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FUNNY MONEY: HOW FEDERAL EDUCATION FUNDING HURTS POOR AND MINORITY STUDENTS

by CASSANDRA JONES HAVARD*

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

—Former United States Chief Justice Earl Warren¹

INTRODUCTION

Neither race nor class alone can predict educational achievement. However, in America, disparities in funding for education may be an impediment to educational opportunity for disadvantaged youth.² At the crux of the Nation's achievement gap among minority children is the question of the how states should allocate federal education funds, and how local school districts should use those monies.³ Educators have long recognized that the socioeconomic circumstances of many public school students present great educational challenges.⁴ Since 1965, Congress has authorized

* B.A., Bennett College; J.D., University of Pennsylvania; Professor of Law, University of Baltimore School of Law. The author thanks Erika Wood for comments on an earlier draft of this paper, and Genevieve Loutinsky and members of the *Temple Political & Civil Rights Law Review* for their editorial assistance.

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

2. Adequate school funding can result in achieving lower student-to-teacher ratios, obtaining better qualified teachers, and acquiring more school materials and supplies, yet an achievement gap still exists between students of different races. Sam Dillon, *Schools Slow in Closing Gaps Between Races*, N.Y. TIMES, Nov. 20, 2006, at A1, available at <http://www.nytimes.com/2006/11/20/education/20gap.html?sq=sam%20dillon%20gaps%20between%20races&st=nyt&scp=1&pagewanted=all>. The 2005 National Assessment of Academic Progress found that nineteen percent of white students in the eighth grade tested below "basic" proficiency in reading, compared with forty-nine percent of black students. *Id.* at A18. Fifty-nine percent of black students tested below basic proficiency in eighth grade math compared with twenty-one percent of white students. *Id.* There is a correlation between the quality of schooling and future economic success. See David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. POL. ECON. 1, 1-2 (1992) (showing the positive correlation between "school quality and earnings").

3. The issue of inter-district funding first came to the attention of the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and the issue of funding equity in public schools generally has been widely litigated since public school desegregation following *Brown*. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 198 (Ky. 1989) (detailing testimony alleging that the unequal state-wide funding system in Kentucky affected the quality of education and school performance); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1137 (Okla. 1987) (determining that equal funds for students are not required for the federal constitution).

4. See Lauren E. Winters, *Colorblind Context: Redefining Race-Conscious Policies in Primary and*

the use of federal funds by local school districts to remedy the achievement gap.⁵

The Elementary and Secondary School Act of 1965 (ESEA)⁶ is now the much debated No Child Left Behind Act (NCLB).⁷ Title I⁸ is the largest federal program assisting elementary and secondary schools; it contains the key accountability provisions under NCLB.⁹ The declared objective of federal education funding is to focus more attention on high-poverty schools.¹⁰ ESEA started the federal government's commitment to providing American children equal access to high-quality public education.¹¹ NCLB represents a federal policy of improved accountability and transparency in education.¹² It is controversial not only because it has separated the federal government from the goal of equal educational opportunity but it has created funding inequities that state and local education

Secondary Education, 86 OR. L. REV. 679, 720 (2007) (noting that household income is a predictor of student achievement).

5. In its landmark *Brown* decision, the Court struck down the separate but equal doctrine in education and paved the way for educational equality. 347 U.S. at 495. As the *Brown* Court said, "[E]ducation is perhaps the most important function of state and local governments." *Id.* at 493. Fifty-five years later, educational opportunity remains hampered by funding disparities between low-poverty and high-poverty public school districts. See KEVIN CAREY, THE EDUC. TRUST, THE FUNDING GAP 2004: MANY STATES STILL SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 5 (2004), available at <http://www2.edtrust.org/NR/rdonlyres/30B3C1B3-3DA6-4809AFB92DAACF11CF88/0/funding2004.pdf> (demonstrating the gap in per-student funding between highest and lowest-poverty districts).

6. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 1965 U.S.C.A.N. (79 Stat.) 29 (now codified at 20 U.S.C. §§ 6301-7941 (2002)).

7. No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-7941 (2004)).

8. 20 U.S.C. §§ 6301-6578 (2001).

9. *Id.* § 6311(b); see also *infra* notes 27-52 and accompanying text (discussing the federal government's role in implementation and oversight of ESEA funds).

10. ESEA § 201, *supra* note 7, at 29 (stating in Title II "Declaration of Policy" that it is to be "the policy of the United States to provide financial assistance . . . to local educational agencies servicing areas with concentrations of children from low-income families."). Title I of the ESEA is a set of programs that distribute funding to schools and school districts with a high percentage of students from low-income families. *Id.* § 203 at 31. Title I of the ESEA is a set of programs to distribute funding to schools and school districts with a high percentage of students from low-income families. *Id.* When enacted, NCLB listed as its objective: "[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind." NCLB, *supra* note 8, 115 Stat. at 1425.

11. See Cong. Budget Office Study, *The Federal Role in Improving Elementary and Secondary Education*, 2, 20 (May 1993) (noting that the largest federal program promoting equal educational opportunity is Chapter I of Title I of the ESEA). Unlike NCLB, ESEA does not provide a national curriculum, leaving local school boards the authority to determine the specific curriculum. *Id.* at 24. The federal government pledged that "no provision of the ESEA should be construed to authorize any department, agency, office, or employee of the United States to exercise any control over the curriculum . . . of any education institution, school, or school system." *Id.*

12. See NCLB, *supra* note 8, at 1439-40 (emphasizing academic assessments, accountability systems and other measures to ensure NCLB's goals are met).

The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education . . . [t]his purpose can be accomplished by . . . ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards.

Id.

boards must now resolve.¹³ Through the receipt of the federal aid, these laws require state and local education policymakers to level the funding inequities.¹⁴ Title I money is federal funding appropriated to local schools with large concentrations of economically disadvantaged students.¹⁵ The legislative goal of federal education funding is to ensure equal education for all children.¹⁶ Schools and districts with large concentrations of underprivileged students are eligible to receive the federal funding; and indeed, that funding plays a major role in school finance.¹⁷

Because it allows for discretion in the allocation of federal monies, Title I federal funding regime has become a source of inequity in educational services for students in high-poverty schools.¹⁸ This inequity is generated by an inherent

13. See Marguerite Roza, *What if We Closed the Title I Comparability Loophole?*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION 9, 63 (2008) (noting that despite Title I funding to promote equity in schools, investigations show that school districts still routinely spend a larger share of state and local funds on schools with fewer low-income students); see also discussion *infra* Parts II, III (elaborating on the federal government's role in Title I and the further funding equities that remain or are exacerbated by the legislation).

14. See *id.* at 13, 61 (discussing Title I's comparability provisions that require school districts to equalize education services purchased with state and local funds before Title I one funds are disbursed to them); see also Rachel F. Moran, *The Politics Of Discretion: Federal Intervention In Bilingual Education*, 76 CAL. L. REV. 1249, 1259 (1988) (stating that the ESEA's objectives at its inception included equalizing educational and economic opportunity for disadvantaged students and the eradication of racial discrimination). Title I funds are designed to bridge the achievement gap that economically disadvantaged children face by providing more instruction and support. NCLB § 1001, *supra* note 8, 115 Stat. at 1439. NCLB represents one of eight re-authorizations in thirty years. It amends Title I of the ESEA and allows states more flexibility in how the funds will be used. See generally Benjamin Michael Superfine, *Using The Courts To Influence The Implementation Of No Child Left Behind*, 28 CARDOZO L. REV. 779, 781 (2006) (discussing NCLB's implementation issues and the role of the courts in addressing statutory conflicts). NCLB funds are commonly referred to as "Title I" money. Michael Janofsky, *Federal Spending Increases, But More Schools Will Get Less Money for Low-Income Students*, N.Y. TIMES, July 4, 2005, at A1. Unlike the NCLB which places performance requirements on all public schools, ESEA as originally enacted, had as its sole objective, the funding of educational programs that would benefit poor children. ESEA § 201, *supra* note 7, at 29.

15. Cong. Budget Office Study, *supra* note 11, at 11. One-third of the federal expenditures for grades K-12 comes from Title I funds. U.S. DEP'T OF EDUC., 10 FACTS ABOUT K-12 EDUC. FUNDING 1, 2 (2005) available at <http://www.ed.gov/about/overview/fed/10facts/10facts.pdf>.

16. NCLB § 1001, *supra* note 8, 115 Stat. at 1439 (stating that "the purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education"); see also 20 U.S.C. § 6311(b)(1)(B) (codifying the rule that under NCLB, states are required to hold Title I students accountable for achieving "the same academic standards that the State applies to all schools and children in the State.").

17. See U.S. Dep't of Educ., *supra* note 15, at 6 (noting that the President's FY 2006 proposed budget included that "Title I, the largest federal K-12 program, would provide over \$13 billion to local districts to improve the academic achievement of children in high-poverty schools."). NCLB was designed to address the widening disparities in achievement. 20 U.S.C. § 6301(3). The Act's Statement of Purpose includes "[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." *Id.* By basing federal funding on school accountability standards, schools are held responsible for failing students. See also Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 EDUC. L. REP. 791, 794 (2006) (indicating that individual schools which do not meet "state adequate yearly progress targets" risk losing federal funding).

18. See Roza, *supra* note 13, at 61 (pointing out that school districts still give more funding to

conflict between two fiscal accountability functions—the “comparability” function of Title I and the “supplement not supplant” provision of Title III.¹⁹ State boards of education and local school districts have the authority and discretion under federal law to use the federal Title I funds to balance their own funding systems.²⁰ Supplanting federal monies occurs when a state or local school district uses the federal money to provide services that the school district was required to make available under state or local laws, or other federal laws.²¹

The use of federal monies to balance local funding needs should occur only when there is “comparability,” or when school districts provide comparable services in Title I and in non-Title I schools.²² Comparability has been misinterpreted and misapplied within the other fiscal accountability measure of “supplement not supplant.”²³ Two events make monitoring program compliance difficult. First, because money is fungible, there are problems determining whether local school districts allocate federal program funding in place of local funding that was unavailable. Second, there are problems determining whether there is a mix of local and federal funds for district-wide programs. When fiscal accountability cannot be established, the federal education funding requirements may actually worsen educational opportunity at the local level.²⁴ Not only do school districts sometimes fail to make funding choices in ways that will benefit economically challenged student populations, but the U.S. Department of Education is also a

schools with a lower number of low-income students); *see also* Daniel, *supra* note 17, at 814 n.28 (noting that Title I funds school reform by broadly “supporting programs designed to improve educational opportunities of low-income and disadvantaged students”).

19. *See* 20 U.S.C. § 6321(b) (“A State educational agency or local educational agency shall use Federal funds . . . only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources.”); 20 U.S.C. § 6321(c) (“[A] local agency may receive funds . . . only if State and local funds will be used to provide services that, taken as a whole, are at least comparable to services in school that are not receiving funds under this part.”).

20. *See id.* (“A state educational agency or local educational agency shall use Federal funds received under [Title I] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources.”). The “supplement not supplant” (SNS) provision prohibits school districts from using Title I funds for activities that it would have carried out in the absence of Title I funds. *Id.*; *see* discussion *infra* Part II (analyzing the historical background of the ESEA and the federal government’s role in public school education).

21. NEV. DEP’T OF EDUC., SUPPLEMENT/SUPLANT REQUIREMENT FOR FEDERAL FUNDS I (2006), <http://epage.doe.nv.gov/epage/documentview.asp?docid=502> (last visited Nov. 11, 2009); TENN. DEP’T OF EDUC., SUPPLEMENT/ SUPPLANT REQUIREMENT FOR NCLB FUNDS I, <http://www.state.tn.us/education/fedprog/doc/TNSupplementNotSupplant.pdf> (last visited Nov. 10, 2009).

22. Most local school districts have determined “comparability” to require the allocation of more staff to high-poverty schools. *See* MARGUERITE ROZA, *What If We Closed the Title I Comparability Loophole*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION 59, 73 CTR. FOR AM. PROGRESS (2008), http://www.americanprogress.org/issues/2008/06/pdf/comparability_part3.pdf (last visited Nov. 10, 2009) (“Some districts are . . . using staffing ratios to document compliance on comparability.”). The original intent of “comparability” was to force districts to equalize per pupil dollar expenditures. *Id.*

23. *See id.* at 63 (noting that state and local funds are not equitably distributed between Title I and non-Title I schools for the basic instruction of poor students prior to the allocation of federal funds).

24. *See* Ctr. for Am. Progress, *Ensuring Equal Opportunity in Public Educ.*, <http://www.americanprogress.org/issues/2008/06/comparability.html> (last visited Nov. 10, 2009) (commenting that a loophole in the comparability provision allowing for the inequitable distribution of local funds to continue magnifies existing inequality in education at the local level).

passive enforcer of the statutory mandate.²⁵ Consequently, local school authorities implement Title I programs with variable levels of success.²⁶ Improving the success rate of local programs should be second only to ensuring that low-income and minority students receive the federal monies that are allocated for them.

Part I of this Article discusses the background and history of Title I, and reviews the debates surrounding the statute's enactment. The Section ends by arguing that problems with the statute's contorted history and weak initial implementation have contributed greatly to ineffective enforcement and inequitable funding outcomes.

Part II discusses the appropriate role for federal government in local school funding. It describes federal funding for education as cooperative federalism, and argues that the federalist assertion that education is solely a local issue is mistaken by analyzing the characteristics and types of programs and funding historically and currently available for state and local education programs. Part II concludes by defining the role that federal government should play in eradicating improper funding allocations at the state and local level. Comparability is the most critical issue to examine if funding inequities are to be eradicated. Part III argues that there should be changes in both the ideology and the legislative schemes that encompass Title I. Specifically, Title I should be more "child-centered" and the funding formula should be keyed to the "Title I child."

This will require more directed monitoring of comparability under Title I and the "supplement not supplant" conditions under Title III. State and local school districts should be restricted from using money for budgeting needs unrelated to the Title I child.²⁷ When educational funding functions equitably, educators become better able to improve the delivery of education and narrow the achievement gap that minority and high-poverty students encounter.

25. See U.S. GEN. ACCOUNTING OFFICE, *DISADVANTAGED STUDENTS: FISCAL OVERSIGHT OF TITLE I COULD BE IMPROVED* 4 (2003), available at <http://www.gao.gov/new.items/d03377.pdf> (finding limitations in the Department of Education's efforts to guide, monitor, and enforce the fiscal accountability provisions) [hereinafter *GAO TITLE I FUNDING*].

26. See Michael Casserly, Executive Dir. of the Council of the Great City Schools, Testimony on Successful Implementation of Title I before the Comm. on Health, Educ., Labor and Pensions of the U.S. Senate 3 (Sept. 10, 2002), available at <http://www.cgcs.org/pdfs/Testimony9-10-02.pdf> (indicating that implementation of Title I has been successful in the nation's urban school districts); Superfine, *supra* note 15, at 791-97 (discussing how the lack of sufficient fiscal and technical capacities have hindered the ability of states, districts and schools to implement NCLB mandates regarding testing and accountability).

27. The change would also amend Title I's "comparability loophole," which currently contributes to wide differentials in teachers' salaries. See Cynthia G. Brown, *Public Education From Pre-Kindergarten Through High School*, 35 *HUM. RTS.* 20, 21 (2008) ("[Title I] contains a loophole that allows differences in teachers' salaries to be excluded from calculations and consequently supports the longstanding and unequal ways that local and state funds have been distributed by districts.").

I. ESEA AS COMPROMISE LEGISLATION

The Supreme Court's decision in *Brown v. Board of Education* sparked national debate and discussion about the quality of education that black and poor children received in the public schools.²⁸ With passage of the ESEA, the federal government focused on the connection between poverty and economic opportunity, and the needs of educationally deprived children for the first time in the country's history.²⁹ This Section explains the historical foundation of the ESEA and provides background information for a later discussion that explores how Title I's current enforcement impedes the achievement of educational equity.

The ESEA was one of the first times that the federal government was directly involved in public school education.³⁰ As a part of President Johnson's "War on Poverty," the ESEA was envisioned as reform legislation that would bridge the gap between poverty and economic opportunity.³¹ The initial vision and the actual compromises that led to the statute's passage present a contorted history that includes compromises which affect its efficacy even today.³²

Congress passed the ESEA of 1965 after much compromise.³³ Title I was the most prominent feature of ESEA because its funding initiatives brought federal intervention to education policy. Title I's funding mechanism became an effective way for the federal government to exercise control over an area that had historically been left to the states.³⁴ ESEA represented a compromise between those opposed to

28. See, e.g., Lyndon B. Johnson, President of the U.S., Special Message to the Congress: "Toward Full Educational Opportunity" (Jan. 12, 1965), available at <http://www.presidency.ucsb.edu/wsz/index.php?pid=27448&st=anti-poverty&st1=>. President Johnson, a former teacher, made educational opportunities for poor, black, and disadvantaged students a critical part of his anti-poverty campaign. When he signed the legislation into law, he gave his perspective on poverty and education: "Poverty has many roots, but the taproot is ignorance . . . [j]ust as ignorance breeds poverty, poverty too often breeds ignorance in the next generation." *Id.*

29. ESEA, § 1.

30. See Regina R. Umpstead, *The No Child Left Behind Act: Is It An Unfunded Mandate Or A Promotion Of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 197 (2008) (noting that the federal government became the largest sponsor of educational reform during the 1960s with the passage of Title VI of the Civil Rights Act of 1964 and the ESEA in 1965, exercising a power that had been used sparingly until that era).

31. See Mariana Kihuen, *Leaving No Child Behind: A Civil Right*, 17 AM. U. J. GENDER SOC. POL'Y & L. 113, 115 (2009) ("Congress passed the ESEA as part of President Johnson's "War on Poverty" to help low-income students obtain educational parity.").

32. See *infra* text accompanying notes 51-61 (detailing some of the many arguments made in either support of or against the ESEA and its practical operation, including the lack of government oversight).

33. See NATIONAL EDUCATION ASS'N, ESEA: IT'S TIME FOR A CHANGE! NEA'S POSITIVE AGENDA FOR THE ESEA REAUTHORIZATION app. 1 (2006), <http://www.ieanea.org/local/aeaw/assets/posagenda.pdf> (noting that ESEA was based on a major compromise concerning federal aid to private and parochial schools).

34. See David Nash, *Improving No Child Left Behind: Achieving Excellence And Equity In Partnership With The States*, 55 RUTGERS L. REV. 239, 245 (2002) (noting that Title I funds were easy to administer and encouraged research and experimentation into new strategies that could address certain needs of disadvantaged students).

federal involvement in education and those concerned about the educational opportunities afforded to black children. Conservatives wanted to avoid federal governmental involvement in an area traditionally left to the states.³⁵ They argued for fiscal restraint and limited federal intervention.³⁶ Proponents of local control over education also argued that limited federal intervention works better because local officials are more versed in the local perspectives and therefore able to create effective solutions.³⁷

Opponents of local control argued that there was a need for uniformity.³⁸ They contended that individual school districts and even some states did not have the financial capacity to provide the educational opportunities needed.³⁹ This faction sought to structure formulae for the allocation of federal education funding in a more equitable way.⁴⁰ The strong anti-centralization bias and the concern that parochial schools should receive aid were among the core concerns that thwarted these efforts.⁴¹ As a result, the substantive intervention of the federal government in local Title I expenditures was actually precluded.⁴² The initial Title I funding scheme was in effect two-dimensional, as evidenced in the legislation—it provided

35. See National Education Association, *supra* note 33, app. 1 at 2 (noting that conservatives would have blocked money from the federal education program, and thus would have shifted both money and power to the state level).

36. President Eisenhower surprised many citizens when he intervened in education on the federal level. See Harry N. Scheiber, *Redesigning The Architecture Of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227, 267-70 (1996) (noting that the 1957 National Defense Education Act marked a significant change in the federal government's role in educational funding).

37. See Gail L. Sunderman, *The Federal Role in Education: From the Reagan to the Obama Administration*, 24 VOICES IN URBAN EDU. 6, 6 (2009), available at http://www.annenberginstitute.org/VUE/pdf/VUE24_Sunderman.pdf (observing that conservative federalists prefer that local governments select how to spend funds).

38. See *id.* at 7 (noting that these education policies sought to address policies that were neglected at the state level and equalize educational opportunities).

39. See generally James W. Guthrie, *A Political Case History: Passage of the ESEA*, 49 THE PHI DELTA KAPPAN 302, 304 (1968) (describing how the Title I formula was a way to distribute more federal funds to less wealthy states).

40. Peter Zamora, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 423 (2003) [hereinafter *Ideological Discord*].

41. *Id.* at 417; see DAVID P. SMOLE, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: SCHOOL CHOICE UNDER THE ESEA: PROGRAMS AND REQUIREMENTS 5 (2008), available at https://www.policyarchive.org/bitstream/handle/10207/19227/RL33506_20080122.pdf?sequence=2 (discussing anti-centralization bias); *id.* at 5 n.7 (discussing concern that some groups such as National Education Association opposed legislation that would permit aid to parochial schools).

42. SMOLE, *supra* note 42, at 5 n.7. This early philosophy contrasts with the accountability provisions of NCLB, which bar the receipt of federal funds by schools that do not meet its standards. 20 U.S.C. § 6311 (2006). The early failures of Congress to intervene in education are tied to the purposes of the federal aid. See Carl F. Kaestle, *Federal Aid to Education Since World War II: Purposes and Politics in THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION* 15 (Center on Education Policy ed., 2000) (“[O]pponents of federal intervention in local public schools argued that it violated a valuable tradition.”).

federal funding and did not disturb basic educational infrastructure.⁴³

Title I's specific goal was equity in education.⁴⁴ The statute financed remedial education programs.⁴⁵ The opposing factions shared recognition that providing targeted funds to schools could help to break the cycle of group poverty for economically deprived students.⁴⁶ ESEA was structured to provide financial aid to local school districts through block grants that involved guidelines for program expenditures. The question of how the federal aid was to be delivered to disadvantaged students was not perceived to be as significant as the identified need to improve basic literacy and mathematical skills.⁴⁷ The aid delivery system focused on having local school districts accurately identify their number of disadvantaged students.⁴⁸ Schools were free to choose their assessment methods for identifying and improving math and literacy instruction.⁴⁹ This delegation of responsibility to local school districts allowed them autonomy to implement programs, and encouraged research and development on the strategies needed to reach disadvantaged students.⁵⁰ Generally, federal money was used to hire teacher's aides and to create remedial "pull-out" classes for disadvantaged students.⁵¹ Despite this autonomy however, curriculum measures instituted on the whole did not raise achievement among the targeted students.⁵²

43. *Ideological Discord*, *supra* note 40, at 419.

44. *Id.*

45. *Id.*

46. *Id.* Zamora argues that Title I's implementation is flawed in part because its foundations are unsupported, if not fallacious. Those assumptions are:

(1) poverty was an inherent educational disadvantage; (2) educational underachievement had negative economic consequences; (3) this cycle could be broken through the targeted use of limited federal funds to partially counterbalance operational funding disparities between schools and income disparities in the home; (4) the curricula, pedagogy, and local expertise employed in local schools at the time were all potentially effective in improving achievement among the "educationally deprived;" (5) the needs of local school districts are coextensive with the needs of low-achieving students; and (6) equalizing educational opportunity would create increased economic opportunity.

Id. at 419-20.

47. See David K. Cohen & Susan L. Moffitt, *Title I: Politics, Poverty, [sic] and Knowledge in THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION*, *supra* note 42, at 78 ("In the 1960s it was reasonable to believe that added conventional educational resources, purchased with federal dollars, would improve education for poor children and lead them out of poverty.").

48. Nash, *supra* note 36, at 245.

49. *Id.*; see also H.R. REP. NO. 103-425, at 268 (1994) (finding that the "[u]se of low-level tests that are not aligned with schools' curricula" is inadequate in identifying information about children's achievement and progress).

50. See Nash, *supra* note 48, at 245 (noting that Title I funds were easy to administer and encouraged research and experimentation into new strategies that could address certain needs of disadvantaged students). But see Phyllis McClure, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION 9, 13 (2008) (criticizing Title I federal guidelines for allowing school districts to go on spending sprees with little federal interference).

51. James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004).

52. *Id.* at 938; see Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. REV. 517, 517-18 (1999) (critiquing the practice of ability-grouping as harmful and often a cause of

To the extent that Title I was a compromise on the issue whether the federal government should be involved in education policy, it was successful.⁵³ As the failures of the country's education system became more apparent, Title I became subject to intense criticism.⁵⁴ Evaluation of the program's effectiveness moved from a critique of its political goals to a question of whether it had in fact closed the achievement gap for poor children.⁵⁵

II. TITLE I'S ENFORCEMENT HISTORY⁵⁶

The enforcement history of Title I has three distinct phases.⁵⁷ The first phase, though initially characterized by weak federal guidelines, leniency, and abuse, was later marked by strong federal guidelines and the establishment of comparability requirements.⁵⁸ The second phase was an era of deregulation. Finally, the third and current phase includes the NCLB requirements and issues surrounding fiscal comparability. Each phase is described briefly below.

A. Phase One

Title I gave state and local school districts wide discretion in determining how to meet the statute's goals and objectives.⁵⁹ As a whole, Title I necessitates federal-local cooperation.⁶⁰ Because the ESEA was a companion statute to the Civil Rights

lower-level standards of educational programming).

53. See McClure, *supra* note 50, at 12-13 (discussing the dispute over the use of Title I funds between traditionalists and those advocates who wanted to change the education establishment). Generally, the traditionalists believed that federal guideline restrictions on state and local discretion to spend Title I funding should be removed. *Id.* at 13. Advocates on the other side wanted to concentrate funds on a limited number of students and certain project areas, and approved other specific proposals of funding. *Id.*

54. Ryan, *supra* note 51, at 937; see, e.g., MICHAEL J. PUMA ET AL., ABT ASSOCIATES., *Prospects: Final Report on Student Outcomes 1*, 7 (1997), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/0a/e8.pdf ("Chapter 1 [Title I], as it was configured at [the] time, was insufficient to close the gap in academic achievement between Chapter 1 students and their more advantaged peers."); see also Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, in *HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM 31*, 33-34 (1999) (drawing correlations between Title I spending and academic achievement).

55. E.g., PUMA, *supra* note 54, at 7 (exemplifying this criticism). See generally NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK 5* (1983), available at <http://www.ed.gov/pubs/NatAtRisk/risk.html> (evaluating the public education system in the U.S. and concluding public education at the time of the report faced a "rising tide of mediocrity").

56. The material in this Section borrows heavily from historical analysis and evaluative methodology performed by Kenneth Wong. See generally Kenneth K. Wong, *Federal Educational Policy As An Anti-Poverty Strategy*, 16 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 421, 422 (2002) (describing three phases of Title I enforcement history and the ramifications of each).

57. *Id.*

58. See McClure, *supra* note 50, at 13-14 (discussing how misuse of Title I funds led to comparability).

59. See *id.* at 12 ("The short time for the legislation's passage through Congress was devoted primarily to working out the details of the Title I formula . . . [I]ittle consideration was given [by Congress] to how the [Title I] money would be used once it arrived in local school districts.").

60. See Kimberly Jenkins Robinson, *The Case For a Collaborative Enforcement Model for a*

legislation of that era, program compliance was linked to other anti-poverty programs.⁶¹ In the early years, the federal government adopted a “hands-off” approach unless outright abuse was discovered.⁶² This also allowed for hundreds of interpretations of the statute and wide variety among implementation schemes. As a result, many of the expenditures paid for goods and services that previously had been purchased with state and local monies.⁶³

The era of leniency that gave school districts almost unfettered discretion on how funds would be spent came to an end in the late 1970s.⁶⁴ Title I became more of an evaluative program as the focus on educational achievement strengthened.⁶⁵ Initiatives during this phase focused on the quality of instruction and curriculum.⁶⁶ Comparability was also introduced as an equalizing doctrine to ensure that Title I schools were receiving equivalent services to other schools.⁶⁷ The concern that Title I funds were supplanting rather than supplementing local and state school funds resulted in more stringent regulations.⁶⁸ The comparability provision was established to end the practice of unfair school resources allocation.⁶⁹ For example, school systems in the South, which were still segregated, were known for supplanting their Title I funding instead of using the funding to supplement existing sources of funding.⁷⁰

The decisions of state and local school districts to supplant state and local expenditures with Title I funds prompted greater enforcement of Title I’s

Federal Right to Education, 40 U.C. DAVIS. L. REV. 1653, 1674-75 (2007) (finding those who constrained the federal role in education by requiring schools to separate regular education from Title I supported programs, hampered Title I implementation).

61. See *id.* at 1673-75 (describing the federal government’s historical role in education and putting the ESEA in context with the Civil Rights Act of 1964).

62. See Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution?* 80 PEABODY J. OF EDUC. 19, 23 (2005) (“An ambiguous legislative mandate meant that in the early days of Title I, there was little congressional oversight or pressure on USOE (now the U.S. Department of Education) to enforce targeting procedures that would have ensured the program had a clear categorical purpose.”).

63. See *id.* (“A comparability requirement, eventually incorporated into the statute, was designed to ensure that Title I funds for educationally disadvantaged students were used in addition to—not in lieu of—state and local funds.”).

64. McClure, *supra* note 50, at 20.

65. See McDonnell, *supra* note 62, at 25 (“[T]he terms of the national discourse shifted from educational opportunity and equity to educational excellence.”); see also *id.* (“ESEA contained unprecedented requirements for systematic evaluation of policy outcomes . . .”).

66. See McClure, *supra* note 50, at 15 (“The instructional and ancillary services provided with State and local funds for children in project areas should be comparable to those provided for children in the non-project areas, particularly with respect to class size, special services, and the number and variety of personnel.”) (quoting U.S. Commissioner of Education Harold Howe II, *Revised Criteria for the Approval of Title I ESEA, Applications from Local Educational Agencies*).

67. *Id.* at 16.

68. The Office of Education in the Department of Health, Education and Welfare, issued a June 1968 program guide that declared the practice of supplanting a violation of Title VI of the 1964 Civil Rights Act. *Id.* at 15.

69. See McDonnell, *supra* note 62, at 23 (“A comparability requirement . . . was designed to ensure that Title I funds for educationally dis-advantaged students were used in addition to – not in lieu of – state and local funds.”).

70. McClure, *supra* note 50, at 14.

comparability rules through the comparability provision and the “supplement, not supplant” regulations.⁷¹ The first phase of Title I, when viewed as a governmental program with a focused response, can be described as “intergovernmental accommodation” with laissez-faire operational methods.⁷²

Although the program had grown in size, absent from the implementation of the ESEA was a “clear definition of what constituted program effectiveness [so therefore] evidence of its positive effects on students were elusive. The implementation of the program became fragmented, partly because ESEA was enforced to varying degrees, and partly because during this phase regulation emphasized ‘fiscal accountability, not programmatic substance.’”⁷³ For the most part, decisions about the substance of educational programming were left to local districts and schools.⁷⁴ By the end of the first phase of Title I, ESEA, involved a large number of discrete, uncoordinated programs.⁷⁵

B. Phase Two

The second phase of Title I can be characterized as the time to reduce “[f]ragmentation” and the beginning of standards-based reforms.⁷⁶ The Reagan Administration determined that the better strategy and reform measure was for schools with concentrations of poor children to become more accountable.⁷⁷ Reviewing the program from a deregulation perspective, the Reagan administration attributed the statute’s ineffectiveness to an absence of national priorities.⁷⁸ The opposition to the continued re-authorization of ESEA was concerned that its duplicative programs failed to focus on the most pressing issues.⁷⁹

Deregulation also impacted the enforcement of ESEA. Specifically, under Title I, deregulation resulted in a reversal of active federal monitoring and enforcement of Title I and a relaxation of the criteria for demonstrating comparability.⁸⁰ Title I enforcement changed dramatically, requiring less-detailed

71. McDonnell, *supra* note 62, at 23 (citation omitted).

72. Wong, *supra* note 56, at 426.

73. McDonnell, *supra* note 62, at 24-25.

74. *Id.*

75. *Id.* at 25.

76. Wong, *supra* note 56, at 427.

77. See McDonnell, *supra* note 62, at 26-27 (supporting the proposition that the Reagan Administration wanted state and local governments to become more accountable for education within their jurisdiction).

78. *Id.*

79. Cf. Wong, *supra* note 56, at 429-432 (describing how “schoolwide” approaches focusing on curriculum and instruction combated defragmentation). Some of these components included: 1) computer-based learning; 2) coordinated and integrated curriculum with supplemental; 3) extended-day learning. *Id.* at 431-32.

80. The Reagan administration actively sought to repeal Title I or to convert it into a block grant program. See McClure, *supra* note 50, at 21 (“The Reagan administration orchestrated this reveal through the enactment of the Education Consolidation and Improvement Act of 1928, which renamed Title I as Chapter I A local educational agency was considered in compliance with the requirements under Section 1120A(c)(2)(A) of the new Act if it had filed with the state educational agency a written assurance that it had established and implemented: 1) district-wide salary schedule; 2) policy to ensure equivalence among schools in teachers, administrators, and other staff; and 3) policy to ensure

reports and a general statement of compliance assurance, which the local jurisdictions kept on file.⁸¹ School districts were not required to ensure comparability; instead, they were given flexibility in determining staffing, materials and supplies.⁸²

The debate about the locus of decision-making was revisited during this era. Determining critical education priorities and how to close the achievement gap for poor children was advanced as a local issue. The planned goal of the Reagan administration was to turn Title I into a block grant program.⁸³ Although this was the planned goal, it failed.⁸⁴ There was also the focus of pushing educational reform at the state level.⁸⁵ The plan was to allow states to determine which ESEA programs were selective with less federal intervention into how to best achieve the federal goals.⁸⁶ This decreasing program fragmentation through program consolidation was considered the better means to strengthen education in low-income communities. The oft-cited reason was that it would permit those closest to the situation to set priorities for the use of funds.⁸⁷

The later part of Phase Two saw a decided return of both the first Bush and Clinton administrations in setting a national agenda on elementary and secondary education policy. Critical of the lack of uniformity in the implementation of Title I, officials of this era emphasized the standards-based reform.⁸⁸ Policy shifted to require more school accountability to provide higher quality education, which was to be assessed by measuring student performance against standards-based outcomes.⁸⁹

Congress also began to take the failure of individual states to measure student achievement more seriously. By passing the Goals 2000: Educate America Act⁹⁰ in 1994, Congress provided federal funding to support states willing to develop more academic rigor by setting achievement standards and measuring outcomes.⁹¹ Consistent with this change in direction at the federal level, the Department of Education was tasked with reviewing the process for developing state standards and

equivalence among schools in the provision of curriculum, materials, and instructional supplies.”).

81. *Id.*

82. Wong, *supra* note 56, at 431.

83. McClure, *supra* note 50, at 21.

84. *Id.*

85. Marshall S. Smith, Jessica Levin, and Joanne E. Cianci, *Beyond a Legislative Agenda: Education Policy Approaches of the Clinton Administration*, 11 *EDU. POL'Y* 209, 210-11 (1997).

86. Wong, *supra* note 56, at 427-32.

87. *Id.* at 431.

88. For example, in the late 1980s, the National Governors Association, chaired by then-Arkansas Governor Bill Clinton, proposed that states would relax regulation on local school districts if the school districts would implement “greater local accountability for effective student learning, as measured largely by improved scores on standardized tests.” McDonnell, *supra* note 62, at 29.

89. See McDonnell, *supra* note 62, at 29 (explaining that “[t]he Clinton administration was also a strong proponent of standards-based reforms that were premised on the notion that setting high academic standards and then expecting schools to teach and students to learn to those standards could serve as a potent level to improve overall educational quality”).

90. Goals 2000: Educate America Act, Pub. L. No. 103-227, § 20, 108 Stat. 125 (1994).

91. McDonnell, *supra* note 62, at 29.

assessments.⁹²

C. Phase Three

NCLB is the third phase of Title I's history.⁹³ This phase can be characterized properly as the achievement outcome stage of Title I's development.⁹⁴ The controversial federal statute expanded the role of the federal government in public K-12 education.⁹⁵ NCLB implements academic standards, sets achievement targets, measures student progress, and impose stringent penalties for schools that do not fall into compliance.⁹⁶

NCLB sets detailed obligations that states and districts must comply with in order to receive Title I funds.⁹⁷ The statute blends local autonomy with federal objectives and requirements. NCLB requires that all students be tested for educational achievement and requires states to make educational plans that incorporate standardized testing, reporting of results, and accountability among schools and districts that fail to obtain the performance standards.⁹⁸

Under NCLB, each state must submit an education plan to the U.S. Department of Education.⁹⁹ These plans must include general academic standards¹⁰⁰ and specific standards for math, reading, and science.¹⁰¹

Perhaps the most significant provision of NCLB is the accountability system that states must now implement.¹⁰² The statute requires public schools following the plan to make "adequate yearly progress" (AYP).¹⁰³ "Additionally, AYP includes a standard of continuous and substantial [academic] improvement."¹⁰⁴ This requirement means that states must ensure that all students are in compliance with the established standards.¹⁰⁵ There are also specific goals for sub-groups of minorities, the economically disadvantaged, the disabled, and students with limited

92. Gary Orfield, Introduction to Gail L. Sunderman & Jimmy Kim, *INSPIRING VISION, DISAPPOINTING RESULTS: FOUR STUDIES ON IMPLEMENTING THE NO CHILD LEFT BEHIND ACT 1, 1* (2004) available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b8/88.pdf.

93. McDonnell, *supra* note 63, at 33.

94. See Orfield, *supra* note 92, at 4 (stating that NCLB places great emphasis on outcomes, like student proficiency).

95. *Id.*

96. *Id.* at 1.

97. Orfield, *supra* note 92, at 1-2. The stated purpose of the NCLB is to ensure that "all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301.

98. 20 U.S.C. §§ 6311(b)(1)(A)-(C).

99. *Id.* § 6311(a).

100. *Id.* § 6311(b)(1)(A).

101. *Id.* § 6311(b)(1)(C).

102. See *id.* § 6311(b)(2) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all . . . schools make adequate yearly progress.").

103. *Id.* §§ 6311(b)(2)(B), (C).

104. 20 U.S.C. § 6311(b)(2)(C)(v).

105. *Id.* §§ 6311(b)(2)(C)(iv), (v).

English proficiency.¹⁰⁶ In these sub-groups, all students must meet performance goals based on prior progress and as required by the provisions set forth in the statute.¹⁰⁷ Schools that fail to make the AYP for two consecutive years are identified as in need of “school improvement.”¹⁰⁸ In a decided change from prior Title I programs, NCLB provides penalties ranging from mild to severe for schools that are out of compliance.¹⁰⁹

While NCLB has received praise, it has also received harsh criticism.¹¹⁰ Criticisms have come from every affected constituency—state legislators, local and state school administrators, teachers and parents.¹¹¹ The criticisms have concerned unilateralism, funding, accountability and pedagogy.¹¹²

Administrators and educators view the statutes as unilateral mandates of assessment methods, which some educators view as unsound and inadequate measures of student performance.¹¹³ There has also been criticism from states, alleging that funds are not available as they should be under the Act to assist them, in attaining the required assessments.¹¹⁴ States having to implement the statutes complain about the costs of implementation.¹¹⁵ This criticism labels NCLB as an “unfunded mandate.”¹¹⁶ NCLB has also been criticized because of a lack of authorized funds.¹¹⁷ Although Congress authorized grants that can total more than twenty-five billion dollars by fiscal year 2007, the actual amount of funds made available to school districts was less.¹¹⁸

As for accountability, it is unclear if the authorized funds are properly used under Title I.¹¹⁹ Whether federal officials monitor states effectively as a condition

106. *Id.* § 6311(b)(2)(C)(v)(II).

107. *Id.* § 6311(b)(2)(I). Additionally, NCLB requires that ninety-five percent of students in each subgroup take the assessment. *Id.* § 6311(b)(2)(I)(ii). It also requires each state to distribute the results of the assessments by creating a report card for each school in every district, broken down by individual subgroups. *Id.* § 6311(b)(10).

108. 20 U.S.C. § 6316(b)(1)(A).

109. *Id.* § 6316 (b)(7)(C)(iv), § 6316(b)(8)(B); *see also* Orfield, *supra* note 92, at 7 (stating two required sanctions for schools that are classified as “in need of improvement”).

110. Orfield, *supra* note 92, at 2.

111. Daniel, *supra* note 18, at 810; Michael Heise, *The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119, 123-32 (2007) (describing legal and policy resistance and consequences to NCLB); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933 (2004) (noting how NCLB has been “condemned” by some in the media and in the education journals).

112. Heise, *supra* note 111, at 123-32; Ryan, *supra* note 111, at 962-63.

113. Daniel, *supra* note 111, at 792 (citation omitted) (providing an example that “some states are permitted to change how they evaluate [student] performance for accountability purposes”).

114. Umpstead, *supra* note 30, at 223.

115. *Id.* at 223.

116. *Id.* at 194; *see* Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 11 n.65 (2008) (explaining how NCLB “operates by command,” and observing that NCLB receives much criticism for lack of funding while subjecting schools to strict sanctions if they are unable to accomplish the goals of the statute).

117. Umpstead, *supra* note, 114 at 193-94.

118. *Id.* at 201-02.

119. Daniel, *supra* note 18, at 798-99.

of receiving the funds is unclear. There are also concerns that the failure of the regulatory structure to analyze and evaluate graduation rates undercuts the entire objective of the legislation.¹²⁰ Finally, to the extent that the statute focuses on student assessment and ties performance and funding to school passage rates, there is a question of whether teachers are using sound pedagogy and effective teaching techniques in the classroom.

D. Current Implementation of Title I

Title I's hallmark is the flexibility that local school officials have in delivering services to individual schools. Title I imposes upon recipients fiscal accountability measures that are intended to police the delivery of funds and services. A concern is that Title I funds will not be substituted for the state and local funding.

One of the fiscal requirements of Title I is "[c]omparability of services."¹²¹ Demonstrating comparability is an annual prerequisite to receiving the annual Title I funds.¹²² A local school district may receive Title I funds only if it uses state and local funds to provide services to Title I schools that are, when taken as a whole, at least comparable to the services that are provided in schools that are not receiving Title I funds.¹²³ If the local school district gives all of its schools Title I funds, that district must use state and local funds to provide services that, taken as a whole, are substantially comparable in each Title I school.¹²⁴

Local school districts meet the comparability requirement by filing a written assurance with the appropriate state body informing the body that it has that it has established and implemented the following: (1) a district-wide salary schedule; (2) a policy to ensure equivalence among schools in teachers, administrators, and other staff; and (3) "a policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies."¹²⁵ A school district may also meet the comparability requirement by establishing and implementing other measures for determining compliance.¹²⁶ The most common way to demonstrate comparability is through staff/student ratio or salary/student ratio.¹²⁷

The principal reason for the comparability requirements is ensuring that states are not using federal funds to fill ordinary budgetary gaps.¹²⁸ If left unrestrained,

120. *Id.* at 803.

121. No Child Left Behind Act of 2001, 20 U.S.C. § 6321(c) (2002).

122. *Id.* § 6321(c)(1)(A).

123. *Id.*

124. *Id.* § 6321(c)(1)(B).

125. *Id.* § 6321(c)(2)(A).

126. *See id.* § 6312(c)(1)(M) (allowing the use of other measures for determining student academic assessment).

127. Each local educational agency (LEA) must develop procedures for complying with the comparability requirements. 20 U.S.C. § 6321(c)(3)(A). The compliance plan should be in writing and include: a timeline for demonstrating comparability; identification of the office responsible for making comparability calculations, the measure and process used to determine whether schools are comparable; and how and when the LEA makes adjustments in schools that are not comparable. *Id.* § 6314(b)(2). The LEA must maintain documentation to support the calculations, and documentation to demonstrate that any needed adjustments to staff assignments are made. *Id.* § 6321(c)(3)(b).

128. Ctr. for Am. Progress Report, *supra* note 24, at 13-14.

local and state school districts might substitute federal funds for state and local funds throughout the school district and thus reallocate resources away from Title I eligible students.¹²⁹

The comparability requirement is evaluated at the school level because it seeks to weigh the services provided in Title I schools with those provided in non-Title I schools. To ensure that states recognize their fiscal partnership with the federal government, states are required to maintain ninety percent of its aggregate state and local funding for the previous year as a condition of receiving the Title I money.¹³⁰

Another fiscal requirement of Title I is the “supplement not supplant” provision.¹³¹ Federal and state officials admit that the current “supplement not supplant” provisions are difficult to understand and apply.¹³² The “supplement not supplant” provision is applied differently depending on how Title I services are applied.¹³³ It is applied directly to the program, or the student in targeted assistance programs, to ensure that more services are being provided for a Title I child than non-Title I child; or it is applied to the school if it operates a school-wide program.¹³⁴ The most important consideration is that school districts prioritize the use of the federal funds within the local school area so that schools with the highest concentrations of poverty receive appropriate funding.¹³⁵

As the use of Title I funding has evolved and Congress has created more flexibility in the way that program funds are used, an unintended consequence has been inadequate monitoring of state and local use of funds. This problem is alleviated whenever the funds are used for targeted assistance programs.¹³⁶ When Title I funds are used not for targeted assistance, but instead for school-wide programs, Title I money can be combined with other funds.¹³⁷ The difficulty with this particular rule is two-fold. First, it is difficult to determine if the local school district would have allocated the funds it uses for the Title I program if the federal funds were not available.¹³⁸ Second, in school wide programs where federal, state,

129. See *id.* at 14 (providing example of a former racially segregated school district that used Title I funds for significant physical improvements to predominantly black schools, but used local funds for the same improvements in predominantly white schools).

130. 20 U.S.C. § 6332(c)(1)(B).

131. *Id.* § 6321(b)(1).

132. *Id.* § 649(a)(2)(A).

133. See *id.* § 6321(b) (“A State educational agency or local education agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this party, and not to supplant such funds.”).

134. *Id.* § 6303(c).

135. *Id.*

136. Targeted funds and services are when Title I funds are used specifically for teachers and materials to use for students who meet the Title I eligibility guidelines. *Id.* § 6315(a).

137. According to the GAO Report from 2002, before NCLB was passed, schools could operate school-wide programs using a combination of Title I and other funds if seventy-five percent or more of their student population was Title I eligible. GAO TITLE I FUNDING, *supra* note 26, at 9. NCLB has lowered that threshold to forty percent or more. 20 U.S.C. § 6314(a).

138. The GAO study found that school districts have a lot of flexibility in the use of Title I funds received and also noted the use over half of the districts reserved some portion of their Title I funds for administration or other district activities. GAO TITLE I FUNDING, *supra* note 26, at 19-21.

and local funds are pooled or where district-wide school reforms have been implemented and programs have changed from year to year, it is difficult to compare funding.¹³⁹ Moreover, it is unclear whether school districts are thoroughly familiar with these limitations.¹⁴⁰

It is ironic that comparability and “supplement not supplant” are intended to serve as fiscal accountability provisions for Title I funding, because neither works effectively. Both provisions are intended to limit the extent to which grantees can use federal funds to replace their own funds. Yet, one of the key findings of the GAO Report was that both the monitoring guidelines and actual practices are so poor that school districts misinterpreted that there were separate requirements that should be both monitored, and reported being in compliance with both requirements even if they were only monitoring and auditing one of them.¹⁴¹ The auditing and monitoring functions must be greatly enhanced so that there can be fiscal balance.

III. THE FEDERAL ROLE IN EDUCATION FUNDING

From their beginnings, Title I and ESEA embodied a political struggle over federalism. The struggle for control in this context is the basic one faced over and over in our democracy on so many issues: namely, whether decisions about education should be made at the state or federal level.

A. Cooperative Federalism

In the United States, we have a federalist system of shared government. The Founding Fathers envisioned several benefits to the division of political power. Federalism balances political power in our country.¹⁴² To maintain this balance, Congress must only act within its delineated powers, thereby refraining from encroachment on the areas under the control of the states. The compromise position for this is cooperative federalism. Cooperative federalism is a system of shared governance in which national, state, and local governments interact cooperatively and collectively to solve common problems.¹⁴³ It is efficient because, rather than making policies separately, state and local governments take the lead from the federal government on the particular project.

The federal approach to education funding embraces cooperative federalism by making funds available to local school districts which then choose how to spend

139. NCLB does not require schools using Title I funds for school-wide programs to maintain records identifying the each fund is used. 20 U.S.C. § 6314(a)(3)(C).

140. The GAO study found that in the states reviewed for compliance with the supplement requirements there was limited program monitoring covering only a portion of local education agencies in any given year. GAO TITLE I FUNDING, *supra* note 26, at 19.

141. *Id.* at 19.

142. Leonardo Rago, National Constitutional Center, *A Founding Father's Dictionary*, in FEDERAL EMPLOYEE'S TOOLKIT 5, 6 (2005), available at http://constitutioncenter.org/Files/fed_toolkit.pdf.

143. Philip J. Weisner, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 728-29 (2003).

them.¹⁴⁴ Title I funding was conceived as a program of cooperative federalism. It represents comprehensive federal educational funding with overarching federal policies and objectives rather than specific mandates and goals.¹⁴⁵ With students as the recipients of the federal funds, state and local school districts serve either as conduits or barriers to the receipt of those funds.¹⁴⁶

A cooperative federalism program, admittedly, is an attempt at nationalization of the subject area. Yet, the choice of the Congressional directive in distributing the funds affects the effectiveness of the program. If Congress chooses to deliver the nationalized program by providing significant funds, there are mandatory regulations that recipients must follow or risk losing that federal funding.¹⁴⁷

Cooperative federalism has been roundly criticized because federal funding often separates program design from its implementation.¹⁴⁸ To the extent that states are given the freedom to implement national programs and objectives, even when there is prior approval of the state's plan as in the case of Title I, there is an inherent inconsistency and incoherence in the interpretation of the federal objectives.¹⁴⁹ Whether there can even be administrative effectiveness and how it can be achieved is an issue worthy of consideration.¹⁵⁰

In cooperative federalism, there is a delicate balance between supporting the state and local government and federal preemption over state and local matters. It is indisputable that education plays a critical function in our country. In some respects, the real question is whether education preparedness is a national issue. Although Title I's ideology was born of compromise, its present configuration clearly gives states a non-negotiable posture that they must adopt or refuse all funding.¹⁵¹ While the localism argument often pins its rationale on states as laboratories for experimentation, a close examination of the present statutory requirements indicates that that little if any of the flexibility and competition that are expected under that principle have been preserved under NCLB: centralized education policy.

A searching analysis reveals that although NCLB mandates that states develop their own education plans, those plans are effectively governed at the federal level by the statute's requirements and penalties. The states's policy choices are actually governed by the receipt of federal dollars. It is apparent that the level of federal

144. See Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 GA. L. REV. 1, 47 (1999) (discussing framework of Title I funding).

145. GAO TITLE I FUNDING, *supra* note 25, at 4-5.

146. Zamora, *supra* note 40, at 426.

147. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987) (discussing constitutionality of requirements for states accepting federal monies).

148. MICHAEL S. GREVE, *BIG GOVERNMENT FEDERALISM 2* (2001), available at <http://federalismproject.org/depository/FederalistOutlook5.pdf>.

149. *Id.* at 3 ("Cooperative programs and expenditures roughly tripled between 1960 and 1980.")

150. "Cooperative federalism thereby undermines political accountability. In the end, 'no one is truly responsible,' and 'everyone is responsible for everything.'" *Id.* at 2 (quoting ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, AN AGENDA FOR AMERICAN FEDERALISM: RESTORING COMPETENCE AND CONFIDENCE 95* (1981), available at <http://www.library.unt.edu/gpo/acir/Reports/policy/a-86.pdf>).

151. See McDonnell, *supra* note 62, at 21-22 (discussing the nature of federal conditional spending).

education funding authorized under ESEA is consistent with the New Deal legislation which sought to unify the nation through uniform and reciprocal laws and regulations.¹⁵² Cooperative federalism can allow states to take less initiative and responsibility for the particular program. If the state only complies with the federal program guidelines, that state gives up its interest or claim over the subject matter. As a result, the state's interest is subsumed by the federal government.

To ensure the success of NCLB, the federally funded program must become more transparent and accountable. Exercising the shared responsibility in a way that is conducive to the proper fund allocation and monitoring by the federal government is the only way to preserve elementary and secondary education as a non-federal issue.

IV. EDUCATION FUNDING AND FEDERALISM

The federal government's role in education has evolved from the Founding Fathers' insistence that the states provide free, public education to the present standards-based movement that NCLB represents. Examination of this history is critical to understanding how federal policy through federal funding has come to dominate state and local control over education.

A. The Gradual Increase of the Federal Role in Education

Exclusive state authority over public education was unchallenged prior to the New Deal era.¹⁵³ The federal government historically exercised no jurisdiction in that area.¹⁵⁴ One interpretation of the Constitution limits Congressional authority to only its enumerated powers. The rationale behind this line of thought is that the Tenth Amendment barred legislation regarding public education because it was not an enumerated power.¹⁵⁵ What the Framers made clear, however, was that an educated citizenry is vital for a democratic society and that the states ought to fund such a function.¹⁵⁶

The "New Deal Supreme Court" found adequate justification for the federal government to legislate in areas traditionally left to the states.¹⁵⁷ This had the concomitant effect of allowing more federal involvement in public education. While the initial involvement was slow, a series of national events served as an

152. Scheiber, *supra* note 38, at 254-55.

153. Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 208-210 (2009) (discussing the federal government's role in requiring states to create and maintain public education systems during the nation's early years).

154. See *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.").

155. U.S. CONST. amend. X.

156. See Thomas Jefferson, Panel Three on The Jefferson Memorial, <http://www.monticello.org/ports/quotes/memorial.html> (last visited Nov. 11, 2009) ("Establish a law for educating the common people. This it is the business of the state and on a general plan.").

157. See Scheiber, *supra* note 38, at 258-59 (describing the New Deal's expansion of federal powers including agriculture, welfare, and social security).

impetus for a national movement of educational equity and excellence.¹⁵⁸

B. The Modern Federal Role in Education Funding

The role that government should play in education funding was squarely faced in *San Antonio Independent School District v. Rodriguez*.¹⁵⁹ That case involved claims of inequitable funding and challenged the practice of relying on property taxes for school financing.¹⁶⁰ The Supreme Court determined that there is no right to education and denied the plaintiffs the requested relief for unequal education opportunities.¹⁶¹

The Court's reasoning was premised on the limits of its enforcement over state and local governments on issues involving non-fundamental rights.¹⁶² The Court acknowledged the scope of the problem by indicating that uniformity in funding and other educational reforms should come from the legislative branch.¹⁶³

Expansive oversight under NCLB seems like the type of legislative action the Court was referring to in *Rodriguez*. In this regard, NCLB is consistent with ESEA, as its intent is to equalize educational funding. It seems obvious Congress has given the U.S. Department of Education the authority to enforce Title I, but the Department has chosen not to conduct the necessary audits or look more closely at audit systems that do not work properly. The lack of adequate enforcement by the U.S. Department of Education of Title I requirements has hindered appropriate implementation.¹⁶⁴ One possible, although hardly justifiable, explanation regarding lax enforcement is that the Department of Education now has a culture of non-enforcement.¹⁶⁵ The history of weak enforcement which began with Congress's inadequate delegation of enforcement authority to the agency, has created a pattern and practice of non-enforcement of violations.¹⁶⁶

ESEA's contorted history and weak initial implementation have contributed greatly to ineffective enforcement and inequitable funding. The comparability provision extends beyond the use of federal dollars by forcing equitable distributions of state and local funds before federal funds are added to school budgets.¹⁶⁷ Federal lawmakers wanted to ensure that Title I-eligible children and

158. See Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1002-03 (2001) (discussing the effect of Russia's launching of the satellite Sputnik on mathematics and science education in the U.S.); see also Robert B. Keiter, *Judicial Review Of Student First Amendment Claims: Assessing The Legitimacy-Competency Debate*, 50 MO. L. REV. 25, 57 (1985) (discussing the role of the federal government in desegregating public schools following the Supreme Court's ruling in *Brown*).

159. 411 U.S. 1 (1973).

160. *Id.* at 4-16.

161. *Id.* at 38-39.

162. *Id.* at 40-41.

163. *Id.* at 54-55.

164. McDonnell, *supra* note 62, at 23.

165. See Cohen & Moffitt, *supra* note 49, at 89 (discussing the Department of Education's need for political support from localities and states and its effects on enforcement).

166. See McDonnell, *supra* note 62, at 23 (discussing early powers of what became the U.S. Department of Education).

167. *Id.*

eligible schools received better teachers, smaller classes, more instructional time, or supplementary programs that were not generally available in the district as a whole without losing out on the standard services provided to all students in the district funding outcomes.¹⁶⁸

These difficulties lead to ineffective enforcement and continued failure to comply with the statutory mandate. The GAO finding that the Department of Education does not properly monitor the accountability and assessment requirements of Title I showed a critical flaw in the statute's efficacy.¹⁶⁹ The investigation also revealed that lax enforcement by the Department of Education has resulted in failing to institute enforcement actions when appropriate.¹⁷⁰ The report recommended additional training for the audit and oversight roles by the states and encouraged a heightened level of attention given to fiscal requirements in their monitoring efforts.¹⁷¹

It is noteworthy that Title I began as "follow the child" funding, so the delivery of the funds determine the statute's efficacy. The delivery of the funds also showed the extent of compromise at the heart of the legislation. The local school district served as a "public trustee" and the funds could go to the public or private school that the child attended.¹⁷² Now, as in the past, the federal government makes Title I awards to state departments of education.¹⁷³ Local school districts receive federal funds after submitting a program application that details how the funds will be allocated within the school district.¹⁷⁴ The awards are made based on a calculation that includes the number of children from high-poverty families that reside in the local district.¹⁷⁵ There is one other mandate worth noting: Title I funds were to "supplement, not supplant" the state funds spent on economically disadvantaged children.¹⁷⁶ Yet, "Title I funds were to be used in any manner approved by the State as long as it was spent on 'educationally deprived' children in public school areas that served at least some low-income students."¹⁷⁷

V. ENSURING FUNDING EQUITY

The current funding system is inadequate because it directs money to those children who do not need help and fails to direct the appropriate amount of money to those children who do need help. Provisions that will ensure greater fiscal equity and more investments in minority and high-poverty schools must be strengthened.

A "funding the child" approach changes the impetus of state and local schools and actually encourages minority and high-poverty student enrollment, because the

168. *Id.* at 20-21.

169. See GAO TITLE I FUNDING, *supra* note 25, at 7-10 (discussing the different oversight processes available to the Department of Education).

170. *Id.* at 15-16.

171. *Id.* at 26.

172. Zamora, *supra* note 40, at 425.

173. *Id.*

174. *Id.*

175. *Id.* at 425-26.

176. *Id.* at 426.

177. *Id.*

child brings additional financial resources. This approach also creates incentives for schools to attract and educate students from all backgrounds, not just the well-to-do. Such a system, based on these principles, would be fairer than the current system because it would ensure that the underserved child receives the intended funds.¹⁷⁸

A. Comparability as Disguised Deregulation

Equity was the essential function of the comparability requirement.¹⁷⁹ Congress recognized soon after passage of the original Title I legislation that the “supplemental” federal help would not be effective unless “the program came with a comparability requirement that stipulated that school districts must equalize educational services purchased with state and local funds before Title I funds are brought into the mix.”¹⁸⁰

Three statutory loopholes exist: teacher salary, funding equivalences, and waivers. Because of these loopholes and a generally lax enforcement mechanism, the statute’s purpose and effectiveness are often thwarted.

1. Teacher Equivalence

As originally enacted, Title I viewed instruction as significant. The law “required equivalence with regard to student-staff ratios *and* per-pupil instructional staff expenditures”¹⁸¹ Specifically, school districts must ensure that there is equivalence with respect to “teachers, administrators, and other staff” between Title

178. See THOMAS B. FORDHAM INSTITUTE, *FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE* 3 (2006), available at http://www.schoolfunding.info/resource_center/media/Fordham_FundtheChild.pdf (providing an in-depth discussion of a “fund the child” approach). This approach is beyond the scope of this Article. This approach is desirable because it provides equal educational opportunity based on the following principles:

1. Funding should follow the child, on a per-student basis, to the public school that he/she attends.
2. Per-student funding should vary according to the child’s need and other relevant circumstances.
3. It should arrive at the school as real dollars (i.e., not teaching positions, ratios, or staffing norms) that can be spent flexibly, with accountability systems focused more on results and less on inputs, programs, or activities.
4. These principles for allocating money to schools should apply to all levels (e.g., federal funds going to states, state funds going to districts, districts to schools).
5. Funding systems should be simplified and made transparent.

Id.

179. Ross Wiener, *Strengthening Comparability Advancing Equity in Public Education*, in *ENSURING EDUCATIONAL OPPORTUNITY IN PUBLIC EDUCATION HOW LOCAL SCHOOL DISTRICT PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT* 33, 35 (2008), available at <http://www.americanprogress.org/issues/2008/06/pdf/comparability.pdf>.

180. Roza, *supra* note 23, at 61.

181. Wiener, *supra* note 179, at 38 (emphasis in original). Originally, comparability “required equal pupil-teacher ratios in terms of certified teachers, other certified staff, and non-certified staff. It also required equal expenditures on instructional staff salaries (other than longevity pay) and other instructional costs.” *Id.* at 37.

I and non-Title I schools.¹⁸² This was done by requiring the Title I school to have a Title I teacher equivalence schedule.¹⁸³

Title I no longer requires school districts to individually assess and determine comparability. Instead, the law allows school districts to count paraprofessionals and teachers for instructional purpose and to ignore differences in teacher salaries across schools.¹⁸⁴ Both of these authorized actions have the effect of undermining the statute's purpose of providing high quality instruction to economically-disadvantaged children. Because semi-professionals are regarded as having the same amount of expertise as college-trained teachers and because the intra-district salary differentials are not segregated, the entire school district's Title I salary ratio can be inflated. The benefit to the school district in by doing this is that more Title I funds can be diverted from the classroom and used for other program expenditures. The result is a decrease in the amount of Title I money spent on teacher instruction which "mask[s] the potentially harmful inequities in access to qualified teachers."¹⁸⁵ More Title I funds can be diverted from instructional costs and used for other program expenditures.¹⁸⁶

2. 90 Percent Fiscal Equity

Title I does not require full fiscal equity. School districts can comply by providing comparable funding when the funding for Title I students reaches ninety percent of the expenditures for non-Title I students.¹⁸⁷ In addition, the provision limits the amount of additional state and local funds that can be provided to high-poverty, Title I schools to no more than ten percent more than the amount provided to non-Title I schools.¹⁸⁸ This means that Title I schools that have significantly smaller class sizes may be out of compliance because average expenditures are too high, although the quality of instruction may be considered necessary.¹⁸⁹ School district inefficiencies in distinguishing between targeted and non-targeted funds can result in high-poverty schools not receiving the appropriate amount of funding while subsidizing low-poverty schools.¹⁹⁰

3. Waivers

The present interpretation of comparability by the Department of Education allows waivers.¹⁹¹ Comparability waivers are, however, inapposite to the statutory scheme.¹⁹² The conditions in the state educational programs do not justify

182. *Id.* at 38.

183. *Id.*

184. *Id.* at 35, 38.

185. *Id.* at 38.

186. Wiener, *supra* note 179, at 37, 39.

187. *Id.* at 39.

188. *Id.*

189. *Id.*

190. *Id.* at 40.

191. See McClure, *supra* note 50, at 26 (discussing the Department of Education's granting of a waiver requested by the San Diego Unified School District).

192. See *id.* ("Here we have the ultimate irony The state actually acts to enforce the law. And

abandoning, temporarily waiving, or weakening the congressional intent and mandate for school comparability as a condition precedent to receipt of federal Title I education funding. The comparability waivers in effect supplant state funds without ever improving the educational conditions of poor students.

The waiver policy allows for failure to help very high-poverty students, who are the intended beneficiaries of federal funds. It is unclear how, if waivers are granted, the lost educational opportunities will be recouped. This is an especially critical point because waivers apply across the board and are available to school districts regardless of the student outcome under NCLB.¹⁹³

The law on comparability has lost most of its effectiveness due to lax enforcement.¹⁹⁴ School districts certify comparability by giving a biennial assurance to the state departments of education that Title I's requirements are being met.¹⁹⁵ There is no ongoing program oversight and no intervention if federal funds are mis-allocated after the funds have been spent.¹⁹⁶ What is actually a program of conditional funding is implemented as though it is a discretionary program. Again, the ideological compromises that surround Title I affect the program's discipline. Allowing states to decide not just the education plans but whether those plans are in compliance with the Title I guidelines undercuts the statute's effectiveness and makes compliance with the statute voluntary. What is worse, compliance is subject to pressure from interest groups or budgetary crises within the local school district or state. Also, no remedies are available until after the money has been spent.

The U.S. Department of Education, as the federal agency with jurisdiction over the process, must exercise more authority over the use of the Title I funds. Otherwise, the system of assessment contained in NCLB lacks a solid enforcement foundation.

the federal government, the supposed guarantor of Title I as a categorical program, waives comparability and Supplement/Not Supplant regulations.”).

193. See U.S. DEP'T OF EDUC., GUIDANCE ON THE STATE FISCAL STABILIZATION FUND PROGRAM 9 (2009), available at <http://www.ed.gov/programs/statestabilization/guidance.pdf> (discussing the Obama Administration's adoption of the following core principles: “making improvements in teacher effectiveness and in the equitable distribution of qualified teachers for all students, particularly students who are most in need; . . . (3) making progress toward rigorous college- and career-ready standards and high-quality assessments that are valid and reliable for all students, including limited English proficient students and students with disabilities; and (4) providing targeted, intensive support and effective interventions for the lowest-performing schools.”).

194. Wiener, *supra* note 179, at 34.

195. *Id.* at 39.

196. *Id.*

CONCLUSION

Our Nation's public school system is highly decentralized. Yet, more than ever, it is clear that education must be a national priority. Federal funding for education makes a cooperative federalism program in which the state and federal government share responsibility for the program design and policy objectives. This arrangement is a beneficial one. The benefits of strong federal funding for education will yield a more informed citizenry, and a better educated and more skilled workforce, making our country more competitive in an increasingly connected world. Although expenditures for education comprise a significant amount of federal dollars, Congress has consistently chosen not to provide strong commitments, completely fund the Nation's educational systems, or declare a right to education. Unfortunately, the costs of these deficiencies will be borne by the country as a whole.

Moreover, the current federal funding system as applied in most states is deeply inequitable and fails to direct funding so as to serve economically challenged populations. Fiscal accountability measures should be strengthened so that the fundamental flaws in the current school finance system make it impossible for the system to provide a maximum return on investment. The statute and implementing regulations should redefine the criteria used to measure comparability and the supplementation requirements. A guarantee of equal educational opportunity is not only what every child deserves, it is what America deserves.