

National Teachers' Unions and the Struggle Over School Reform



CITIZENS' COMMISSION ON
CIVIL ★ RIGHTS

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Rights

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About This Report

The Citizens' Commission on Civil Rights (CCCR) is a bipartisan organization established in 1982 to monitor the civil rights policies and practices of the federal government. This is the second of two reports. The first, *Fresh Ideas in Collective Bargaining: How New Agreements Help Kids* (2007), outlined progressive initiatives by local unions aimed at increasing student achievement. This report broadens the scope to the national level, looking at how the national unions affect federal policy.

Introduction

Over the past four decades observers and stakeholders in public education have engaged in a continuing discussion about what is needed to arrest what is perceived to be a decline in public school systems and what is required to serve the needs of disadvantaged children.

On many issues of policy the record of national teachers' unions has been clear. They have a long and honorable history of supporting an end to discrimination in education, they have argued for an end to segregation, for measures to provide equal treatment for women and girls and for assistance to students with disabilities.

But in one major area – public school reform – the record of unions is far less clear. At times, union leaders have treated the measures advocated by others to close the gaps between disadvantaged students and their more affluent peers as inimical to the interests of teachers.

And at times, the union opposition to reform has become vehement. A few years ago, the National Education Association (NEA) advised its local affiliates to negotiate the following language into new teacher contracts:

“Without the agreement of the [NEA], the Employer shall take no action to comply with [NCLB]...that has an adverse impact on any bargaining member.”¹

Whether intended or not, the statement is startling in its potential reach. The No Child Left Behind Act (NCLB) is a federal grant-in-aid law designed to improve education for disadvantaged children. If school districts or their employees “take no action to comply with NCLB” they are violating the law.

Of course, teachers' union leaders are not all of one mind on questions of reform. At the regional and local levels, some union officials have been ready to entertain proposals to base teacher pay in part on performance, a position the national unions oppose.

And of course, unions are not alone in their positions against specific reform measures. School boards, administrators, academics and others have been overtly critical of some reform proposals. But teachers and their representatives occupy a unique position. Without their acceptance of policy change, it's unlikely to occur.

Thus, the positions taken by national leaders can have a major impact on the future of reform.

In this study, the Commission seeks to set forth a full and fair explication of the words and actions of national unions over the last several years.

Our report examines and analyzes:

1. Key provisions of the law and implementing regulations and guidance. We summarize the major NCLB provisions (in current law and regulations) and leading proposals (for reauthorization) that potentially have the greatest impact on teachers' employment and working conditions. These provisions include:
 - assessment (particularly the inclusion and accommodation of English Language Learners and students with disabilities);
 - teacher quality, equitable distribution of teachers and other resources among schools and school districts;
 - identification of schools in need of improvement and corrective action; and
 - remedies (e.g., choice, Supplemental Education Services (tutoring), restructuring (e.g., closure, charter conversion)).
2. Public positions and statements. The report identifies specific positions taken by both unions (which may differ in some cases), with regard to passage of the Improving America's Schools Act in 1994; passage of the No Child Left Behind Act in 2001; their public positions and statements on the Act since 2001; and, finally, current federal policy proposals to amend the law (including their own).

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The clash between national teachers' unions and school reformers often occurs along the following lines:

- 1) establishing valid and reliable accountability and assessment systems;
- 2) "professionalization of the profession," i.e., improvement of teacher knowledge, skills, and experience, along with reform of the compensation system to establish differentials in pay based on responsibilities and performance; and
- 3) equalization in the distribution of qualified teachers.

While teachers' unions are legitimately concerned with securing fair and unbiased treatment at the hands of management, these concerns have often been translated into fierce opposition to reforms designed to hold schools and their faculties accountable for how their students perform.

This resistance has posed a barrier to improving educational opportunity for the most disadvantaged students and closing the performance gap between them and their more advantaged peers. It has also led to calcified systems in which talented people are deterred from applying or staying as teachers because they believe their skills will not be recognized or rewarded.

Background & Context

Improving America's Schools Act

Although public education is largely a state and local concern, the Fourteenth Amendment calls upon the federal government to ensure equality of educational opportunity. Guided by the Supreme Court's 1954 decision in *Brown v. Board of Education*, the national interest in education has been manifested for the past three decades primarily through the civil rights laws and through Title I of the Elementary and Secondary Education Act of 1965. While the federal share of educational expenditures is small, Title I has helped to narrow the gap in education revenue that exists between high- and low-income areas because of inequities in state school financing systems. There is also evidence that the program has been effective in teaching basic skills and in ameliorating, to a degree, the persistent achievement gaps between white and minority students.

Nevertheless, evidence drawn from schools operating under the old law (then called Chapter 1) showed that the law was not fully effective because: (1) it was designed to teach only basic, not advanced, skills; (2) it was based on and ratified low expectations of poor and minority youngsters; and (3) it isolated these youngsters from the mainstream by pulling them out of the classroom for remediation. In 1988, a new quality focus was added to the program.

In 1992 The Commission on Chapter 1, including representation from both the NEA and AFT, released *Making Schools Work for Children in Poverty*, a report that helped lay the groundwork for reauthorization.¹ In 1994, Congress completely overhauled the law in the Improving America's Schools Act (IASA), reauthorizing Chapter 1 (now Title I) for a five-year period. The IASA contained many of the major changes recommended by education and civil rights advocates to ensure that Title I and other federal funds would be used by state and local education agencies to undertake meaningful reforms that would result in substantial academic gains for poor and minority students.²

NCTAF Report

Two years after passage of IASA, a group of prominent Americans came together to grapple with what was widely acknowledged to be a missing link in the emerging school reform movement: the issue of teachers and teaching. The release of *What Matters Most: Teaching for America's Future*, by the National Commission on Teaching and America's

¹ *Making Schools Work for Children in Poverty*, Commission on Chapter 1, December 1992.

² Dianne M. Piche, *Title I in Midstream: The Fight to Improve Schools for Poor Kids*, Citizens' Commission on Civil Rights, June 1999, available at <http://www.cccr.org/doc/midstream.pdf>.

Future (NCTAF), seemed to signal an emerging national consensus on the importance of teachers to meaningful education reform.³

The report was supported by an influential group of policymakers across the political spectrum. Notable among them were former National Education Association (NEA) President Keith Geiger, and former American Federation of Teachers (AFT) President Albert Shanker. Neither's involvement was surprising, given the focus of the report on teachers: In the words of the report; "On the whole, the school reform movement has ignored the obvious: What teachers know and can do makes the crucial difference in what children learn."⁴

The report called for serious, far-reaching changes in the education system. By signing onto it, the NEA and AFT, as represented by Geiger and Shanker, backed: "A dramatic departure from the status quo—one that creates a new infrastructure for professional learning and an accountability system that ensures attention to standards for educators as well as students at every level—national, state, local school district, school, and classroom."

The National Commission laid out three straightforward premises:

1. What teachers know and can do is the most important influence on what students learn.
2. Recruiting, preparing, and retaining good teachers is the central strategy for improving our schools.
3. School reform cannot succeed unless it focuses on creating the conditions in which teachers can teach, and teach well.

The report's authors publicly stated their commitment to addressing these issues. "Within a decade—by the year 2006—we will provide every student in America with what should be his or her educational birthright: access to competent, caring, qualified teaching in schools organized for success."

Twelve years later, in 2008, the children who were in kindergarten when *What Matters Most* was written should have been graduating from high school. Some have graduated - but others have dropped out, failed to obtain a regular high school diploma because they were erroneously placed in special education programs, were treated as uneducable, or did not receive the education needed to pass an exit exam. And these negative consequences are much more likely to have been visited on students who are black, Hispanic, and/or poor.⁵ According to *Diplomas Count 2008*, only 70% of the students

³ NCTAF's Chair was then-Governor of North Carolina, James B. Hunt, Jr., and the Executive Director was Linda Darling-Hammond.

⁴ *What Matters Most: Teaching for America's Future*, National Commission on Teaching and America's Future, September 1996, p.5 available at <http://www.nctaf.org/documents/WhatMattersMost.pdf>.

⁵ Christopher Swanson, *Cities in Crisis*, (Education Alliance, 2008) available at

who started 9th grade in 2004 were expected to graduate on time with their peers in 2008. In real numbers this means that approximately 1.23 million students will be non-graduates in 2008. Disaggregated, the story gets even worse, with only 55% of black and 57% of Hispanics graduating on time.⁶

Twelve years – the entire length of a child’s education – is a long time.

Yet twelve years later, few of the necessary reforms to reach these goals are in place.

In many cases they have been resisted by teachers’ unions – groups that seemed supportive of change in 1996. While union efforts are not the only obstacle to implementing sensible education reform with broad political support, *they have been an important part of the active resistance to efforts they once supported.*

Much of the criticism of teachers’ unions has come from the political right. However, more telling, instructive, and powerful are the criticisms of the NEA and the AFT that have come from within. As early as 1994, Billy Boyton and John Lloyd, former top officers respectively of the Nebraska and Kansas NEA affiliates spoke out: “The NEA has been the single biggest obstacle to education reform in this country. We know because we worked for the NEA.”⁷

Boyton and Lloyd were not alone. Mark Simon and Naomi Baden, both of whom have long histories as NEA activists and who are now Co-Directors of the Tom Mooney Institute, an effort from by members of teachers’ unions to support progressive teacher unionists, echo this criticism in a more restrained way:

"Whatever the merits or shortcomings of the federal No Child Left Behind Act, or the reasons behind the resentment it has generated among teachers, the public perception of teachers’ unions has suffered: They have come to be seen as the "just say no" organizations."

"Either the new presidents of the NEA and the AFT will lead with a bold vision, inspiring the next generation of local leaders to navigate the complicated education reform landscape and champion creative solutions to school improvement that speak to the concerns of the younger and the most accomplished teachers, or the unions will remain

http://www.americaspromise.org/uploadedFiles/AmericasPromiseAlliance/Dropout_Crisis/SWANSONCitesInCrisis040108.pdf.

⁶ Editorial Projects in Education Resource Center, *Diplomas Count 2008*, available at www.edweek.org/go/dc08.

⁷ Research & Strategic Services: Lessons From California. Luntz Weber, Educational Freedom, Vol. 27, No. 2 (Spring-Summer, 1994)

on the periphery of what is important to those members and to the public." ⁸

As noted on p. 6, this report examines the role of teachers' unions in seeking to oppose or limit three specific types of reform, each of which would contribute to providing all communities with skilled teachers capable of ensuring that all children can learn. These reforms, all of which have been embedded in the federal Elementary and Secondary Education Act (ESEA) since 1994, are:

- 1) establishing valid and reliable accountability and assessment systems;
- 2) "professionalization of the profession," i.e., improvement of teacher knowledge, skills, and experience, along with reform of the compensation system; and
- 3) equalization in the distribution of qualified teachers.

In each of these areas, teachers' unions profess to put students first – but often act in ways that subordinate their interests. While the unions state agreement with the goals, they work to oppose specific reform in the political process and the classroom.

According to David Kilpatrick, who spent more than a dozen years as a top officer and staffer of affiliates of the NEA and the AFT,

"The unions do everything possible to maintain [the status quo]...They invariably call for variations of the status quo, more of the same, rather than reforms that mean real changes. Not coincidentally they also almost uniformly call for the spending of more money and the creation of more teaching positions which, of course, result in an increase in union membership, union income and union power."⁹

The two unions are not the same. As will be demonstrated, the AFT has supported some aspects of education reform, while the NEA has opposed nearly every proposed change. However, on many important issues the two unions have joined together to oppose reform.

⁸ Mark Simon and Naomi Baden, *The Power of Progressive Thinking*, Education Week, January 30, 2008, available at <http://www.edweek.org/ew/articles/2008/01/30/21simon.h27.html>.

⁹ David W. Kilpatrick, *Teacher Unions and Educational Reform*, Government Union Review, Vol. 19 No. 2, available at http://www.adti.net/education/govUnionRevteacherunions_dkirkpatrick00.html.

Undermining Accountability and Assessment

Accountability for academic progress is for many educators the watchword of school reform. In the 1994 Improving America's Schools Act, Congress emphasized accountability as a key component of reform, and continued that focus in 2001's No Child Left Behind Act.

In the 1994 law, Congress made the key finding that all children can learn: "All children can master challenging content and complex problem-solving skills. Research clearly shows that children, including low-achieving children, can succeed when expectations are high and all children are given the opportunity to learn challenging material."¹⁰

It therefore followed logically that educators should be held accountable for their impact on the progress of students. The building block of determining the educational progress of students – and of a teacher's impact on that progress – is a system of strong standards and assessments.

Standing for Standards

Given their support for the 1996 report one might have expected that unions would play a lead role in the effort to put such standards and assessments in place. In 1996, the NCTAF report stated unequivocally that standards were key to reform:

"This Commission is convinced that common agreement on what students should know and be able to do is long overdue. Without publicly established standards for content and performance grounded in high expectations for learning, we will continue what we have now—an unacknowledged national curriculum, predicated on low expectations, unaligned with our needs, and developed without public oversight by publishers and test-makers."

Even earlier, in 1992, then-AFT President Shanker, "urged states to learn from other high achieving countries and set high and rigorous standards for all children and do what was necessary to make sure that they all had an opportunity to achieve them."¹¹ In 1995, the AFT began tracking state efforts to develop standards and implement standards-based reform, and continued to advocate for standards throughout the 1990s.

"The American Federation of Teachers believes that the success of school reforms in the states depends in large part

¹⁰ Improving America's Schools Act of 1994, Sec. 1001(c)(1), *available at* <http://www.ed.gov/legislation/ESEA/sec1001.html>.

¹¹ AFT, *Making Standards Matter: An Update on State Activity*, Educational Issues Policy Brief Number 11, November 1999, *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/fb/4e.pdf.

on the quality of the academic standards states set for children and on how seriously those standards are taken by everyone connected with the schools.”¹²

In 2001, when the No Child Left Behind Act of 2001 included a requirement for all states to build out their standards systems to grades 3 through 8, and high school, neither the AFT or the NEA went on record opposing the law. In fact, the NEA applauded the law’s support for “NEA’s core priorities of student achievement and teacher quality.”¹³

Then-AFT President Sandra Feldman warned delegates against opposition to reform and said that it is the union’s duty to make sure the law is implemented positively.¹⁴

Yet both unions have assiduously fought to block the law’s implementation.

‘Averse to Change’

Interviews by an Education Week reporter with Hill aides, lobbyists, and public policy experts revealed a widespread perception that the unions were averse to change in many instances and unwilling to offer meaningful alternatives. As one unnamed Democratic aide put it: “Americans were crying for education reform, and both the White House and Congress meant to deliver— with or without the help of the unions.”¹⁵

These perceptions were based on specific union actions.

The NEA hit the ground running against the law’s implementation, seeking to “protect” teachers from the use of assessments to evaluate their work: “In 2002, the NEA resolved that “standardized tests and assessments should be used only to improve the quality of instruction,” not used for any type of accountability.”¹⁶

According to the reform organization Education Sector, the NEA spent more than \$8 million between 2002 and 2006 “in a stealth campaign” against NCLB, “paying for research and political opposition in an effort to derail it.”¹⁷

At the same time it was supporting this campaign, the NEA publicly touted its “Great Public Schools for Every Child” campaign, which seemed to advocate the same principles as NCLB. This campaign was designed to:

¹² AFT, *supra* note 7.

¹³ Congress Passes Sweeping Education Law, NEA Today, March 2002.

¹⁴ Julie Blair, *The Reporter’s Notebook – AFT Opens Political War Chest for State Affiliates*, Education Week, August 7, 2002, available at <http://www.edweek.org/ew/articles/2002/08/07/43aftnote.h21.html>.

¹⁵ Julie Blair, *Unions Position Unheeded on ESEA*, Education Week, November 6, 2002, available at <http://www.edweek.org/ew/articles/2002/11/06/10esea.h22.html>.

¹⁶ NEA Today, The NEA Representative Assembly, Sept. 2002.

¹⁷ Greg Toppo, *Report: NEA Pays opponents of No Child Left Behind Law*, USA Today, July 10, 2006, available at http://www.usatoday.com/news/education/2006-07-10-nea-no-child_x.htm.

- “Support common sense standards and accountability as well as adequate and equitable funding and resources for public schools;
- Encourage districts to help close the achievement gap by investing in public schools and holding teachers, administrators, parents, students, and elected officials responsible for the success of our children and our schools;
- Encourage states and districts to take the lead in setting and implementing high standards to ensure student success; and
- Support multiple measures of student success that help prepare students for work and life.”¹⁸

Yet more privately, NEA was advising its local affiliates how to fight against these very principles by noncompliance.¹⁹

The AFT at first maintained its official position in support of the law by blaming the US Department of Education, arguing that the problem lay in poor implementation by the Department.²⁰

Taking a page from the NEA’s book, the AFT became more vocally critical of the law over time. In 2006 (after the death of Sandra Feldman), then-AFT President Ed McElroy testified that “state tests should be aligned with curriculum – if you’re going to judge schools on tests scores then the test should measure what’s being taught.”²¹ Like the NEA, McElroy was arguing that tests should be aligned to what was being taught in the classroom, rather than the standards states had developed.

In 2007, the NEA abandoned all pretense of support for the law. The NEA annual convention in 2007 asked teachers to document consequences of the law and promoted their view of the “negative aspects” of the law, despite calls for moderation and rational thinking from NEA members. “NEA has immense problems with NCLB,” said Robert H. Chanin, the chief counsel for the 2.7 million-member union. “At this convention, I think any pretense of support has been swept away.”²²

When the US Department of Education (DOE) created a flexible pilot program, the “growth model,” to address some of the unions’ criticisms by basing adequate yearly progress on growth attained by individual students within a school year instead of relying exclusively on grade comparisons, both unions assailed the new program.

¹⁸ NEA ESEA Bargaining & Local Policy Guide, 2003

¹⁹ NEA, *supra* note 16.

²⁰ Julie Blair, *supra* note 9.

²¹ Edward McElroy, AFT President, Testimony Before the Commission on No Child Left Behind, Washington, DC, September 25, 2006.

²² Bess Keller, *supra* note 15.

The NEA:

- Criticized the draft growth model and multiple measures as inadequate, saying even more flexibility was needed beyond what the reauthorization draft included.²³
- Worked to water down accountability, calling the law's interpretation "still overly restrictive and prescriptive in the authority provided to states and school districts in designing their accountability plans and procedures, and still overly focused on measuring schools based on two test scores."²⁴
- Called for accountability models in which any student progress, no matter how little, would be counted: "growth models... should allow for a broader range of options in addition to this trajectory model, and give schools credit for students' improvement on all points of the achievement scale."²⁵
- Opposed using a common, national set of requirements for growth models in favor of state peer panels.²⁶

Likewise, the AFT:

- Critiqued DOE's definition of growth as "too narrow." "Schools should be able to use a variety of proposals and those schools farthest behind that are making progress should be recognized."²⁷
- Objected that the growth model AFT had championed to be included in the law failed to capture student gains.²⁸
- Advocated for states that do not have the means to measure individual student progress to nonetheless use growth models, choosing other types of growth models that are "fair and accurate, set achievable growth standards, and help schools demonstrate that they are making progress, including those that do not have the capacity to measure individual student progress and therefore cannot implement a growth model."²⁹

²³ Reg Weaver, NEA President, Testimony Before House Education and Labor Committee, September 10, 2007.

²⁴ Diane Shust and Joel Packer, NEA Letter to G. Miller, H.B. McKeon, D. Kildee, M. Castle, *Title I Comments to Congress*, September 5, 2007.

²⁵ Shust and Packer, *supra* note 18. Under the "trajectory model," schools and LEAs could count students performing below par to be treated as meeting the goal if they were "on a trajectory" to meeting it.

²⁶ NEA's Top Legislative Priorities for ESEA, NEA, March 21, 2007, available at <http://www.nea.org/eSEA/legpriorities.html>

²⁷ Edward McElroy, AFT President, Testimony Before the Senate Committee on Health, Education, Labor and Pensions, March 13, 2007.

²⁸ Antonia Cortese, AFT Vice President, Testimony Before the U.S. House of Representatives Committee on Education and Labor, Sept. 10, 2007.

²⁹ Kristor W. Cowan, AFT Letter to G. Miller and H.B. McKeon, *Title I Comments*, September 5, 2007.

Today the NEA argues that, instead of uniformly measuring student achievement – the basic requirement for a strong accountability system - a revised law should “decrease the testing burden on states, schools and districts by allowing states to assess students annually in selected grades in elementary, middle schools, and high schools.”³⁰

In effect, this would move the requirements back to the 1994 level.

Rather than advocating for higher-quality state tests, the NEA would rather “help states develop assessment systems that include district and school-based measures,” ostensibly in order to provide better, more timely information about student learning. But the NEA position goes beyond a call for the use of “multiple measures” in gauging student proficiency. Several groups have called for “multiple measures” to be used in standards to reflect their concerns that limiting standards and assessments to mathematics and reading works to narrow the curriculum. Others argue that for disadvantaged students, mastery of reading and mathematics skills is crucial to their becoming productive workers and involved citizens.

The NEA position is more far reaching than that of either side in the multiple measures debate. It is arguing for allowing school districts and schools to adopt differing assessment systems, making comparisons between schools difficult, if not impossible. The bottom line is that the NEA would permit different standards for different children, a system that was prevalent during the days of racial segregation in schools.³¹

Congress had already considered the merits of local assessment systems. In *No Child Left Behind*, passed in 2001, Congress rejected such systems because of a belief that wealthy areas and inner cities would adopt divergent standards and assessments, creating a new form of dual system (like the racially dual system struck down by the Supreme Court in *Brown v. Board of Education*).

The NEA does not address this question of whether there is a problem in having differing standards for Detroit and Bloomfield Hills – or the Bronx and Westchester County.

³⁰ NEA, Joint Organizational Statement on ‘No Child Left Behind’ Act, updated February 15, 2008

³¹ In 2007 NCLB reauthorization proposals, the NEA again put forward ways to dilute the integrity of testing and accountability. It called for; 1. Providing incentives for states and districts to develop multiple indicators of student learning from a variety of sources at multiple points in time, without specifying how these “multiple indicators” would measure what students need to know. 2. Providing states incentives and supports to include high quality local assessment systems in meeting ESEA's accountability requirements, alone or by augmenting state assessments. 3. Funding pilot projects in which interested states demonstrate how they can meet ESEA's accountability requirements through locally-developed assessments of students' learning or by integrating local assessments with state assessments. (Forum on Educational Accountability, June 2007)

By advocating these positions, the NEA again sought to move the level of standards setting, test creation, and oversight, downward (both in terms of jurisdiction and psychometric integrity) from states, to school districts, to individual teachers. The result would be both a dilution of standards and a lack of uniformity in the accountability of different jurisdictions.

Finally, the union call for diverse assessments of performance and local control flies in the face of social science evidence that such systems would make accountability impossible. In 2006, a prestigious panel of the National Academy of Sciences asked if such a system would allow “Americans, wherever they live, to see how their children are doing to make valid comparative judgments about the performance of their schools?”

“Can scores on one test be made interpretable in terms of scores on other tests? Can we have more uniform data about student performance from our healthy hodgepodge of state and local programs?”

And the answer: “After deliberation that lasted nine months, involving intensive review of the technical literature and consideration of every possible methodological nuance, the committee’s answer was a blunt ‘no.’”³²

Opposition to Corrective Action

With such strong union opposition to accountability, it is not surprising that their objections to the corrective action requirements of the law are even stronger. The law specifies a series of corrective actions to be taken at schools that fail to meet Adequate Yearly Progress (AYP) goals over a two year period. In a guide providing suggested language for collective bargaining agreements, the NEA included provisions to:

- Eliminate four of the five options specified in NCLB for sanctioning schools in corrective action. Districts could not reopen the school as a charter; replace teachers or support personnel; turn the school over to a private company; or turn the school over to the state;
- Eliminate three of the six options for sanctioning districts in corrective action. States could not replace teachers or support personnel; remove individual schools from the jurisdiction of the district; or abolish the district;
- Ensure that school improvement committees that are tasked with designing/implementing school improvement strategies are selected by the union;
- Prevent school improvement plans from being implemented unless the union agrees; and
- Prohibit the use of test scores in employee evaluations.³³

³² Micheal Feuer, Executive Director of the Division of Behavioral and Social Sciences and Education, National Research Council, National Academies of Sciences, in “Moderating the Debate,” Harvard Education Press, 2006.

³³ NEA, *supra* note 16.

The AFT also wants to water down these provisions. It would:

- Allow schools to decide which interventions they need.³⁴

What is striking is that the AFT has not proposed alternative changes that are calculated in their view to turn around schools that are failing to educate particular groups of students.

While some of the discussion and debate among educators is centered on “differential accountability” to fine-tune corrective actions more carefully to the nature and extent of the school’s failure to achieve proficiency, union opposition is whole scale.

³⁴ Antonia Cortese, *supra* note 22.

Teacher Quality and Effectiveness

American students are entitled to teachers who know their subjects, understand their students and what they need, and have developed the pedagogical skills required to make learning come alive.

Based on its two-year study, NCTAF identified a number of barriers to achieving this goal. They include:

- Low expectations by some teachers for student performance; and
- Unenforced standards for teachers.

The report went on to lament the state of teacher qualifications with the latest data available at the time.

Between 1987 and 1991, the proportion of well-qualified new teachers in public school - those entering teaching with a college major or minor and a license in their fields - actually declined from about 74% to 67%.³⁵

These numbers remain largely unchanged.³⁶

The availability of a highly qualified corps of teachers in the most disadvantaged school is critical to the success of NCLB or any other school reform. In the 1996 *What Matters Most* study the NEA and the AFT agreed:

“Although no state will allow a person to fix plumbing, guard swimming pools, style hair, write wills, design a building, or practice medicine without completing training and passing an examination, more than 40 states allow school districts to hire teachers on emergency licenses who have not met these basic requirements.”³⁷

In 1996 the NEA and the AFT called for a fully qualified teaching force in ten years (by 2006) in which all teachers knew their subjects. At the same time, many voiced concern about the decreasing percentage of teachers qualified to teach specific subjects, as

³⁵ Taken from: Rollefson, M. *Teacher Supply in the United States: Sources of Newly Hired Teachers in Public and Private Schools* (Washington, D.C.: U.S. Department of Education, National Center for Education Statistics, 1993), 10.

³⁶ William Taylor, Dianne Piche, and Crystal Rosario, *The Continuing Challenge: Good Teachers for Disadvantaged Students*, Citizens' Commission on Civil Rights, February 2008, available at <http://www.cccr.org/doc/TheContinuingChallengeReport.pdf>.

³⁷ *What Matters Most: Teaching for America's Future*, National Commission on Teaching and America's Future, September 1996, available at <http://www.nctaf.org/documents/WhatMattersMost.pdf>.

measured by their possessing a college major and a license to teach in their fields. (The report did not address a central problem – that teachers unions have not played an important role in establishing or enforcing standards for public school teachers. Most professions – law, medicine, cosmetology – set their own professional standards. Teachers do not. In effect, that responsibility has been left to elected and appointed officials.)

In 2001, Congress and the President, after intense negotiations with the unions, reached agreement through NCLB on a set of standards. Teachers who met these standards would be considered “highly qualified.”

However, even these modest standards were to apply only to new teachers – initially, only to those providing instruction in the federal Title I program – not “all teachers” as proposed earlier by the NEA and AFT.

Once NCLB was enacted in 2002, these new teachers had four years – until 2006– to meet these modest and limited qualifications. 2006 was also the exact deadline the NEA and the AFT had agreed to in the NCTAF report for “access to competent, caring, qualified teaching in schools organized for success.”

NEA publications speak proudly of the success of its lobbyists in having “the most egregious parts of the then-evolving law removed. Vouchers, testing of current teachers, across the board hiring freezes of paras [paraprofessionals]--all were jettisoned.”³⁸

This, despite then-NEA president Bob Chase’s 2002 criticism that politicians were not being held accountable for high-quality teachers: “It is morally wrong to threaten children of poverty with high-stakes tests if you are going to deny them high-quality teachers and schools.”³⁹

³⁸ *No Child Left Behind?*, NEA Today, May 2003, available at <http://www.nea.org/neatoday/0305/cover.html>.

³⁹ *The 2002 NEA Representative Assembly*, NEA Today, September 2002, available at http://findarticles.com/p/articles/mi_qa3617/is_ai_n9095976.

The No Child Left Behind Act of 2001 defines a highly qualified teacher as follows:

New Elementary:

- 1) earned a bachelor’s degree,
- 2) obtained full state certification or licensure, and
- 3) passed a test in each subject they teach.

New Middle and High School:

- 1) earned a bachelor’s degree,
- 2) obtained full state certification or licensure, and
- 3) earned a major in the subject they teach; or earned credits equivalent to a major in the subject; or, passed a test in each subject they teach.

Existing Teacher at Any Level:

- 1) meet a “High, Objective, Uniform State Standard of Evaluation” (HOUSSSE). Proof may consist of a combination of teaching experience, professional development, and knowledge in the subject garnered over time in the profession (the provisions vary tremendously from state to state).

Another concession the unions won is the alternative to these requirements for teachers already in place: the Highly Objective Uniform State Standard of Evaluation, or HOUSSE. “Many teachers across the country are meeting the new standards by using a provision of NCLB that resulted from intensive NEA lobbying. It lets teachers become “highly qualified” through a “Highly Objective Uniform State Standard of Evaluation” (HOUSSE) instead of a written content knowledge test.”⁴⁰

After the law rolled out, both the NEA and AFT stressed their commitment to high quality teachers in a joint publication issued in July 2003: “AFT and NEA share a common commitment to ensuring that every student has a high quality teacher. Our organizations have worked diligently to establish and promote high standards for the teaching profession.”⁴¹

But the NEA wasn’t in any hurry to get to that goal: “Tom Blanford, associate director of NEA Teacher Quality, says teachers hired under the old rules should get all the financial support and time they need to requalify under the new ones.”⁴²

Education Secretary Rod Paige announced March 15, 2004, that the Department of Education revised some of the “highly qualified teacher” provisions under ESEA. The changes affect teachers in rural districts; science teachers who instruct in more than one discipline; and middle and high school teachers who teach multiple subjects.

“These much-needed improvements were among those urged by NEA and many others who are focused on improving the quality of education for all children and students,” NEA President Reg Weaver said.⁴³

The NEA praised the Department for “changing the rules.” Whatever the merits of the changes, in this case they relaxed the law’s requirements.

In late 2006, the Education Department announced that only nine states had submitted highly qualified teacher plans that met the department’s criteria, 39 states partially met the criteria, and four states—Hawaii, Missouri, Utah and Wisconsin—did not meet the criteria at all. Yet when Secretary Spellings stepped up efforts to achieve compliance, the NEA complained: the Department was “changing the rules.” Weaver testified before the Aspen Commission in 2006:

States have received Title II Teacher Quality funding for four years, but many have been told recently that their

⁴⁰ *Double Deadline*, NEA Today, October 2005, available at http://findarticles.com/p/articles/mi_qa3617/is_200510/ai_n15642925.

⁴¹ *Meeting NCLB’s Highly* www.aft.org/topics/nclb/downloads/ESEANEAAFT.pdf. *Qualified Guidelines*, AFT-NEA, July 2003, available at

⁴² NEA Today, 2005, available at http://findarticles.com/p/articles/mi_qa3617/is_200510/ai_n15642925.

⁴³ *Dept. of Education releases revised ESEA “highly qualified” rules*, Wisconsin Education Association Council, March 4, 2004, available at http://www.weac.org/News/2003-04/mar04/esea_changes.htm

definitions do not comply with NCLB. This is another example of putting the cart before the horse that has caused major disruption and high levels of anxiety among our members. For four years, our members were told by their states to comply with a set of requirements, only to be told—as the time for full compliance had almost elapsed—that they may have to meet a different set of requirements.

Weaver also criticized the provisions as “too rigid,” despite the multiple concessions the NEA had already demanded, and received:

We absolutely support the requirement that every child be taught by a qualified, certified, caring teacher,” he said. “But the rigid nature of the highly qualified teacher requirement in NCLB is forcing too many teachers, such as special education teachers who teach multiple subjects, to jump through hoops to receive this designation.⁴⁴

Weaver did not explain that those “hoops” were designed to ensure that the requirement “that every child be taught by a qualified, certified, caring teacher” would actually be met.

The NEA also has never explained how the changes it has already negotiated benefit students.

Currently, the NEA is advocating that Congress:

- Revise the definition of *highly qualified* teachers to recognize state licensure/certification, eliminate nonessential requirements that create unnecessary obstacles and eliminate loopholes in the scope of coverage; and
- Provide teachers who may not meet the *highly qualified* standard by the current deadlines, due to significant implementation problems, with assistance and additional time to meet the requirement.⁴⁵

Rewarding Teacher Performance

One testament to the shortsightedness of the existing system is that it rewards teachers solely on the amount of time they spend in the education system – regardless of where they teach, what their workload is or of their demonstrated ability to improve student performance. As a result, teachers are rarely given concrete incentives to apply their expertise to the most challenging learning problems or to major system needs.

⁴⁴ NCLB Commission, Aspen Institute, 2006.

⁴⁵ *ESEA: It's Time for a Change! NEA's Positive Agenda for the ESEA Reauthorization*, NEA, July 2006.

Together with baseline requirements for teachers to be highly qualified, many experts believe that incentives are necessary to challenge teachers to continue to improve. The NEA itself despaired in 2003, “What about attracting the best to the profession? ... That's what's being left behind.”⁴⁶

Both unions endorsed one of these incentives –a form of “merit” pay - in the 1996 *What Matters Most* report. Back then, they promised to:

- Increase the ability of low-wealth districts to pay for qualified teachers, and insist that districts hire only qualified teachers; and
- Aggressively recruit high-need teachers and provide incentives for teaching in shortage areas.

In 2005, House Education Committee Congressman George Miller, along with Representative Chaka Fattah and other members of Congress, introduced the TEACH Act that offered a variety of forms of “merit pay” in the broadest sense of the term. According to Miller’s website, the bill was intended to:

Help solve a looming teacher shortage by paying more competitive salaries and offering up-front tuition assistance to talented undergraduates committed to a career in education and to established teachers working in fields like math and science;

Provide higher pay for exemplary highly-qualified teachers and principals who transfer into the hardest-to-staff schools where they can help the children who need them most; and

Identify and reward our best teachers.⁴⁷

The bill would have allowed, but not required, schools to award financial bonuses to teachers based on student test scores.

The last – rewarding teachers - is the most controversial. Yet many policymakers see its usefulness and want it on the table. As Gary Huggins, the director of the Aspen Institute’s NCLB commission, said in 2007:

“policymakers, regardless of political affiliation, appear to be attracted to performance pay in increasing numbers ‘because you want to use every tool on board’ to attract

⁴⁶ No Child Left Behind? *supra* note 31.

⁴⁷ Representative Miller Announces Major Teacher Quality Initiative, Press Release, May 24, 2005, available at http://www.house.gov/apps/list/press/edlabor_dem/rel52405.html.

new teachers to the profession and to improve troubled schools. This is one of the fascinating ways in which NCLB has changed the world.”⁴⁸

But no matter what it is called – bonus pay, differential pay, merit pay, or pay for performance – the national teachers’ unions tend to oppose it with very few exceptions. The AFT allows locals to bargain for pay for performance and even provides guidance on how to do so, while the NEA explicitly does not support such initiatives by their local affiliates.

When two-thirds of Los Angeles public schools received failing grades from the state of California in 2000, the superintendent announced his support for paying teachers according to merit. The United Teachers of Los Angeles (UTLA) fought this proposal tooth and nail and eventually killed it. Then-UTLA President Day Higuchi announced that the union would accept the reform only on “a cold day in hell.”⁴⁹

Even when unions appear to be working to promote performance-based pay, their leaders may work in the background to scuttle the changes. When the St. Petersburg Times asked Pinellas Classroom Teachers Association executive director Jade Moore why few teachers were signing up for the merit pay program the union helped design for the school district, Moore replied, “Our goal was to make it nearly impossible.”⁵⁰

At the same time, the NEA listed the TEACH Act (the purpose of which was to upgrade teachers) in a list of bills it supported, urging members to “See if your Senator is a cosponsor.”⁵¹

In 2007, The bipartisan Aspen Commission on No Child Left Behind declared “it is time to ensure that all teachers demonstrate their effectiveness in the classroom rather than just their qualifications for entering it.”⁵² The Commission based its recommendations on numerous public hearings and roundtables, school visits, research, and more than 10,000 public comments.

The Aspen Commission, over time, has made at least three discrete recommendations on this score, some of which are quite similar to Congressman Miller’s 2005 proposal:

- Use bonus pay to attract the most successful teachers and those in

⁴⁸ Vaishali Honawar, *Merit Pay Gaining Bipartisan Favor in Federal Arena*, Education Week, July 26, 2007, available at <http://www.edweek.org/ew/articles/2007/08/01/44merit.h26.html?qs=vaishali+july+26>.

⁴⁹ Louis Sahagun and Richard Lee Colvin, *Cortines Seeks 1,000 Staff Cuts*, Los Angeles Times, February 24, 2000, available at <http://articles.latimes.com/2000/feb/24/news/mn-2073>.

⁵⁰ Stephan Hegarty, *Teachers not buying state’s performance bonus program*, St. Petersburg Times, April 3, 2003, available at http://www.sptimes.com/2003/04/03/State/Teachers_not_buying_s.shtml.

⁵¹ *Urge Congress to Support Bills to Improve NCLB*, NEA, available at <http://www.nea.org/lac/esea/07nclb.html>.

⁵² *Beyond NCLB*, The Commission on No Child Left Behind, Aspen Institute, April 2007, available at <http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/FINALNCLBCommissionPublicLegLanguage4.4.07.pdf>.

subject-area shortage areas;

- Evaluate teachers' impact on student achievement to determine their highly qualified status and to steer the least effective teachers out of the profession; and
- Tie teacher pay to student to performance (sometimes called merit pay, or pay for performance).⁵³

In the wake of these recommendations, in 2007 Miller re-introduced the TEACH Act. In addition, Miller and House Education Committee Ranking Member Buck McKeon included identical language in their draft NCLB reauthorization proposal, published online in August 2007. That legislation would have created a combination of incentives to attract qualified teachers into high-poverty schools and into hard-to-staff areas, covering Aspen's recommendations, including tying teacher pay to student test scores.

In May 2007 NEA President Reg Weaver-CR praised the bill's introduction:

“This bill addresses [our] concerns by providing teachers the tools and resources they need to be successful. The TEACH Act creates commonsense incentives to attract qualified individuals to the teaching profession and to keep teachers in the classroom.”⁵⁴

But then Weaver reversed himself dramatically. At a September 10, 2007 hearing of the House Education and Labor Committee, he castigated the very same bill:

“NEA cannot support federal programs—voluntary or not—that mandate pay for test scores *as an element* of any federal program.”⁵⁵ (emphasis added)

AFT Executive Vice President Toni Cortese acknowledged at the same September 10 hearing on the bill that the AFT was pleased with many features of the TEACH Act, although it had “a specific concern about its support for programs that use student test scores to evaluate teachers.”⁵⁶

⁵³ NCLB Commission, Aspen Institute, 2006 <http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/NCLBTeacherQualityHearingReport%20042406.pdf>.

⁵⁴ *NEA Supports Bill to Ensure High Quality Teachers in America's Classrooms*, NEA Press Release, May 9, 2007, available at <http://www.nea.org/newsreleases/2007/nr070509.html>.

⁵⁵ Reg Weaver, NEA President, Testimony Before the House Education and Labor Committee, September 10, 2007, available at <http://edlabor.house.gov/testimony/091007RegWeaverTestimony.pdf>.

⁵⁶ Michele, *Hearing on Miller-McKeon Discussion Draft, Let's Get it Right*, AFT NCLBlog, available at http://www.letsgetitright.org/blog/2007/09/hearing_on_millermckeon_discus.html.

The hearing led to a “lively exchange with Congressman Miller, who contended that both the AFT and the NEA were involved in negotiations on the TEACH Act.”⁵⁷

Congressman George Miller virtually accused the NEA of acting in bad faith for opposing language that the union had previously approved.⁵⁸

As Education Week’s David Hoff summarized, “The NEA made a deal on merit pay last year, then not only reneged on the deal but denied, in public, through their Pres[ident], making the deal to the Chairman with whom they made the deal despite clear documentation that shows the Pres[ident] was, uh, mistaken.”⁵⁹

The crux of both unions’ opposition to merit pay is the use of student test data to evaluate teachers.

The AFT’s Toni Cortese wrote to Miller,

“We are concerned that such ‘value-added’ programs have not been thoroughly developed, researched and rigorously evaluated. Given this, we agree with you that it is essential that teachers be a part of any decision to use a value-added system. We hope that measurement systems will become more refined and credible in the future. Nevertheless, we believe that more research, study and psychometric guidelines are necessary before this evaluation tool is used to reward teachers.”⁶⁰

The NEA’s Packer likewise argued that research doesn’t exist to show whether the rule change would be likely to help or hurt, so it is “at best premature.”⁶¹

The unions’ objection to the use of test scores to gauge teacher effectiveness does not rest on whether the cores are the sole element or one among many. While proponents of pay for performance rest much of their case on increasing evidence that student achievement is closely linked to teacher quality, few proposals rely solely on test data as the measure of teacher competence. In Denver and other locals, merit pay systems rely on comprehensive teacher evaluations as well as other factors establishing a “merit pay system.”⁶² Reform-minded local union leaders have cooperated with community leaders

⁵⁷ Michele, *supra* note 45.

⁵⁸ Joe Williams, *Rep. George Miller: The CTA Is Lying And They Know It*, Democrats for Education Reform, September 11, 2007, available at http://www.dfer.org/2007/09/rep_george_mill.php.

⁵⁹ David Hoff, *Miller Says CTA Got It Wrong*, NCLB: Act II, Education Week, September 11, 2007, available at http://blogs.edweek.org/edweek/NCLB-ActII/2007/09/miller_says_cta_got_it_wrong.html.

⁶⁰ Michele, *supra* note 45.

⁶¹ Bess Keller, *Draft Proposal Seeks to Equalize School Resources*, Education Week, September 12, 2007, available at <http://www.edweek.org/ew/articles/2007/09/19/04nclb-salary.h27.html>.

⁶² William Taylor and Crystal Rosario, *Fresh Ideas in Collective Bargaining*, Citizens’ Commission on Civil Rights, September 2007, available at <http://www.cccr.org/doc/Full%20Final%20PDF%20CB%20report.pdf>.

Back in 1998, when Congressmen George Miller and (now Senator) Lindsay Graham offered an amendment to the Higher Education Act in 1998 to use limited federal funds to provide loan forgiveness to qualified teachers who taught in high-poverty schools or subject areas, the national teachers unions opposed it. They wanted loan forgiveness for all teachers or nothing. When subsequent proposals were made to target such assistance on teachers in high-need subjects and specialties, the unions again opposed such targeting as unfair, even though these amendments were intended to address severe shortages in subjects like math and science and specialties like special education or English as a second language.

and educators in developing pay for performance systems, which national leadership sometimes frowns on but looks the other way.⁶³

But at the national level, the NEA is perfectly clear: it would “oppose an ESEA reauthorization bill if such provision were included.

Specifically, the NEA includes as a non-starter: “Mandated federal requirements for “effective teachers” - any new mandates for highly qualified definition, including evaluations directly tied to student performance or growth model results.”⁶⁴

The AFT simply calls the requirements “burdensome,” “demoralizing to teachers,” and “unworkable” as implemented.⁶⁵

Teacher Equity

From the outset, supporters of Title I of the ESEA have sought equity in the funding of schools within a district. Advocates have been concerned both that high need schools – the intended beneficiaries of the law – receive their fair share of resources. And, they have fought to ensure that districts did not manipulate funds

transfers between schools (substitution) to continue the advantage that more affluent schools already had.

No Child Left Behind requires that the states ensure that low-income and minority students are taught by qualified teachers at the same rate as other students. (The law states this as “ensuring that low-income and minority students are not taught disproportionately by inexperienced, out-of-field, or uncertified teachers). In fact, the law includes two separate provisions, one for districts and another for states.

In other words, ***the law in place since 2002 requires that the highest-need children receive the remedy –high quality teaching-- that research says makes the biggest difference in student achievement.***

⁶³ William Taylor, *supra* note 51.

⁶⁴ NEA, *supra* note 20.

⁶⁵ Edward McElroy, AFT President, Testimony Before the Senate HELP Committee, March 13, 2007, available at http://help.senate.gov/Hearings/2007_03_13/McElroy.pdf, and *The AFT on NCLB*, Hot Topics, AFT website, available at <http://www.aft.org/topics/nclb/index.htm>.

But the teacher unions have worked tirelessly against this requirement from the very beginning of the ESEA. Despite their insistence on educational inputs as the key to educational success, the unions repeatedly seek to block one of the most important of these inputs – equitable distribution of highly qualified teachers to high needs schools.

AFT President Ed McElroy denied that the unions have any responsibility to deal with this issue: “Union-negotiated transfer policies are not responsible for unequal distribution across low-performing and high-performing schools.” He said that states without collective bargaining have the same problems – and that in fact, collective bargaining states had more equal distribution.⁶⁶

The influence of unions is particularly important in working against a safeguard placed within Title I – comparability. This safeguard is intended to make sure that, in order to receive Title I funds, districts establish that all schools have essentially the same level of resources.⁶⁷

Logically, this would include a requirement that all students have access to high-quality teachers.

Title I historian Phyllis McClure cites John Hughes, the first federal director of Title I programs, on the critical importance of comparability in civil rights:

Comparability as a concept poses a threat to the big city tendency to assign their least qualified and poorest paid teachers to the inner-city, predominantly black or Spanish-speaking schools.⁶⁸

Comparability requirements are designed to prevent and correct intra-district inequities in school spending. Comparability calls on districts to perform comparisons between its Title I within a district and non-Title I schools (It does not address differences between high- and low-poverty districts).⁶⁹

But comparability has been undermined by a major exception adopted at the urging of teachers unions. Rather than comparing two schools’ entire budgets, including teacher salaries, districts can exempt costs due to “teacher longevity” before the comparison is made. In other words, for the purposes of determining equity, every school can be counted as having the budget equivalent of first-year teachers, ignoring the reality that

⁶⁶ Edward McElroy, *supra* note 16.

⁶⁷ Section 1120A(c), *Non-Regulatory Guidance on Title I Fiscal Issues: Maintenance of Effort; Comparability; Supplement, Not Supplant; Carryover; Consolidating Funds in Schoolwide Programs and Grantback Requirements*, USDE, February 2008, available at <http://www.ed.gov/programs/titleiparta/fiscalguid.pdf>.

⁶⁸ Phyllis McClure, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965, Ensuring Equal Opportunity In Public Education*, Center for American Progress, June 2008, available at http://www.americanprogress.org/issues/2008/06/pdf/comparability_part1.pdf.

⁶⁹ Phyllis McClure, *supra* note 57.

some schools have very experienced teachers who earn more money. In fact, since comparability can be determined simply by comparing the number of staff, districts can sometimes count teachers' aides as teachers.⁷⁰

Teacher longevity – the number of years a teacher has taught – is not an exact match for teacher quality. However, there is clear evidence that brand-new teachers are not as effective as they will eventually become – and the neediest students are “disproportionately assigned to teachers who are new to the profession.”⁷¹ Says Marguerite Roza, “this is a very big deal: expenditures on experience-based salary increases represent approximately ten percent of all money spent on public education nationally.”⁷²

The unions continue to object to any attempt to ensure equal access to high-quality teachers, making arguments that rectifying inequities wouldn't make much financial difference to schools – while simultaneously arguing an overall need for more resources.⁷³ Howard Nelson, Lead Researcher in the Office of the President for the AFT, added that policymakers should be wary of unintended consequences and that the increase in funding through comparability would be “pretty tiny” for high needs schools. Some studies, however, have put the per student gap in funding as high as \$3,700.⁷⁴

The NEA has also publicly opposed efforts to equalize school funding, fearing that comparability would interfere with local contracts. “A gut issue for our members is that they are opposed to something that weakens rights they have under their contract, and it is not the federal role to interfere with that,” said Joel Packer, Director of Education Policy and Practice at the NEA. The NEA has asserted there is no research to demonstrate that doing so would have a positive impact on high needs schools.⁷⁵

In general, teachers who start in high-poverty, high-needs schools, transfer to lower-poverty, less needy schools as they gain tenure and seniority by right under some collective bargaining agreements. But under comparability exceptions the higher salaries of these more experienced teachers do not count in measuring equity. Collective bargaining limits meaningful school reform in other ways as well, as documented by The New Teacher Project.⁷⁶ In short, contractual staffing rules strip urban schools of their

⁷⁰ Marguerite Roza, *What If We Closed the Title I Comparability Loophole?*, Ensuring Equal Opportunity in Public Education, Center for American Progress, June 2008, available at http://www.americanprogress.org/issues/2008/06/comparability_part3.html.

⁷¹ Heather Peske and Kati Haycock, *Teaching Inequality*, The Education Trust, June 2006, available at <http://www2.edtrust.org/NR/rdonlyres/010DBD9F-CED8-4D2B-9E0D-91B446746ED3/0/TQReportJune2006.pdf>.

⁷² Marguerite Roza, *Frozen Assets: Rethinking Teacher Contracts Could Free Billions for School Reform*, Education Sector, January 2007, available at http://www.educationsector.org/usr_doc/FrozenAssets.pdf.

⁷³ Bess Keller, *supra* note 50.

⁷⁴ Bess Keller, *supra* note 50.

⁷⁵ Bess Keller, *supra* note 50.

⁷⁶ Jessica Levin, Jennifer Mulhern, and Joan Schunck, *Unintended Consequences: The Case for Reforming the Staffing Rules in Urban Teachers Union Contracts*, The New Teacher Project, 2005, available at <http://www.tntp.org/files/UnintendedConsequences.pdf>.

ability to hire and keep the best possible teachers, treat new teachers as expendable, and result in poor performers being passed from school to school.⁷⁷

The comparability measures proposed in Congress have explicitly stated that teachers would not be required to transfer to remedy disparities in comparability. But both unions continue to argue the worst-case scenario of forced teacher transfers.

Packer warned of potentially disastrous effects on teacher shortages and already-high turnover rates should the transfer provision become law. “Forcing a teacher to go someplace just doesn’t work,” he said. “They are not indentured servants, and if you force people to go where they don’t want to go, it will affect morale.”⁷⁸

The AFT went so far as to use a 1970 desegregation case as proof that transferring teachers against their will doesn’t work; the teachers will simply leave the district, or the profession. The AFT blog cited the 1970 Hobson case as an example of teachers leaving the DC school district after the school board mandated transfers in order to achieve equity and comply with the court’s decision.⁷⁹ Of course, suburbanization of teachers took place in many districts where there were no mandated transfers.

Unions routinely use loaded language to paint teacher equity as a gloom-and-doom scenario. For example, the AFT argued that “Schools where there usually is a lack of [highly qualified teachers] are the ones with ‘terrible building conditions, unsupportive leadership, and a lack of professional supports, as well as other factors that contribute to an unacceptable learning and teaching environment.’”⁸⁰

Such schools do have higher turnover. But research shows that because a primary reason is because these schools are often least equipped to support new teachers in their efforts to become effective.⁸¹

Teaching conditions commonplace in the nation’s poor and minority schools – including inadequate safety, equipment and supplies, and facilities – do affect teachers’ working conditions. So does teaching out of field, and having inappropriate, unfair, or unmanageable teaching assignments. These problems are too important, and too harmful to student achievement, to simply sweep under the rug of collective bargaining.⁸² “Lack

⁷⁷ Unintended Consequences: The Case for Reforming the Staffing Rules in Urban Teachers Union Contracts, The New Teacher Project, 2005.

⁷⁸ Vaishali Honawar, *Administration Wants Districts Free to Transfer Teachers*, Education Week, March 22, 2007, available at <http://www.edweek.org/ew/articles/2007/03/21/28transfers.h26.html?qs=honawar>.

⁷⁹ Michele, *Comparability Conundrum*, Let’s Get It Right, AFT NCLBlog, September 18, 2007, available at http://www.letsgetitright.org/blog/2007/09/comparability_conundrum.html.

⁸⁰ Kristor W. Cowan, *supra* note 23.

⁸¹ Johnson, S. M., & Birkeland, S. (2003). *Pursuing a “sense of success”*: New teachers explain their career decisions. American Educational Research Journal, 40(3), 581-617 cited in *Who stays in teaching and why*, The Project on the Next Generation of Teachers, Harvard Graduate School of Education, February 2005.

⁸² Johnson, S. M., & Birkeland, S., *supra* note 68.

of attention to this problem simply perpetuates the cycle in which poor children receive the least experienced teachers and the least continuity of adults in the school community from one year to the next,” writes Harvard Professor Susan Moore Blake, director of the Project on the Next Generation of Teachers.

The unions also ignore or discuss evidence from places where there has been a determined effort to upgrade teacher quality and teacher conditions and where the effort has proved successful. Oakland, California is one such place.

“During the early 2000s, the Oakland Unified School District embarked on a reform initiative that was focused on achievement, accountability and equity... This new Results-Based Budgeting system pushed dollars out to school sites and used actual site-by-site expenditures to develop budgets. In conjunction with its other reform initiatives, the Oakland Unified School District has been the most improved large, urban school district in the state of California over the last three years.”⁸³

Unions worry that equitable teacher distribution and comparability provisions threaten collective bargaining. Typical collective bargaining agreements cover wages, hours, and other “terms and conditions” of employment. “If a teacher-transfer measure goes through, [teacher union officials] say, it could open the door to other attempts to undercut collective bargaining rights.”⁸⁴

The Bush administration’s reauthorization proposals would give local school officials new powers to override anti-transfer provisions of collective bargaining agreements, an idea Education Secretary Margaret Spellings said would help local superintendents, “if they could transfer teachers in their districts to help improve poorly performing schools, even if union contracts banned such moves.”⁸⁵

Yet the unions insist that collective bargaining is off-limits to Congress.

“A gut issue for our members is that they are opposed to something that weakens rights they have under their contract, and it is not the federal role to interfere with that,” said Joel Packer, Director of Education Policy and Practice at the NEA.⁸⁶

The proposal “interjects the federal government into the collective bargaining process,” objected Antonia Cortese, AFT’s Executive Vice President.⁸⁷

⁸³ Matt Hill, *Funding Schools Equitably: Results-Based Budgeting in the Oakland Unified School District*, Ensuring Equal Opportunity in Public Education, Center for American Progress, June 2008, available at http://zedc3test.techprogress.org/issues/2008/06/pdf/comparability_part4.pdf.

⁸⁴ Vaishali Honawar, *supra* note 66.

⁸⁵ Diana Jean Schemo, *Bush Proposes Broadening the No Child Left Behind Act*, The New York Times, January 25, 2007, available at <http://www.nytimes.com/2007/01/25/us/25child.html?scp=1&sq=%93Bush%20Proposes%20Broadening%20the%20NCLB%20Act%94%20&st=cse>.

⁸⁶ Bess Keller, *supra* note 50.

The 2002 battle over interpreting an NCLB provision concerning collective bargaining is illustrative of union opposition.

In 2002, DOE officials issued guidance on teacher quality, including provisions dealing with collective bargaining. The original guidance would have interpreted some of NCLB's provisions as trumping any future collective bargaining agreements and employee protections.

The unions persuaded the Department to back down. Both the NEA and AFT, as well as other groups, opposed the original interpretation – and the Secretary of Education agreed. “The federal law, the groups noted, says that “nothing” among the Act's consequences for low-performing schools can override employee rights and protections under state or local laws, or collective bargaining agreements. That, they said, includes prospective laws and pacts.”⁸⁷

The final regulations said the opposite: “[T]he secretary [of education] agrees that the proposed regulations arguably were inconsistent with a strict reading of the [law] and may have conflicted with applicable state and local laws.”⁸⁹

Indeed, the NEA objected to Congressman Miller's NCLB discussion draft on the basis of its treatment of collective bargaining. The NEA said:

- “The [Miller] draft contains several provisions that could undermine teachers' collective bargaining rights and adversely affect compensation or others terms and conditions of employment. Among these are:
 - A limitation on how many years a student in a school designated as in need of school improvement may be taught by a “novice” teacher (pages 195-196 and 244-45);
 - New comparability requirements for teacher salaries (pages 299-300);
 - A new program for expanded learning time (new Section J on page 399);
 - Requirements for a “unique statewide teacher identifier that remains consistent over time and matches all student records described in this subsection to the appropriate teacher.” (Page 308); and
 - The allowance for salary increments or bonuses for teachers serving high-need schools who “increase the number of low-income students who take Advanced Placement or International

⁸⁷ Antonia Cortese, *supra* note 22.

⁸⁸ Erik W. Robelen, *Federal File: Not So Fast*, Education Week, December 11, 2002, available at <http://www.edweek.org/ew/articles/2002/12/11/15fedfil.h22.html?qs=Federal+File+Not+So+Fast>.

⁸⁹ Erik W. Robelen, *supra* note 76.

Baccalaureate examinations with the goal of successfully passing such examinations.” (Page 381)⁹⁰

Despite the evidence cited above on teacher mobility and the feasibility of equalizing critical teacher resources, the unions staunchly insist on the status quo, and the primacy of collective bargaining rights.

Paul T. Hill, who leads the Center on Reinventing Public Education and initiated the research documenting significant teacher-salary gaps in some 10 urban districts, predicts further union opposition.

“It will be opposed in the back rooms,” he predicted. “Unions and districts have built their financial structures around using average salaries as opposed to actual salaries to divvy up money to schools”, Mr. Hill said.⁹¹

The NEA’s Covert Effort to End NCLB Enforcement

Also, in 2008, the NEA, along with the National School Bonds Association, launched a covert attack on NCLB in Congress. The groups persuaded two members of Congress, Representatives Walz and Graves, to offer an amendment in the House Appropriations Committee relieving states and school districts of their responsibility under NCLB to take corrective action with respect to schools that failed under the law to make adequate progress. Indeed where remedies such as transfer to a higher performing school were already in place, Walz-Graves would have revoked them, allowing children to be sent back to low-performing schools.

In years past, riders like the Walz-Graves amendment were offered in the Appropriations Committee to sabotage civil rights laws by stripping them of effective enforcement provisions. Here, as in past cases, no hearings would be held and the rider would be scripted into a large funding bill. The NEA and the NSBA gave no notice to civil rights or the education groups of their intentions. But Committee Chairmen David Obey and George Miller discovered the ruse, as did several civil rights groups, including the Citizen’s Commission. The Leadership Conference on Civil Rights protested in a letter to Congress and the amendments were withdrawn.

⁹⁰ Kristor W. Corwan, *supra* note 23.

⁹¹ Bess Keller, *supra* note 50.

The NEA's Campaign Against NCLB in the Courts

The NEA has not limited its attack on education reform to a continued war against NCLB in its meetings with teachers or in other public forums. Nor has its advocacy been confined to lobbying in Congress and with the Administration.

In addition, the NEA has launched a campaign in federal courts seeking to escape the obligations imposed on local school districts by the No Child Left Behind Act by claiming that these obligations were not fully paid for by the federal government. The main lawsuit brought by the NEA was in 2005 in Michigan where the organization assembled a line up of districts consisting of the Pontiac, Michigan; Laredo, Texas and several small Vermont districts, along with the NEA, claiming that the Department of Education had violated the law by using “an unfunded mandate.”

In November 2005, the District Court dismissed the complaint for failure to state a claim. The NEA and the other plaintiffs appealed to the U.S. Court of Appeals for the Sixth Circuit. On January 7, 2008 a three-judge panel of the Circuit reversed the lower court decision by a vote of two to one, saying that the plaintiffs should have an opportunity to prove their case. Speaking for the majority, Judge R. Guy Cole said that because of ambiguous language concerning funding in the statute “a state official could plausibly contend that she understood exactly the opposite—that her State need not comply with NCLB requirements for which federal funding falls short.”⁹²

In a vigorous dissent Judge David W. McKeague wrote that:

“The notion that Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by states and school districts, not federal agencies, is not only nonsensical and fiscally irresponsible, but also contravenes the traditional recognition of state and local governments' primary responsibility for public education.”

Despite the fact that the decision merely revived the lawsuit and was far from done, the NEA declared victory. While conceding that the ruling was only a binding in the four states that make up the Sixth Circuit, Robert Chanin, the NEA's chief lawyer said that the decision should give “comfort and heart” to states and school districts across the country and that they would be “on solid ground in refusing to use their own funds to pay for NCLB obligations not paid for in NCLB. As Education Week reported:

⁹² 6 U.S.C.A. § 05-2708 (B)(2)(a) available at <http://www.ca6.uscourts.gov/opinions.pdf/08a0006p-06.pdf>.

“The National Education Association suggested this week that school districts need not use their own money to pay for obligations under the No Child Left Behind Act...”⁹³

Secretary Spellings alluded to the Chanin remarks in a letter to Chief State School Officers stating that “no state or school district should regard the ruling as license to disregard NCLB’s requirements.”⁹⁴

In February, Secretary Margaret Spellings asked the full 6th Circuit Court of Appeals to reconsider the panel’s ruling. She was joined in her petition by the Connecticut NAACP and Connecticut parents and children who were resisting a similar effort in federal court by the Attorney General of Connecticut. This group was represented by the NAACP, the Citizens’ Commission on Civil Rights and the Lawyers’ Committee for Civil Rights Under Law, was given status as a friend of the court on the Michigan case and argued that if the panel’s opinion were to stand, states would keep their federal funding and use it as they chose, without observing conditions that have been imposed in almost every welfare and social justice program enacted since the New Deal.

On May 1, the full Court of Appeals decided to reexamine the panel’s ruling and set it aside, leaving it with no force and effect even in the four states of the 6th Circuit.⁹⁵ In the rehearing by the full court held on December 10 Robert Chanin, arguing for the NEA, told the court that “states and local districts are prisoners of this law.” But the judges noted that none of the states in the 6th Circuit--Kentucky, Michigan, Ohio, Tennessee--had joined the lawsuit.⁹⁶

Conclusion and Recommendations

In our study *Fresh Ideas in Collective Bargaining: How New Agreements Help Kids* the Citizens’ Commission reported on promising initiatives embraced by local teachers’ unions to improve student learning and establish better working conditions for teachers. The initiatives included pay for performance, a decreased role for seniority in hiring practices, increased involvement of parents and the community in the decision making process, and enhanced professional development and career opportunities for teachers. This sequel on the role of national unions in school reform stands in stark contrast to our earlier report on the work of some local leaders. Over the last decade, the national leaders of the National Education Association and the American Federation of Teachers have

⁹³ Mark Walsh, *Court Ruling in NCLB Suit Fuels Fight Over Costs*, Education Week, January 11, 2008, available at <http://www.edweek.org/ew/articles/2008/01/16/19nclb-suit.h27.html?qs=court+ruling+in+nclb+suit>.

⁹⁴ Mark Walsh, *Spellings Asks 6th Circuit to Reconsider NCLB Ruling*, Education Week, February 7, 2008, available at <http://www.edweek.org/ew/articles/2008/02/13/23nclb.h27.html?qs=feb+13+spellings>.

⁹⁵ Mark Walsh, *Full Appeals Court to Reconsider Ruling That Revived NCLB Suit*, Education Week, May 1, 2008, available at <http://www.edweek.org/ew/articles/2008/05/07/36conn.h27.html?qs=full+appeals+court+to+reconsider>.

⁹⁶ Mark Walsh, *Federal Appeals Court Weighs Union’s Suit Over NCLB*, Education Week, January 7, 2009, available at <http://www.edweek.org/ew/articles/2008/12/11/16nclbsuit.h28.html?r=970740764>.

made their unions implacable foes of laws and policies designed to improve public education for disadvantaged children.

The unions have battled against the principle that schools and education agencies should be held accountable for the academic progress of their students. They have sought to water down the standards adopted by states to reflect what students should know and be able to do. They have attacked assessments designed to measure the progress of schools, seeking to localize decisions about test content so that the performance of students in one school or community cannot be compared with others. They have resisted innovative ways—such as growth models—to assess student performance.

In their attack on education reform, the national unions have often been unconstrained by considerations of propriety and fairness. They have sought to inject weakening amendments in appropriations bills, hoping that they would prevail if no hearings were held and the public was unaware of their efforts. They have used the courts to launch an attack on education reform, employing arguments that could imperil many federal assistance programs going back to the New Deal. They have failed to inform their own members of the content of federal reform laws.

Worse yet, the NEA has on more than one occasion counseled disobedience to the law.

This history is not consistent with the long record of the two unions to advance equality of educational opportunity and with the leadership of former AFT President Albert Shanker in seeking to make teaching into a profession which would be responsible for the academic progress of students.

The Commission does not believe that the recent records of the NEA and the AFT are etched in concrete. Both unions have new leaders who could take their argumentations on a more constructive path. Groups espousing reform have recognized that there are weaknesses in the current law that necessitate change, including improvements in assessment, increasing incentives for teaching, and eliminating rigidities in the law. These groups would undoubtedly be willing to enter dialogue with the unions on changes as long as they preserved the basic principles of reform.

We urge that the NEA and the AFT reconsider their positions on the critical elements of reform—accountability, standards, and assessment. We urge also that they review the progress schools and students have made under The Improving America's School Act and No Child Left Behind law and make constructive recommendations for improving the laws without weakening their basic principles.

We urge that the national unions provide a forum for the reform initiatives put forward by local union leaders and that they undertake a dialogue with teacher education institutions about how they can better prepare their students to serve students with special needs.

We firmly believe that this is the course unions must take if they wish to preserve public education as a vital institution in American society.