school’s responsibilities in the context of the Court’s decisions on issues of students’ constitutional rights in the school setting. “Today’s public expects its schools not simply to teach the fundamentals, but ‘to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,’ all in a school environment that is safe and encourages learning.” *Safford Unified Sch. Dist. v. Redding*, 536 U.S. 822, 840 (2009) (Breyer, J., concurring).

#### IV. SOLUTION: "NEVER WASTE A GOOD CRISIS"

At such times as the present, when there is an actual or perceived crisis in education,<sup>276</sup> there exists an opportunity to persuade the public that a different approach must be taken to resolve the crisis at our doorstep.<sup>277</sup> Historians have demonstrated that widespread reform can be successfully implemented at such moments in history.<sup>278</sup> The solution, then, to the Fund's race to the bottom is for liberals and progressives to seize the opportunity afforded by the economic crisis that prompted increased spending for education as well as the "general crisis of confidence" in public schools, especially those serving low-income children. Now is the time to push forward a set of policies that broaden the focus beyond school accountability toward greater federal recognition of the significant challenges faced by high-poverty schools as well as the need for a direct investment in a targeted social safety net for low-income children and their families.

As a modest first step, President Obama's rhetoric on the link between poverty and education must be revised. This is important because a popular president has the power to shape a large segment of the public's opinion on policy issues.<sup>279</sup> Although President Obama's popularity has slipped since the initial days of his presidency,<sup>280</sup> he nevertheless remains popular with many

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276. Only 22% of those surveyed in 2007 and 18% of those surveyed in 2009 gave the Nation's schools an "A" or "B." William G. Howell, Paul E. Peterson & Martin R. West, *The Persuadable Public: The 2009 Education Next-PEPD Survey Asks If Information Changes Minds about School Reform*, 9 *Educ. Next* 20, 23 (Fall 2009) (available at <http://educationnext.org/files/fall09-persuadable-public.pdf>). Milton Friedman wrote that "only a crisis—actual or perceived—produces real change." Klein, *supra* n. 27, at 7.

277. McGuinn, *supra* n. 3, at 31.

278. *Id.* at 21. Brown University Professor Carl Kaestle has spent thirty years as a historian of United States education. Kaestle "remarked in his analysis of 'the public schools and the public mood' that 'the schools always have had plenty of critics, but widespread reform has succeeded only when there has been a general crisis of confidence in the schools and reformers have solidified public consensus about what changes are needed.'" *Id.*

279. Harvard U. John F. Kennedy Sch. Gov., "Obama Effect" Strongly Influences Public Attitudes on Controversial Education Topics, According to Education Next—PEPG 2009 National Survey, <http://www.hks.harvard.edu/news-events/news/press-releases/pepg-study-persuadable-public> (Aug. 31, 2009).

280. Pew Research Ctr. for the People & the Press, *Obama's Approval Ratings Slide: By the Numbers*, <http://pewresearch.org/pubs/1333/obama-approval-falls-across-most-major-demographics> (Sept. 4, 2009).

segments of the population, most notably Democrats.<sup>281</sup> And because the Democratic Party has lost its way on issues of education and poverty, it is incumbent upon the leaders of the party to chart a new course. Therefore, President Obama should make three points very clear to the American electorate: (1) there is a connection between struggling schools and poverty, (2) significant social and economic problems impact the academic achievement of low-income children attending persistently lowest-achieving schools that cannot be addressed by schools alone, and (3) the federal government must play a broader and more active role in remedying these problems both by implementing targeted social safety-net programs that have been proven to mitigate the impact of poverty on the educational achievement of low-income children. This section will begin with a look at how the President can begin to shift public opinion on these important issues and will end with a brief discussion of a few of the concrete steps that must be taken by the federal government.

#### A. Stating the Connection between Struggling Schools and Poverty: Why the President's Words Matter

Some have argued that one of the main problems with our education system is that it has become a victim of its own touted potential. The rhetoric that prevails today among policy makers advertises the power of education to perform miracles, making up for all the disadvantages children bring with them to school.<sup>282</sup> And when the schools fail to perform miracles, they are viewed as the cause of a child's poor academic performance.<sup>283</sup> As a result,

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281. *Id.* at <http://pewresearch.org/assets/pdf/1333.pdf>.

282. See Nancy Fredman Krent, Panel Remarks, *Separate But Unequal: The Status of America's Public Schools* (U. Mich. L. Sch., Feb. 9, 2002), in 8 Mich. J. Race & L. 249, 319–320 (2002) (stating that “public schools have become the social service agency of last resort for children in this country.”).

283. Despite this perception, data support the opposite view:

Although conventional opinion is that “failing” schools contribute mightily to the achievement gap, evidence indicates that schools already do a great deal to combat it. Most of the social class difference in average academic potential exists by the time children are three years old. This difference is exacerbated during the years that children spend in school, but during these years the growth in the gap occurs mostly in the after-school hours and during the summertime, when children are not actually in classrooms.

Rothstein, *supra* n. 161, at 10.

the frustration many in our society feel about the plight of low-income children is directed at the schools and not, for instance, at the federal government's failure to provide low-income families and children with necessary supports.

President Obama has acknowledged in his speeches that many of the struggling schools he hopes to turn around are combating deep-rooted challenges exacerbated by poverty.<sup>284</sup> Such an important statement should not be made in passing but rather should be turned into a teachable moment for the voting public. President Obama must establish more clearly the link between poverty and decreased educational attainment. After all, President Obama has stated that nothing is more important to the quality of our future as a Nation than the education we provide to our children.<sup>285</sup> But if President Obama is sincere in this belief, he must say and do much more to bolster the federal government's role in creating the conditions necessary to enable children to benefit from the education provided to them.

A glimpse of what needs to be done was provided last year when President Obama acknowledged in an address to schoolchildren that the challenges many face outside of school often impede their ability to focus on their studies.<sup>286</sup> But more often than not, the President's Administration has avoided linking these out-of-school factors with issues of educational attainment. When asked in the course of a Senate committee hearing to explain what he meant by "bottom schools," Secretary Duncan drew no link whatsoever between bottom schools and issues of poverty. Instead, he provided a very vague description of struggling schools that placed the focus solely on what the schools were doing, *and not doing*, to remedy the situation:

**[Secretary] Duncan:** And then finally, I keep coming back to this idea of struggling schools, and let me just take one second on this. We have about 95,000 schools in our country. Let's call it 100,000. What if we took the bottom 1[%] of the bottom 1[%] of schools each year."

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284. Obama, *supra* n. 129.

285. Obama, *supra* n. 5.

286. See Obama, *supra* n. 246 (acknowledging that "it's not always easy to do well in school. I know a lot of you have challenges in your lives right now that can make it hard to focus on your schoolwork. I get it. I know what that's like.").

**[Senator] Harkin:** Bottom in what way?

**[Secretary] Duncan:** A thousand schools. Dropout factories.

**[Senator] Harkin:** Ok.

**[Secretary] Duncan:** Low gains, students not learning. Basically where it's just simply not working. And we could figure it out, you know, state by state, you know, what that looked like.<sup>287</sup>

The follow-up questions Senator Harkin might have asked include: Why isn't it working in those schools? Why are they dropout factories? Which students are dropping out? In which communities are these bottom schools located? Better yet, Secretary Duncan should have been prepared to provide the answers to those questions without being prompted.

In order to shift public discourse about the relationship between persistently lowest-achieving schools, poverty, and the federal government's role in addressing poverty, it must be made quite clear to the American people that the task of educating children is made more difficult not only by the very high rates of childhood poverty in this country but also by the concentration of poverty in certain communities, neighborhoods, and schools.<sup>288</sup> The reality that the level of poverty at a school can be correlated with students' level of achievement, test scores, and graduation rates must be emphasized; attempting to fix schools in isolation

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287. Sen. Subcomm. Lab., Health & Human Svcs., Educ. & Related Agencies, *supra* n. 11, at 32.

288. David C. Berliner & Bruce J. Biddle, *The Manufactured Crisis: Myths, Fraud, and the Attack on America's Public Schools* 220 (Addison-Wesley 1995). "[T]he larger the proportion of citizens who live in poverty, the greater the challenge for public schools. And . . . when the poor are more numerous, the aggregate performance of public schools will suffer." *Id.* (emphasis removed). There is also a correlation between socioeconomic segregation and segregation by race and ethnicity:

[I]n 2006-07 the average white student attended a school in which about 30% of the students were low-income. But the average black or Hispanic student was in a school where nearly 60% of the students were classified as low-income; similarly, the average American Indian was in a school where more than half the students were poor.

David C. Berliner, *Poverty and Potential: Out-of-School Factors and School Success* 7-8 (EPIC/EPRU Mar. 2009) (available at <http://epicpolicy.org/publication/poverty-and-potential>).

without addressing the host of poverty-related in-school and out-of-school factors that impact educational achievement is not only inefficient but most likely futile as well.

Failing to make the connection between concentrated poverty and decreased educational attainment also weakens the public's resolve to fund public education. The primary reason for this is that public support for taxpayer-funded education is correlated to perceptions of fairness and efficiency in the distribution of funds.<sup>289</sup> Frustration runs high among both taxpayers and voters when high-poverty school districts appear to be in constant need of additional resources. Statewide school funding formulas become sources of great political tension when certain cities and towns receive disproportionately large shares of state revenue.<sup>290</sup> It is overly simplistic, but nonetheless politically appealing, to equate fairness with the equalization of per-pupil expenditures. The reality is that it is more expensive to educate students who have special education needs, who are English language learners, and who face acute challenges both inside and outside the school environment; the education literature refers to this dynamic as vertical equity.<sup>291</sup> High-poverty schools have greater percentages of these high-need students.<sup>292</sup> Therefore, support for increased funding for education at the local, state, and federal level is threatened when our elected officials, most notably the president,

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289. See Ben Levin, *Organisation for Economic Co-operation & Development, Approaches to Equity in Policy for Lifelong Learning* 9, <http://www.oecd.org/dataoecd/50/16/38692676.pdf> (Aug. 2003) (discussing the complex issues that create barriers to equity in education). Even when equity has not increased, public support for increased funding for education exists when public perception of equity and success in education is present. *Id.*

290. New York provides an example of a statewide school funding formula, which is an effort by a state-appointed committee "[t]o improve the method of funding public schools." Trumansburg Central School District, *About the Statewide School Finance Consortium* 1, [http://www.tburg.k12.ny.us/citizens\\_advisory/SSFCPolicyIntroduction.pdf](http://www.tburg.k12.ny.us/citizens_advisory/SSFCPolicyIntroduction.pdf) (accessed Sept. 2, 2010). New York's Statewide School Finance Consortium is charged with providing "a more equitable school aid formula that addresses the disparities between wealthy and poor school districts" that utilizes "a new method for funding education that relies less on the property tax," makes "school funding more predictable," and makes "the new method easy to understand and manage." *Id.*

291. See e.g. Bruce D. Baker & Reva Friedman-Nimz, *State Policies and Equal Opportunity: The Example of Gifted Education*, 26 *Educ. Evaluation & Policy Analysis* 39, 39 (2004) (describing vertical equity as "the unequal treatment of unequals. For example, insuring that students with different needs, and different costs associated with those needs, are able to access adequately differentiated opportunities.").

292. Valerie E. Lee & David T. Burkam, *Dropping out of High School: The Role of School Organization and Structure*, 40 *Am. Ed. Research J.* 353 (2003).

fail to acknowledge that there are higher costs associated with educating students in high-poverty schools.

If President Obama decides to begin establishing the link between poverty, socioeconomics, and education, he stands a good chance of persuading the body politic that increased federal funding for both education and out-of-school safety-net programs are warranted. It is clear that there is ample information the President can use to establish his case. Furthermore, a recent survey conducted by Education Next and Harvard University's Program on Education Policy and Governance revealed that many Americans are inclined to change their views on education policy if a popular political leader asks them to do so.<sup>293</sup>

Taking the issue of merit-based pay for teachers, for example, those informed that President Obama supports it increased their own support for the policy by 13% over those not so informed.<sup>294</sup> Support among African-Americans increased by 23% and, surprisingly, support among teachers even increased when they were told of the President's position on the matter.<sup>295</sup> President Obama's support for merit pay caused support for the policy among Democrats to increase from 41% to 56%.<sup>296</sup> Similar findings were made with respect to public opinion on school vouchers and charter schools, with support for those policies shifting based upon awareness of the President's views on the subject.<sup>297</sup> Because of this, what the President says is almost as important as what he does. And there is plenty for President Obama to say about this issue to the American people.

#### B. What the Research Shows about the Needs of High-Poverty Schools

The extent of the cause-and-effect relationship between poverty and reduced educational attainment remains a topic of great debate and controversy. In addition, disagreement persists about precisely which inputs are needed to address the challenges

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293. Howell et al., *supra* n. 276, at 29.

294. *Id.* at 24.

295. *Id.*

296. *Id.*

297. *Id.* at 25.

faced by high-poverty schools.<sup>298</sup> That schools with a high concentration of poverty face increased challenges such as “a host of poverty-induced physical, sociological, and psychological problems that children often bring to school” is beyond dispute, however.<sup>299</sup>

High-poverty schools, on average, will fare worse in the areas of student achievement, test scores, and graduation rates. Research demonstrates that students’ achievement levels show sharp declines when school poverty concentration exceeds 40%.<sup>300</sup> Test scores reveal that, on average, children in high-poverty schools fare worse on standardized assessments than their counterparts in low-poverty schools.<sup>301</sup> Although many school reformers argue that these test scores simply reflect the effectiveness of the instruction that is taking place in high-poverty schools, there is ample research indicating that family background and prior educational experiences out of school have a greater impact on student outcomes than the school the student currently attends.<sup>302</sup> These findings have held true over time.

As such, it is not at all surprising that 1996 National Assessment of Educational Progress (NAEP) test scores showed that the average math achievement for nine-year-olds in schools where more than 75% of students received free and reduced-price lunches fell more than two grade levels behind performance in schools where 25% or fewer students received free and reduced-price lunches.<sup>303</sup> An even higher disparity exists with respect to students’ performance on the reading portion of the assessment.<sup>304</sup> Results from an international math and science assessment conducted in 2007 also reveal that school scores are very closely linked to the school’s enrollment of low-income students. The

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298. Berliner, *supra* n. 288, at 5–6.

299. *Id.* at 1.

300. Wake Co. Pub. Sch. Sys., *The Impact of Poverty upon Schools* 1, [http://www.wcpss.net/evaluation-research/reports/1999/9920\\_poverty.pdf](http://www.wcpss.net/evaluation-research/reports/1999/9920_poverty.pdf) (Mar. 2009).

301. *Id.*

302. Henry M. Levin, *Economics of School Reform for At-Risk Students in Improving America’s Schools: The Role of Incentives* 225, 225 (Eric Alan Hanushek & Dale Weldeau Jorgenson eds., Natl. Acads. Press 1996); Stephen W. Raudenbush, *Schooling, Statistics, and Poverty: Can We Measure School Improvement?* 6 (Educ. Testing Serv. 2004).

303. U.S. Dept. Educ., *School Poverty and Academic Performance: NAEP Achievement in High-Poverty Schools—A Special Evaluation Report for the National Assessment of Title I*, <http://www.ed.gov/pubs/schoolpoverty/index.html> (updated Mar. 10, 1999) [hereinafter *NAEP Achievement*].

304. *Id.* “The achievement gap in reading between [nine]-year-old students in high and low-poverty schools is substantially larger than the gap in math . . . .” *Id.*

higher the percentage of students eligible for free or reduced-price lunch, the lower the school's average math score on this assessment.<sup>305</sup> Similarly, school districts with high rates of poverty are more likely to have low graduation rates.<sup>306</sup>

Children of color, who are disproportionately poor,<sup>307</sup> also face a greater likelihood that their pursuit of an education will be stymied by concentrated poverty.<sup>308</sup> Children of color are more likely to attend both high-poverty schools and highly segregated schools.<sup>309</sup> Generally, about two-thirds of Hispanic and African-American students attend majority-minority schools.<sup>310</sup> In schools where 90% or more of the student population is comprised of students of color, only 42% of freshmen advance to grade twelve.<sup>311</sup>

The data reveals that, in high-poverty schools, the concentration of poverty impacts the academic achievement of all children, even those from more-advantaged families, as measured by test scores. Low-income students in high-poverty schools are therefore doubly disadvantaged because resources and funding are scarce, reducing the ability to provide better programs to support their higher levels of need. Furthermore, the opportunity to raise a school's academic achievement through either increased funding or peer influences is also weakened as higher income and comparatively advantaged families remove students to better-perceived schools, such as charter schools.<sup>312</sup>

Furthermore, numerous studies demonstrate that the bulk of the disparities in cognitive skills between low-income and middle-class children stems not from the job the children's schools are

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305. The average math scores of American fourth graders on the Trends in International Mathematics and Science Study (TIMSS) in 2007 demonstrate the manner in which concentrated poverty correlates with lower academic outcomes at the individual school level. Berliner, *supra* n. 288, at 4–5.

306. Orfield et al., *supra* n. 14, at 5.

307. Daniel T. Lichter, *Poverty and Inequality among Children*, 23 Annual Rev. of Sociology, 121, 131 (1997).

308. *Id.* at 122.

309. Charles Hamilton Houston Inst. for Race & Justice, *The Childhood Opportunity Gap*, [http://www.charleshamiltonhouston.org/assets/documents/publications/CHHIRJ\\_Opportunity%20Gap.pdf](http://www.charleshamiltonhouston.org/assets/documents/publications/CHHIRJ_Opportunity%20Gap.pdf) (Jan. 2010).

310. See *id.* (noting statistics for 2007); Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards 4* (Civ. Rights Project 2010) (available at <http://eric.ed.gov/PDFS/ED509773.pdf>) (providing similar statistics for charter schools).

311. Orfield et al., *supra* n. 14, at 8.

312. Wake Co. Pub. Sch. Sys., *supra* n. 300, at 1.

doing or not doing but from family and neighborhood sources.<sup>313</sup> Professor David C. Berliner conducts research in the field of education and concludes that several common out-of-school factors significantly depress measures of academic achievement. These include: “(1) low birth-weight and non-genetic prenatal influences on children; (2) inadequate medical, dental, and vision care, often a result of inadequate or no medical insurance; (3) food insecurity; (4) environmental pollutants; (5) family relations and family stress; and (6) neighborhood characteristics.”<sup>314</sup> Neighborhood violence also plays a role.<sup>315</sup> It is important for the public to understand that many of these factors often occur simultaneously and build upon one another in a destructive manner. For instance, a lack of medical insurance can result in inadequate medical care.<sup>316</sup> In turn, higher rates of poverty are linked to untreated medical problems.<sup>317</sup> Therefore, poor children are more likely to be sick, less likely to have medical insurance and to receive adequate medical care, and more likely to have their medical problems go untreated than their wealthier counterparts.

High-poverty schools are more likely to have a larger population of students who suffer from learning disabilities and who require individualized educational services; furthermore, the parents of these children are less likely to aggressively request the services that their children need.<sup>318</sup> In addition, there is a much greater likelihood that a poor child will suffer from a psychiatric disorder.<sup>319</sup> Indeed, a poor child’s odds of having “attention deficit hyperactivity disorder, a conduct disorder, or an emotional dis-

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313. Berliner, *supra* n. 288, at 4. The problems facing low-income students have numerous sources:

[I]t is very difficult to provide good schooling for impoverished students who may come to school hungry or in cast-off and torn clothing, who suffer from untreated medical problems, who live in neighborhoods that are rife with crime and violence, or who come from homes that lack even basic amenities—let alone books and other supports for education.

Berliner & Biddle, *supra* n. 288, at 219; *see* Raudenbush, *supra* n. 302, at 6 (indicating that family background and prior schools have a greater effect on students than their current school).

314. Berliner, *supra* n. 288, at 1.

315. Berliner & Biddle, *supra* n. 288, at 220.

316. Berliner, *supra* n. 288, at 12.

317. Berliner & Biddle, *supra* n. 288, at 220.

318. Kahlenberg, *supra* n. 133, at 59.

319. *Id.*

order” between the ages of four and eleven is “more than three times that of a non[-]poor child.”<sup>320</sup>

Another significant challenge faced by schools and students in high-poverty areas is the presence of home environments that are not always supportive of learning.<sup>321</sup> Richard Rothstein, research associate of the Economic Policy Institute, compiled voluminous research on the impact of socioeconomic class on a child’s educational achievement. In particular, Rothstein examined the educational impact of a child’s home environment and compiled a long list of factors that result in either cognitive gains or deficits. Verbal and reasoning skills are affected by whether and how a child’s parents read to him or her and how they talk to him or her, including whether they draw her into adult conversations in which he or she may express his or her own opinions and the number of words spoken to him or her.<sup>322</sup> Other factors affecting cognitive skills include the number of books in the home,<sup>323</sup> beliefs about what children should know before entering kindergarten (how to count, know the alphabet, et cetera),<sup>324</sup> the parent’s ability to supervise and guide homework completion, and the grandparents’ social class backgrounds.<sup>325</sup>

Rothstein’s findings are confirmed by Richard Kahlenberg, whose work also highlights the link between the lower levels of achievement among disadvantaged students and the obstacles they face—including the fact “that poor children are exposed to about one-third as much language as children of professionals.”<sup>326</sup> Kahlenberg also documents the fact that poor children “receive about one-fiftieth the amount of one-on-one reading as middle-class children, and are half as likely to be taken to museums, and one-third as likely to visit the library.”<sup>327</sup> While middle-class children continue to make educational gains during their summer vacations, the opposite holds true for many lower-income children.<sup>328</sup> Indeed, Kahlenberg’s portrait reveals the sad fact that

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320. *Id.*

321. Levin, *supra* n. 302, at 225; Raudenbush, *supra* n. 302, at 6–7.

322. Rothstein, *supra* n. 161, at 21–22.

323. *Id.* at 19.

324. *Id.* at 22.

325. *Id.* at 27–28.

326. Kahlenberg, *supra* n. 133, at 49.

327. *Id.*

328. *Id.*

many children from poor homes are so educationally deprived “that watching television—which depresses achievement of middle-class children—has been found to sometimes raise achievement for some poor children because even the worst TV is more enriching than their home environments.”<sup>329</sup>

### C. How the President Can Support the Work of Public Schools

A comprehensive approach to lightening the load borne by persistently struggling schools is imperative. One of the critiques of United States schools is that they try to do too much, shouldering the burden not only of intellectual tasks but of political, economic, and social tasks.<sup>330</sup> It is not clear why our schools *alone* should bear the responsibility of turning around the lives of our most disadvantaged children. And it is clear that if forced to bear the burden *alone*, they will fail in doing so. Richard Rothstein points out that the myriad challenges faced by disadvantaged children “cannot be made up by schools alone, no matter how high the teachers’ expectations.”<sup>331</sup> Such a narrow strategy will not succeed in eliminating inequities at the starting line, and will likely result in the weakening of the public schools themselves.<sup>332</sup>

If the rate at which childhood poverty has increased in the last few decades serves as an indication of what is to come, there will be increasingly more poor children to educate in our public schools.<sup>333</sup> Already, at-risk students make up more than one-third of all elementary and secondary school enrollments.<sup>334</sup> And if the general consensus is that public schools are not up to the task at

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329. *Id.*

330. Evensen et al., *supra* n. 220, at 37. “United States schools, unlike schools in other Western countries, simply try to do too much. Berliner and Biddle refer to this as the myth of ‘unbounded responsibility,’ wherein ‘Americans believe that schools can and should assist students in intellectual tasks AND political tasks AND economic tasks AND social tasks.’” *Id.*

331. Rothstein, *supra* n. 161, at 28.

332. Evensen et al. argue that this may be a primary reason why schools as institutions have become so vulnerable to what they call “the equivalent of corporate takeovers.” Evensen et al., *supra* n. 220, at 37.

333. Levin, *supra* n. 302, at 225; see Children’s Defense Fund, *The State of America’s Children 2008* 5, <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-children-2008-report.pdf> (2008) [hereinafter *State of America’s Children*] (finding that “[m]ore than [one] in [six]—13.3 million—children in the United States are poor. . . . The federal poverty line for a family of four in 2008 [was] \$21,200.”).

334. Levin, *supra* n. 302, at 225.

present, it seems unlikely that they will be in the future if they must educate an even greater number of impoverished children.<sup>335</sup>

There are proven ways to mitigate the impact of socioeconomic factors on education and there are identifiable roles for the federal government in lifting children out of poverty that are more profound and significant than simply holding schools accountable on the basis of narrow measures such as test scores. The federal government should support the work of high-poverty schools by investing in safety-net programs such as preschool programs for at-risk students<sup>336</sup> and affordable housing for low-income families.

Lacking a social safety net at the federal level, public education has become “America’s answer to the European social welfare state.”<sup>337</sup> It can be said that our “public schools have become the social service agency of last resort for children in this country.”<sup>338</sup> Schools cannot operate as both educational institutions and social service agencies with the limited resources at their disposal.<sup>339</sup> The result of trying to do too much is that school districts throughout the country are in a state of crisis.<sup>340</sup> Indeed, schools are not even provided with sufficient funds to perform the basic tasks of the education process, including providing teachers in sufficient numbers.<sup>341</sup>

The great irony in school reform today is that educational entrepreneurs are in the business of seeking federal funds to provide privately what the federal government itself fails to provide as a matter of public policy. In other words, although consensus can sometimes be reached about what is needed to help low-income children succeed, the primary disagreement appears to lie in deciding who is to provide it. A telling example of this problem can be found in the Fiscal Year 2010 and proposed Fiscal Year 2011 budgets’ inclusion of funding for Promise Neighborhoods,<sup>342</sup>

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335. Kahlenberg, *supra* n. 133, at 43.

336. Levin, *supra* n. 302, at 231.

337. Kahlenberg, *supra* n. 133, at 211. European governments far outspend the United States on social welfare programs. *Id.*

338. Krent, *supra* n. 282, at 319–320.

339. *Id.* at 320.

340. *Id.*

341. Michael Rebell, *Huffington Post*, *Educational Budget Cuts: Unconscionable—and Unconstitutional*, [http://www.huffingtonpost.com/michael-rebell/educational-budget-cuts-\\_b\\_453636.html](http://www.huffingtonpost.com/michael-rebell/educational-budget-cuts-_b_453636.html) (Feb. 8, 2010).

342. The 2010 Education Budget initiates “*Promise Neighborhoods*, a new \$10 million effort to improve achievement in high-poverty areas and support health, social services[,]”

a program that seeks to replicate the Harlem Children's Zone (HCZ).<sup>343</sup>

In an inspirational speech he gave in July 2007 on how he would change the odds for urban America if elected president, Senator Obama described the HCZ as a model strategy:

The philosophy behind the [Harlem Children's Zone] is simple—if poverty is a disease that infects an entire community in the form of unemployment and violence, failing schools and broken homes, then we can't just treat those symptoms in isolation. We have to heal that entire community. And we have to focus on what actually works.<sup>344</sup>

And what is touted about the HCZ approach is not just schools and not just education—although charter schools are central to the framework—but a comprehensive approach that has been described as “a safety net woven so tightly that children in the neighborhood just can't slip through.”<sup>345</sup>

The “whatever it takes”<sup>346</sup> approach of the HCZ begins with Baby College, a parenting skills program that targets both “expecting parents and parents of children up to the age of three.”<sup>347</sup> Free breakfast and lunch are provided throughout the

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and educational needs of children and youth through comprehensive neighborhood planning grants.” Democratic Staff, H.R. Comm. Educ. & Lab., 111th Cong., *FY 2010 Obama Education Budget Reversing the Trend; Renewing America's Promise 2* (Comm. Rpt. May 7, 2009) (available at <http://edlabor.house.gov/documents/111/pdf/publications/2010ObamaEducationBudgetSummary.pdf>). Furthermore, the Fiscal Year 2011 Budget allocates \$210 million to the Promise Neighborhoods initiative. U.S. Dept. Educ., *The Budget for Fiscal Year 2011* 63, <http://www.gpoaccess.gov/usbudget/fy11/pdf/budget/education.pdf> (accessed Sept. 2, 2010) [hereinafter *2011 Budget*].

343. *2011 Budget*, *supra* n. 342, at 65. Promise Neighborhoods is “modeled after the Harlem Children's Zone” and “aims to improve college going rates by combining a rigorous K-12 education with a full network of supportive services in an entire neighborhood.” *Id.* The core principle behind Promise Neighborhoods is that “combining both effective academic programs and strong health and social-service systems can combat the effects of poverty and improve the education and life outcomes of children.” *Id.*

344. Barack Obama, Remarks, *Remarks of Senator Barack Obama: Changing the Odds for Urban America* (D.C., July 18, 2007) (available at [http://www.barackobama.com/2007/07/18/remarks\\_of\\_senator\\_barack\\_obam\\_19.php](http://www.barackobama.com/2007/07/18/remarks_of_senator_barack_obam_19.php)).

345. Paul Tough, *N.Y. Times*, *The Harlem Project*, <http://www.nytimes.com/2004/06/20/magazine/the-harlem-project.html> (June 20, 2004).

346. *Whatever It Takes* is the title of Paul Tough's recent book chronicling the work of Geoffrey Canada and the Harlem Children's Zone. Tough, *supra* n. 176, at 1.

347. *Id.* at 58.

nine sessions of Baby College, along with raffle prizes and other financial incentives.<sup>348</sup>

Geoffrey Canada, president and CEO of the HCZ, arrived at this strategy due to his belief that changing the lives of poor children growing up in Harlem, as well as other poor communities, requires starting interventions before kindergarten.<sup>349</sup> The “conveyor belt”<sup>350</sup> envisioned by Canada goes on to include a program for the parents of three-year-olds<sup>351</sup> selected through a lottery to enter the Promise Academy charter school. During the Three-Year-Old Journey program, parenting skills, language skills, and child development are discussed on Saturdays over several months. Four-year-olds enter the Harlem Gems program, an all-day prekindergarten in which they are taught English, Spanish, and French. The classes have a 4:1 student-to-teacher ratio and the program is run from 8:00 a.m. to 6:00 p.m. The Harlem Gems program is followed by the Promise Academy Charter Schools, which comprise a K-12 pathway.<sup>352</sup>

In addition to these educational components, the HCZ Project also includes after-school, social-service, health, and community-building programs.<sup>353</sup> This exclusive—available only to residents of Harlem—and privately created<sup>354</sup> safety net also includes “asthma prevention plans and fresh produce deliveries; dental, medical, and psychiatric care; after-school arts and music; tenant-ownership schemes . . . taekwondo and dance, weight training and sports; and foster care prevention.”<sup>355</sup> The HCZ encompasses approximately twenty different programs, has a staff of more than 1,500, and “reach[es] approximately 8,200 young people out

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348. *Id.* at 59, 61.

349. *Id.* at 58.

350. Geoffrey Canada employs the term “conveyor belt” to describe the continuous, purposeful, and enriching pathway the HCZ seeks to provide for the children in Harlem. *Id.* at 195–197.

351. Harlem Children’s Zone, *The HCZ Project Pipeline: Early Childhood*, <http://www.hcz.org/programs/early-childhood> (accessed Sept. 2, 2010).

352. *Id.*

353. Harlem Children’s Zone, *The HCZ Project Pipeline: Family, Community, Health*, <http://www.hcz.org/programs/family-community-a-health> (accessed Sept. 2, 2010).

354. A large portion of the HCZ’s budget is raised privately by Geoffrey Canada. Robin Shulman, *Harlem Program Singled Out as Model; Obama Administration to Replicate Plan in Other Cities to Boost Poor Children*, *Wash. Post* A03 (Aug. 2, 2009).

355. *Id.*

of 11,300 in the zone.”<sup>356</sup> With a budget that exceeds \$48 million, an average of \$5,000 is spent per child.<sup>357</sup>

The unique aspect of HCZ is the amount of thought taken to provide “whatever it takes” to the children and their families. For instance, HCZ was recently able to ease some of the financial stresses faced by low-income families in the community by returning \$6 million to Harlem residents through the provision of free tax-preparation services.<sup>358</sup> The lessons for the rest of the country are profound. As a presidential candidate, Senator Obama provided a glimpse of what the HCZ strategy could mean at the federal level:

When you’re in these neighborhoods, you can see what a difference it makes to have a government that cares. You can see what a free lunch program does for a hungry child. You can see what a little extra money from an earned income tax credit does for a family that’s struggling. You can see what prenatal care does for the health of a mother and a newborn. So don’t tell me there’s no role for government in lifting up our cities.<sup>359</sup>

Indeed, HCZ’s tightly woven safety net at the neighborhood level provides an example of what a tightly woven safety net at the federal level could do for our Nation’s low-income children and families.

It is disappointing that President Obama, as opposed to presidential candidate Obama, has opted for a very weak approach to realizing the HCZ’s promise at the federal level. Instead of seeking to create a tightly woven safety net at the federal level with federal resources, the answer has been to request resources to assist in replicating the HCZ privately in a few other communities. The assistance provided by the federal government will be purely ancillary and the bulk of the funding for any such initiative will still be largely dependent on private funds.

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356. *Id.*

357. Harlem Children’s Zone, *The HCZ Project: 100 Blocks, One Bright Future*, <http://www.hcz.org/about-us/the-hcz-project> (accessed Sept. 2, 2010).

358. Congressman Charles B. Rangel, *Harlem Students Organize Youth Financial Summit*, <http://rangel.house.gov/2009/03/> (March 27, 2009).

359. Obama, *supra* n. 344.

Through the initiative of Promise Neighborhoods, one-year planning grants will be awarded through a competitive process to non-profit, community-based organizations to implement programs modeled after the Harlem Children's Zone.<sup>360</sup> Again, competition, as opposed to equity, is the driving force behind the federal funding stream. President Obama's response does not do justice to his rhetoric as a candidate. And the Promise Neighborhoods do not honor the idea behind the HCZ, which is to do "whatever it takes" to enable the children to succeed.

The HCZ approach is a scientific one, implementing strategies based upon solid research on child development and school readiness. It is a systematic approach that provides the necessary inputs or resources demonstrated to enable children to become successful middle-class adults.<sup>361</sup> And ultimately it is a narrowly targeted approach with a relentless focus on what the next generation needs in order to grow up to become successful, productive citizens.<sup>362</sup>

The federal government would be wise to learn some of these lessons. It might begin by providing adequate and equitable funding for early childhood programs targeting low-income children. First, research shows that early childhood programs significantly increase a child's educational achievement, reduce a child's chances of dropping out of school, and improve their employment outcomes,<sup>363</sup> such programs also help children avoid the "prison

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360. U.S. Dept. Educ., *U.S. Department of Education Opens Competition for Promise Neighborhoods*, <http://www2.ed.gov/news/pressreleases/2010/04/04302010b.html> (Apr. 30, 2010); see also Harlem Children's Zone, *Focusing on Results in Promise Neighborhoods: Recommendations for the Federal Initiative* 7–9, <http://www.hcz.org/images/stories/Focusing%20on%20Results%20-%20final%2001%2008%2010.pdf> (Jan. 2010) (recommending ways to use federal funding in urban neighborhoods).

361. Tough, *supra* n. 176, at 39.

362. President Obama said,

Over the course of a lifetime, those with a college degree—and I want the young people here especially to listen to this—over the course of a lifetime, those with a college degree earn over 60[%] more than those with only a high school diploma—60[%] more. Most of the fastest growing jobs require a bachelor's degree or more . . . Four out of every [ten] new jobs will require at least some advanced education or training within the next decade. So put simply, the right education is a prerequisite for success. There was a time when if you just got a high[-]school education and you were willing to work hard, you could get a job in a trade or in the factory that paid a middle-class wage. And those days are declining. The currency of today's economy is knowledge.

Obama, *supra* n. 5.

363. Levin, *supra* n. 302, at 231.

pipeline.”<sup>364</sup> Despite this evidence, low-income families have few options in the area of childcare and early childhood learning. Parents of three-year-olds in twenty states have no access to state-funded prekindergarten programs.<sup>365</sup> In a majority of states, parents of preschoolers pay more per year for center-based childcare than they would for tuition at a four-year public university.<sup>366</sup> The Early Head Start program is only able to serve around 3% of eligible young children, and no more than two-thirds of eligible children enroll in the program.<sup>367</sup>

Such a weak federal investment is illogical given the evidence demonstrating the cost-efficiency of early childhood investments. A cost-benefit analysis conducted by the HighScope Perry Preschool Project revealed that the benefits of such services exceeded the costs by a large margin.<sup>368</sup> The HighScope Perry Preschool Project study assessed whether high-quality preschool programs could provide benefits over the short and long term to impoverished children who were at a high risk of not succeeding in school.<sup>369</sup> The 1960s study followed into adulthood 123 African-American children who lived in the Ypsilanti, Michigan, neighborhood served by the Perry Elementary School.<sup>370</sup>

The youngsters participating in the study were randomly divided into a *program group*, who received a high-quality, active learning preschool program, and a *no-program group*, who received no preschool program. The status of the two groups was assessed annually from ages [three] to [eleven], at ages [fourteen to fifteen], at age [nineteen], and again at age [twenty-seven], on variables representing certain characteristics, abilities, attitudes, and types of performance.<sup>371</sup>

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364. *State of America's Children*, *supra* n. 333, at 10.

365. *Id.*

366. *Id.*

367. *Id.*

368. Levin, *supra* n. 302, at 231–232.

369. Texas Youth Commn., *Significant Benefits: The High / Scope Perry Preschool Study Through Age 27*, <http://www.tyc.state.tx.us/prevention/hiscope.html> (updated July 19, 2004).

370. *Id.*

371. *Id.* (emphasis in original).

The differences between the program and no-program group were startling, with the program group earning more per month than the no-program group, completing more school, receiving fewer social services, and experiencing fewer arrests, among other positive outcomes.<sup>372</sup> The vast majority of the net benefits, 80%, accrued directly to taxpayers by way of increased tax contributions and decreased government expenditures on education, social services, and crime, among other things.<sup>373</sup>

Although President Obama's proposed 2011 budget aims to support pending legislation designed to help states improve their early childhood programs,<sup>374</sup> the competitive approach adopted under the Early Learning Challenge Fund stands to deliver only more of the same tired accountability rhetoric and does not seek to provide equitable and adequate funding for early childhood programs to all states and districts in need of such resources.<sup>375</sup> Such an approach is entirely out of place in the context of early childhood programs, for which an overwhelming amount of

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372. *Id.* When comparing the two groups (no-program and program), the program group had:

- significantly higher monthly earnings at age [twenty-seven] (with 29% vs. 7% earning \$2,000 or more per month);
- significantly higher percentages of home ownership (36% vs. 13%) and second car ownership (30% vs. 13%);
- a significantly higher level of schooling completed (with 71% vs. 54% completing [twelfth] grade or higher);
- a significantly lower percentage receiving social services at some time in the previous ten] years (59% vs. 80%); and
- significantly fewer arrests by age [twenty-seven] (7% vs. 35% with 5 or more arrests), including significantly fewer arrests for crimes of drug making or dealing (7% vs. 25%).

*Id.*

373. Levin, *supra* n. 302, at 232.

374. *2011 Budget*, *supra*. n. 342, at 65.

375. President Obama has stated:

And we should raise the bar when it comes to early learning programs . . . . Today, some early learning programs are excellent. Some are mediocre. And some are wasting what studies show are by far a child's most formative years.

That's why I've issued a challenge to America's governors: If you match the success of states like Pennsylvania and develop an effective model for early learning; if you focus reform on standards and results in early learning programs; if you demonstrate how you will prepare the lowest income children to meet the highest standards of success—then you can compete for an Early Learning Challenge Grant that will help prepare all our children to enter kindergarten all ready to learn.

Obama, *supra* n. 42.

research and data support a robust federal investment.<sup>376</sup> President Obama appears intent on eroding the legacy of the Democratic Party's commitment to equity in the field of education.<sup>377</sup>

A final example of the federal government's misguided and underfunded approach to helping low-income children succeed in life can be found in federal policy on affordable housing. It is equally clear in this arena that a narrow focus on the classroom is a limited strategy for improving a child's educational and life outcomes, and other services that only the federal government is in a position to provide must be offered to low-income children and their families.<sup>378</sup> The current shortage of affordable housing is

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376. Richard Rothstein, *Class and the Classroom: Even the Best Schools Can't Close the Race Achievement Gap*, 191 Am. Sch. Bd. J. 17, 21 (Oct. 2004). Early education programs, evaluated over a period of years, had significant effects in "school competence, developed abilities, children's attitudes and values, and selected family outcomes." Irving Lazar et al., *Lasting Effects of Early Education: A Report from the Consortium for Longitudinal Studies*, 47 Monographs of Socy. for Research in Child Dev. Nos. 2-3, 55-56 (1982). Early education significantly improved the ability of low-income children to meet their schools' requirement for adequate performance; students were half as likely to be assigned to special education classes, were less likely to be retained in grade, and improved their performance on intelligence and achievement tests. *Id.*; see Carollee Howes, *Can the Age of Entry Into Child Care and the Quality of Child Care Predict Adjustment in Kindergarten?* 26 Developmental Psychol. 292, 300 (1990) (finding that "[o]nly those children enrolled as infants in low-quality, as opposed to high-quality, child-care centers, appeared maladjusted."); NICHD Early Child Care Research Network, *Early Child Care and Children's Development Prior to School Entry: Results from the NICHD Study of Early Child Care*, 39 Am. Educ. Research J. 133, 157 (2002) (noting that "[h]igher-quality child care predicted better pre-academic skills and language"); Anna L. Papero, *Is Early, High-Quality Daycare an Asset for the Children of Low-Income, Depressed Mothers?* 25 Developmental Rev. 181, 181 (2005) (reviewing the effect of daycare intervention on child development).

377. See e.g. The American Presidency Project, *Democratic Party Platform of 1984*, <http://www.presidency.ucsb.edu/ws/index.php?pid=29608> (proclaiming that "Democrats are committed to equity in education.").

378. Rothstein, *supra* n. 376. Michael Rebell writes that "state and federal educational policies fail to deal with the enormous impediments to learning that are posed by the conditions of poverty in which millions of school children live." Michael A. Rebell, Symposium, *High-Poverty Schooling in America: Lessons in Second-Class Citizenship: What Are the Limits and Possibilities of Legal Remedies? Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. Rev. 1467, 1467 (2007). In this same piece, Rebell discusses the need for "a comprehensive range of specific in-school and coordinated out-of-school services to children from backgrounds of concentrated poverty." *Id.* at 1470. Rebell argues for a response to the "health, nutrition, housing, family support, and other out-of-school factors that directly impede a child's readiness to learn." *Id.* at 1469. Class issues are addressed as well, and Rebell writes that "[a] commitment to 'meaningful' educational opportunity" requires "countering the trends toward widening the income gaps between 'haves' and 'have nots' in society as a whole." *Id.* at 1470.

linked to an additional challenge faced by high-poverty schools—the high incidence of student mobility.

A number of studies document the fact that the poor move much more often than the middle-class; this is true across racial lines.<sup>379</sup> Factors accounting for greater mobility among the poor include higher rates of renting as opposed to home ownership and higher rates of eviction, as well as a greater likelihood that the poor will be engaged in migrant agricultural work.<sup>380</sup> Studies show that moving is not only educationally disruptive to the individual student but also to classmates who must adjust to other students leaving and entering throughout the academic year.<sup>381</sup> One of the consequences of high rates of mobility is that teachers in these classrooms must devote a large portion of their time to developing relationships with the new students and catching them up academically.<sup>382</sup> Of course, that takes time away from the other students in the class, as well as the pursuit of other academic objectives.

The federal government's response to this problem has suffered from the same myopic and school-centric approach critiqued elsewhere in this Article. The McKinney-Vento Act<sup>383</sup> was designed, in part, to reduce mobility among homeless students<sup>384</sup>

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379. Kahlenberg, *supra* n. 133, at 60.

380. *Id.*

381. *Id.*

382. *Id.*

383. 42 U.S.C. § 11301 (2006).

384. The McKinney-Vento Homeless Assistance Act (Title X, Part C, of the No Child Left Behind Act) defines "homeless" as follows:

The term "homeless children and youths"—

- (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1)); and
- (B) includes—
  - (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
  - (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C));

by enabling children to remain in the school they were attending prior to becoming homeless, even if no longer residing in the district.<sup>385</sup> School districts are also required to bear the costs of transporting homeless students back to their school of origin.<sup>386</sup> A number of lawsuits have been filed against school districts to enforce McKinney-Vento protections.<sup>387</sup>

Although these legal protections provide an important safeguard for homeless students within the school context, it is ironic that the federal government has done little to prevent children from becoming homeless in the first place. Indeed, the National Low-Income Housing Coalition reports that disinvestment in affordable housing began at the federal level in 1976.<sup>388</sup> While the rest of the federal budget has increased dramatically, the Housing and Urban Development (HUD) budget for the period 1976–2004 remained relatively stagnant,<sup>389</sup> yet the number of affordable housing units shrank substantially beginning in the mid-1990s.<sup>390</sup>

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- (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
  - (iv) migratory children (as such term is defined in section 6399 of Title 20) who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in clauses (i) through (iii).

42 U.S.C. § 11434a(2) (2006).

385. Natl. Ctr. Homeless Educ., *School Help for Homeless Children with Disabilities: Information for Parents* 1, <http://eric.ed.gov/PDFS/ED499429.pdf> (Fall 2007).

386. Mass. Dept. of Elementary & Secondary Educ., *McKinney-Vento Homeless Assistance*, [http://www.doe.mass.edu/mv/haa/02\\_3.html](http://www.doe.mass.edu/mv/haa/02_3.html) (updated Aug. 16, 2002); see also McKinney-Vento Education for Homeless Children and Youths Program, 67 Fed. Reg. 10697, 10698 (Mar. 8, 2002) (requiring that local education agencies “provide or arrange for the transportation of homeless children and youth”).

387. See Patricia Julianelle, *Natl. L. Ctr. Homelessness & Poverty, Litigation Related to the McKinney-Vento Act*, [http://www.nlchp.org/content/pubs/Litigation\\_related\\_to\\_McKinney-Vento1.pdf](http://www.nlchp.org/content/pubs/Litigation_related_to_McKinney-Vento1.pdf) (Spring 2008) (summarizing litigation related to the McKinney-Vento Act).

388. Natl. Low Income Housing Coalition, *Changing Priorities: The Federal Budget and Housing Assistance 1976-2005* 1, <http://www.nlihc.org/doc/cp04.pdf> (Oct. 2004) (noting that the mid-1970s represented “[t]he federal government’s high water mark for housing assistance”).

389. *Id.* at 5–10. The study projected that housing assistance outlays would decrease 23% through 2009. *Id.* at 4–5.

390. “Beginning in 1995, a decade of condo conversions, housing speculation, and gentrification resulted in a significant 17% shrinkage in the number of units affordable to renters earning less than \$16,000.” Natl. Low Income Housing Coalition, *Out of Reach 2009* 1, <http://www.nlihc.org/oor/oor2009/oor2009pub.pdf> (Apr. 2009). Currently, low-wage workers are all but unable to access affordable housing. *Id.* at 4–5.

It is apparently one thing to delegate responsibility for this social problem to the schools but quite another to undertake the hard work of providing affordable housing and thereby securing greater stability for homeless children and youths. Some observers have found glimmers of hope in President Obama's initiatives in the arena of housing and urban development.<sup>391</sup> Although it remains too early to tell whether President Obama will transform federal policy in the area of affordable housing, this is precisely the type of change that could help children in our struggling schools.

### V. CONCLUSION

Ultimately, if the political goal is to deflect attention away from the federal government, then a narrow focus on school accountability without a significant influx of federal resources is in order. As long as the public is kept busy tinkering around the edges of public schooling, less attention will be paid to other actors responsible for achievement gaps between low-income children and their wealthier counterparts. For those whose goal is to improve the lives of children in a comprehensive and significant manner, however, schools remain an important but limited intervention. We are indeed at a crossroads, and voters must push President Obama to pursue progressive and poverty-conscious policies at the federal level over the narrow school accountability reforms currently promoted by the Race to the Top Fund.

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391. See Nicholas J. Brunick & Patrick O'B. Maier, *Renewing the Land of Opportunity*, 19 J. Affordable Housing & Community Dev. L. 161, 184–185 (2010) (available at <http://www.inhousing.org/PDFs/RenewingtheLandofOpportunity.pdf>) (noting that the Obama administration “has taken a number of positive steps” including providing “increased resources for affordable housing and community development through the American Recovery and Reinvestment Act.”).



# APPENDIX

## AMERICAN RECOVERY AND REINVESTMENT ACT

<b>Elementary and Secondary Education Act of 1965 (ESEA),</b> Targeted grants:	\$5,000,000,000
<b>ESEA, Title I, Section 1125A,</b> Education finance incentive grants:	\$5,000,000,000
<b>ESEA, Title I, Section 1003(g),</b> School improvement grants:	\$3,000,000,000
<b>ESEA, Title VIII, Section 8007,</b> Impact Aid:	\$100,000,000
<b>ESEA, Title II, Subpart 1, Part D:</b>	\$650,000,000
<b>McKinney-Vento Homeless Assistance Act, Title VII, Subtitle B:</b>	\$70,000,000
<b>ESEA, Title V, Subpart 1, Part D,</b> Innovation and Improvement:	\$200,000,000
<b>Individuals with Disabilities Education Act, Parts B–C:</b>	\$12,200,000,000
<b>Rehabilitation Act of 1973, Title I, Part B,</b>	
<b>Rehabilitation Act of 1973, Title VII, Chapter 1, Parts B–C,</b>	
<b>Rehabilitation Act of 1973, Title VII, Chapter 2,</b> Rehabilitation Services and Disability Research:	\$680,000,000
<b>Higher Education Act of 1965 (HEA), Title IV, Part A, Subpart 1,</b> Student Financial Assistance (available through 2011):	\$15,640,000,000
<b>HEA, Title IV, Part C,</b> Student Financial Assistance (available through 2011):	\$200,000,000
<b>HEA, Title I, Part D,</b>	
<b>HEA, Title IV, Part A, Subparts 1–3,</b>	
<b>HEA, Title IV, Parts B–E,</b> Student Aid Administration:	\$100,000,000
<b>HEA, Title II, Part A Higher Education:</b>	\$100,000,000
<b>Educational Technical Assistance Act, Section 208,</b> Institute of Education Sciences:	\$250,000,000
<b>Office of the Inspector General,</b> Management of the department (available through FY 2012):	\$14,000,000
<b>Total ARRA Title VII Department of Education:</b>	\$43,204,000,000
<b>State Fiscal Stability Fund (SFSF),</b>	
<b>SFSF that the Sec. of Educ. must allocate to “outlying areas”:</b>	\$0–\$278,000,000
<b>SFSF that the Sec. of Educ. may reserve for admin/oversight:</b>	\$14,000,000
<b>SFSF must be reserved for sections 14006 and 14007 grants:</b> may be reserved for section 14007 Innovation Grants:	\$5,000,000,000
	(max: \$650,000,000)

may be reserved for section 14006 Incentive (Race to the Top Fund) Grants:  
(min: \$4,350,000,000)

**SFSF must go to States:**

61% on the basis of their relative population aged five through twenty-four  
39% on the basis of their relative total population Remainder  
(\$48,600,000,000–\$48,308,000,000)

**Total ARRA Title XIV State Fiscal Stabilization Fund (2009–2011)** \$53,600,000,000

**Total ARRA funds to the Department of Education (2009–2011)** \$96,804,000,000

*The House of Representatives passed the 2010 education budget totaling \$67,287,773,200. Department of Education Appropriations Act, 2010, H.R. 3293, 111th Cong. (1st Sess. 2009) (as reported in the Senate). H.R. 3239 appropriates the following:*

**Elementary and Secondary Education Act of 1965 (ESEA), Title I,**

**Higher Education Act of 1965 (HEA), Section 418A,**

**S.1121 (School Building Fairness Act of 2009),**

Education for the Disadvantaged: (2009–2011) \$15,891,132,000

**ESEA, Title VIII,**

Impact Aid: \$1,265,718,000

**ESEA, Title II, Parts A–B, D,**

**ESEA, Title IV, Part B,**

**ESEA, Title V, Part D, Subparts 6, 9,**

**ESEA, Title VI, Parts A–B,**

**ESEA, Title VII, Parts B–C,**

**McKinney-Vento Homeless Assistance Act,**

**Educational Technical Assistance Act of 2002, Section 203,**

**Compact of Free Association Amendments Act of 2003,**

**HEA, Title VIII, Part Z,**

**Civil Rights Act of 1964,**

School Improvement: (2010–2011) \$5,197,316,000

**ESEA, Title VII, Part A,**

Indian Education: \$1,322,282,000

**ESEA, Title I, Part G,**

**ESEA, Title II, Part A, Subpart 5,**

**ESEA, Title II, Parts C–D,**

**ESEA, Title V, Parts B–D,**

**ESEA, Title I,**

**ESEA, Section 1504,**

**HEA, Title VIII, Part F,**

Innovation and Improvement: \$1,234,787,000

**ESEA, Title II, Part C, Subpart 3,**

**ESEA, Title IV, Part A,**

**ESEA, Title V, Part D, Subparts 2–3, 10,**

Safe Schools and Citizenship Education: \$438,061,000

2010]	<i>A Race to the Bottom?</i>	713
<b>ESEA, Title III, Part A,</b>		
English Language Acquisition:	(2010–2011)	\$750,000,000
<b>Individuals with Disabilities Education Act,</b>		
<b>Special Olympics Sport and Empowerment Act of 2004,</b>		
Special Education:	(2010–2011)	\$12,587,856,000
<b>Rehabilitation Act of 1973,</b>		
<b>Assistive Technology Act of 1998,</b>		
<b>Helen Keller National Center Act,</b>		
Rehabilitation Services and Disability Research:		\$3,507,322,000
<b>Act of March 3, 1879,</b>		
American Printing House for the Blind:		\$24,600,000
<b>Education of the Deaf Act of 1986, Titles I–II</b>		
National Technical Institute for the Deaf:		\$68,437,000
<b>Education of the Deaf Act of 1986, Titles I–II,</b>		
Kendall Demonstration Elementary School, Model Secondary School for the Deaf, Gallaudet University:		\$126,000,000
<b>Carl D. Perkins Career and Technical Education Act of 2006,</b>		
<b>Adult Education and Family Literacy Act,</b>		
<b>ESEA, Title V, Part D, Subpart 4,</b>		
<b>Higher Education Amendments of 1998, Title VIII, Part D,</b>		
Career, Technical, and Adult Education:	(2009–2011)	\$4,400,000
	(2010–2011)	\$2,014,047,000
<b>HEA, Title IV, Part A, Subparts 1, 3–4,</b>		
<b>HEA, Title IV, Parts C, E,</b>		
Student Financial Assistance: (But Section 401A(e)(1)(D) rescinded funds [\$511,000,000].)		\$19,296,809,000
<b>HEA, Title I, Part D,</b>		
<b>HEA, Title IV, Part A, Subparts 1, 3–4, 9,</b>		
<b>HEA, Title IV, Parts B–E,</b>		
Student Aid Administration:		\$870,402,000
<b>HEA, Titles II–VIII,</b>		
<b>Higher Education Amendments of 1992, Section 1543,</b>		
<b>Mutual Education and Cultural Exchange Act,</b>		
<b>Higher Education Amendments of 1998, Title VIII,</b>		
America COMPETES Act, Title VI, Subtitle A, Part I, Carl D Perkins Career and Technical Education Act of 2006,		
Higher Education:	(2010–2011)	\$2,106,749,000
<b>Howard University Endowment Act,</b>		
Howard University grant and support:		\$234,977,000
<b>HEA, Section 121,</b>		
College Housing and Academic Facilities Loan Program:		\$461,000
<b>HEA, Title III, Part D,</b>		
Historically Black College and University Capital Financing Program:		\$10,354,000

714

*Stetson Law Review*

[Vol. 39]

**Education Sciences Reform Act of 2002,****National Assessment of Educational Progress Authorization Act, Section 208,****Educational Technical Assistance Act of 2002,****Individuals with Disabilities Education Act, Section 664,**

Institute of Education Sciences:	(2010)	\$317,015,000
	(2011)	\$361,241,000

**Department Management****Department of Education Organization Act,**

Program Administration:		\$452,200,000
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**Department of Education Organization Act, Section 203,**

Office for Civil Rights:		\$103,024,000
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**Office of the Inspector General:**

		\$60,053,000
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