No Educator Left Unscathed: How No Child Left Behind Threatens Educators' Careers

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NO EDUCATOR LEFT UNSCATHERD: HOW NO CHILD LEFT BEHIND THREATENS EDUCATORS' CAREERS

I. INTRODUCTION

The No Child Left Behind Act of 2001 (NCLB), the 2002 federal law that overhauls the requirements that states and their schools must meet in order to qualify for federal education funding,1 puts the careers of tenured teachers and administrators at risk.2 It does this by setting unreasonable standards3 and then calls for the termination of educators when they fail to meet those standards.4 Specifically, NCLB requires schools to make Adequate Yearly Progress (AYP), meaning that a gradually increasing percentage of students must score at or above a "proficient" level on standardized tests5 until one hundred percent of students score at that level by 2014.6 Such an unreasonable standard will likely lead nearly every U.S. school to be labeled a "failure" by that year.7 After all, differences arising from varied student skill levels, personal adversities faced by students, disabilities, a lack of language skills among some non-native English speakers, and countless other variables render it extraordinarily unlikely that every single student in every U.S. school will attain "proficient" standardized test scores.8 Just two school years after NCLB was enacted, one out of every twenty U.S. schools was already failing to meet federal requirements.9 The number of "failing" schools

2. Infra sec. II.E (discussing risks to the careers of educators).
3. Infra secs. II.B–II.C (discussing NCLB standards).
5. NCLB calls for student test performance to be categorized as either "basic," "proficient," or "advanced." A "basic" score indicates an unsatisfactory level of achievement, a "proficient" score indicates a satisfactory level of achievement, and an "advanced" score indicates an even higher level of mastery. 20 U.S.C. § 6311(b)(1)(D)(ii).
7. Infra sec. II.D (discussing the unreasonableness of the NCLB requirements). See also W. James Popham, America’s "Failing" Schools: How Parents and Teachers Can Cope With No Child Left Behind 150–51 (Routledge Falmer 2004).
8. See infra secs. II.C–II.D
will rise dramatically until nearly every U.S. school joins their ranks by 2014.\textsuperscript{10}

As this occurs, the careers of teachers and administrators will be at risk. This is because “failing” schools lose federal funding unless they impose increasingly severe sanctions each consecutive year that they fail to meet NCLB’s unrealistic standards.\textsuperscript{11} After a school fails to make AYP for four consecutive years,\textsuperscript{12} the local educational agency is required to take corrective action.\textsuperscript{13} Corrective action requires the “failing” school to implement at least one of six restructuring measures,\textsuperscript{14} one of which is to “replace the school staff who are relevant to the failure to make adequate yearly progress.”\textsuperscript{15} By setting unreasonable standards for achieving AYP and by calling for the termination of educators when they fail to meet them, NCLB dooms teachers and administrators to failure and threatens their careers when they do.\textsuperscript{16}

However, tenured educators cannot lose their jobs so easily.\textsuperscript{17} Tenured teachers and administrators can be terminated only after they are given due process and only for just cause.\textsuperscript{18} Though state laws vary, just cause generally requires a showing of insubordination, incompetence, immorality, or unprofessional conduct.\textsuperscript{19} Failing to meet NCLB’s unreasonable AYP requirements does not provide the requisite just cause to terminate a tenured educator.\textsuperscript{20} Rather, failure to meet an unattainable goal reveals the flaws of the goal and not the flaws in those
who are compelled to attempt to meet it.\textsuperscript{21} Consequently, no teacher or administrator should lose his or her job for being deemed relevant to a school's failure to meet NCLB's unreasonable requirements.\textsuperscript{22} Moreover, the corrective action that calls upon local education agencies to "replace the school staff who are relevant to the failure to make adequate yearly progress"\textsuperscript{23} should be void for vagueness.\textsuperscript{24} Accordingly, this corrective measure should be severed from NCLB.\textsuperscript{25} If, before such severing, tenured educators challenge their NCLB-sanctioned dismissals, courts should rule in their favor.\textsuperscript{26}

Section II of this Note explains how NCLB in its current form threatens the jobs of teachers and administrators.\textsuperscript{27} Section III describes the protections afforded by tenure and analyzes the meaning of the "just cause" required to terminate a tenured teacher or administrator.\textsuperscript{28} Section IV suggests that failure to meet NCLB testing requirements does not provide the just cause necessary to terminate a tenured educator.\textsuperscript{29} Section V recommends that no educator should lose his or her job when the percentage of students in his or her school scoring at or above "proficiency" falls below NCLB requirements.\textsuperscript{30} Section V also recommends the severance of the NCLB corrective measure that endorses "replac[ing] the school staff who are relevant to the failure to make adequate yearly progress."\textsuperscript{31} Finally, Section VI recommends that courts rule in favor of tenured educators when those individuals challenge their NCLB-sanctioned dismissals.\textsuperscript{32} Because NCLB standards are unreasonable, no tenured teacher or administrator should lose his or her job for "failing" to satisfy NCLB's requirements.

\begin{itemize}
\item \textsuperscript{21} See infra section IV for an explanation of just cause and the NCLB provision.
\item \textsuperscript{22} See infra sec. V (recommending severance of the NCLB corrective action supporting termination of such educators).
\item \textsuperscript{23} 20 U.S.C. 6316(b)(7)(C)(iv)(I).
\item \textsuperscript{24} See infra nn. 187–194 and accompanying text (suggesting that the corrective action should be found void for vagueness).
\item \textsuperscript{25} See infra sec. V (recommending an abandonment of NCLB's suggestion that such teachers be terminated).
\item \textsuperscript{26} See infra sec. V (recommending an abandonment of NCLB's suggestion that such teachers be terminated).
\item \textsuperscript{27} Infra sec. II.
\item \textsuperscript{28} Infra sec. III.
\item \textsuperscript{29} Infra sec. IV.
\item \textsuperscript{30} Infra sec. V.
\item \textsuperscript{31} 20 U.S.C. § 6316(b)(7)(C)(iv)(I).
\item \textsuperscript{32} Infra sec. V.
\end{itemize}
II. HOW NO CHILD LEFT BEHIND THREATENS THE JOBS OF TEACHERS AND ADMINISTRATORS

A. Federal Control Through Funding

Prior to 1965, the federal government had limited involvement in crafting education policy. However, Congress changed its limited power when it enacted the Education for Secondary and Elementary Schools Act of 1965 (ESEA). This law was designed to provide federal funding to schools where high percentages of students come from families of low socioeconomic status. Since 1965, the ESEA has grown to offer vital federal funding to nearly every U.S. school district, thereby enhancing federal influence over education policy.

Enacted on January 8, 2002, NCLB amended the ESEA. Much as it did before it was modified by NCLB, Title I of the ESEA “provides supplemental education funding, especially in high-poverty areas, for locally designed programs that provide extra academic support to help raise the achievement of students at risk of educational failure or, in the case of schoolwide programs, help all students in high-poverty schools to meet challenging State academic standards.” However, a school district need not be in a high-poverty area in order to receive Title I funds; a school district qualifies for Title I funds if it serves at least ten students from low socioeconomic backgrounds and if the total number of students from low socioeconomic backgrounds exceeds two percent of the school district’s total school age population. Thus, even predominately wealthy school districts serving a small proportion of students from low socioeconomic backgrounds qualify as Title I recipients. Accordingly, nearly all school districts in the United States are Title I recipients. As

34. Popham, supra n. 7, at 14.
38. 20 U.S.C. § 6333(b).
39. See id.
40. See supra n. 35.
such, they received a combined $12.3 billion in 2004 and $12.7 billion in 2005.\textsuperscript{41} In order to continue receiving the Title I federal funding on which they rely, schools must fulfill NCLB requirements.\textsuperscript{42}

\textit{B. Adequate Yearly Progress}

NCLB requires that by the 2013–14 school year, one hundred percent of every school's students score at or above a "proficient" level on standardized tests that are developed by each state in conformity with federal guidelines.\textsuperscript{43} In the meantime, NCLB requires that schools make Adequate Yearly Progress (AYP) toward that goal.\textsuperscript{44}

A school district must satisfy several criteria in order to make AYP.\textsuperscript{45} First, the school district must develop challenging academic standards consistent with federal guidelines.\textsuperscript{46} These standards must be uniformly applied to all schools and all children in the state.\textsuperscript{47} These guidelines require the following:

(i) challenging academic content standards in academic subjects that—
(\textit{I}) specify what children are expected to know and be able to do;
(\textit{II}) contain coherent and rigorous content; and
(\textit{III}) encourage the teaching of advanced skills; and

(ii) challenging student academic achievement standards that—
(\textit{I}) are aligned with the State's academic content standards;
(\textit{II}) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material required by the State academic content standards; and
(\textit{III}) describe a third level of achievement (basic) to provide complete information about the progress of lower-achieving children toward mastering the proficient and advanced levels of achievement.\textsuperscript{48}

To determine whether students are satisfactorily meeting these

\textsuperscript{42}. 20 U.S.C. § 6311.
\textsuperscript{43}. \textit{ld.} at § 6311(b)(2). A "proficient" score indicates a satisfactory level of achievement, an "advanced" score indicates an even higher level of mastery, and a "basic" score indicates an unsatisfactory level of achievement. \textit{ld.} at § 6311(b)(1)(D)(ii). See \textit{infra} notes 68–91 and accompanying text for exceptions to this requirement.
\textsuperscript{44}. \textit{ld.} at § 6311(b)(2)(B).
\textsuperscript{45}. \textit{ld.} at § 6311(b)(2)(C).
\textsuperscript{46}. \textit{ld.} at § 6311(b)(1).
\textsuperscript{47}. \textit{ld.} at § 6311(b)(1)(B).
\textsuperscript{48}. \textit{ld.} at § 6311(b)(1).
challenging academic standards, states must assess their students.49 These assessments must be uniform,50 must “be aligned with the State’s challenging academic content and student academic achievement standards, and must provide coherent information about student attainment of such standards.”51 These standardized tests are to be administered in mathematics, reading or language arts, and, after the 2006–2007 school year, in science.52 Students must be tested at least once during grades three through five, grades six though nine, and grades ten through twelve.53 Beginning not later than the 2005–2006 school year, students must be tested each year during grades three through eight.54

Second, the percentage of all students who score at or above a “proficient” level on the tests must meet or exceed the AYP requirements for that particular year.55 The AYP required percentage of students who must score at or above a “proficient” level on the standardized tests increases each year between the 2002 implementation of NCLB and 2014.56 By the 2013–2014 school year, one hundred percent of students must score at or above a “proficient” level on the tests in order for the school to satisfy NCLB student achievement requirements.57

Third, the school district’s high school graduation rate must be acceptable58 and for middle schools and elementary schools, some other academic indicator established by the state must be met.59 This other academic indicator must be valid, reliable, and “consistent with relevant, nationally recognized professional and technical standards, if any; and ... may not reduce the number of, or change, the schools that would otherwise be subject to school improvement, [or] corrective action ....”60 Such other academic indicators could include, but are not limited to, additional state or locally administered assessments, grade-to-grade retention rates, attendance rates, and the percentage of students who complete gifted and talented, advanced placement, and college

49. Id. at § 6311(b)(3)(A).
50. Id. at § 6311(b)(3)(C)(i).
51. Id. at § 6311(b)(3)(C)(ii).
52. Id. at § 6311(b)(3)(A).
53. Id. at § 6311(b)(3)(C)(v), (vii).
54. Id. at § 6311(b)(3)(C)(v), (vii).
55. Id. at § 6311(b)(2).
56. Id. at § 6311(b)(2)(F).
57. Id.; see also 34 C.F.R. at § 200.15 (requiring AYP goals leading to proficient scores by 2014). See infra notes 68–91 and accompanying text for exceptions to the one hundred percent proficiency policy.
59. 20 U.S.C. § 6311(b)(2)(C), (D); 34 C.F.R. at § 200.19.
60. 20 U.S.C. § 6311(2)(D).
preparatory courses.}\(^\text{61}\)

Fourth, the percentage of students in "accountability groups" scoring at or above the "proficient" level, disaggregated and considered independently of school-wide averages, must also meet AYP.\(^\text{62}\) Students in accountability groups are those who are economically disadvantaged, from a major racial or ethnic group, disabled, or who have limited English proficiency.\(^\text{63}\) Thus, a school that would make AYP based solely on an aggregate calculation of the entire student body would still fail to make AYP if the independently calculated, disaggregated percentage of students in any accountability group does not also satisfy test score requirements, graduation rate requirements, and all other AYP requirements for a particular year.\(^\text{64}\)

Fifth, at least ninety-five percent of the students in each accountability group must be tested at each test administration.\(^\text{65}\) Thus, schools cannot improve their AYP results by excluding accountability group students from taking tests or by permitting them to miss test administrations.\(^\text{66}\) If at least ninety-five percent of the students in each accountability group are not assessed, then the school cannot make AYP no matter how well the rest of the school's students perform.\(^\text{67}\)

C. Insufficient Exceptions to Adequate Yearly Progress

Granted, some exceptions to one hundred percent "proficiency" exist.\(^\text{68}\) NCLB creates a "safe harbor" for schools in which an accountability group's disaggregated test scores would otherwise preclude the school from achieving AYP.\(^\text{69}\) Specifically, so long as an additional academic indicator is satisfied and the current accountability group's test performance is at least ten percent higher than the

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\(^{61}\) 34 C.F.R. at § 200.19(b).


\(^{63}\) 20 U.S.C. § 6311(b)(2)(C)(v)(II); 34 C.F.R. at § 200.13(b). A school with a number of students in an accountability group that is insufficient to yield adequate statistical information or in which the results would reveal the identity of a student need not disaggregate the testing scores of members of the accountability group. 20 U.S.C. § 6311(b)(2)(C)(v)(II).

\(^{64}\) 20 U.S.C. § 6311(b)(2)(I)(i); but see infra nn. 68–91 and accompanying text (listing exceptions to this rule).

\(^{65}\) 20 U.S.C. § 6311(b)(2)(I)(ii). However, "the 95 percent requirement...shall not apply in a case in which the number of students in an accountability group is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student."\(^{id}\)

\(^{66}\) 34 C.F.R. at § 200.7(a)(I).


\(^{68}\) Id. at §§ 6311(b)(2)(I), (b)(3)(C)(iv)(II)–(III).

\(^{69}\) Id. at § 6311(b)(2)(I).
accountability group’s test performance from the previous year, AYP is satisfied.70

Additionally, NCLB makes specific exceptions for students with disabilities.71 A student with a disability is a student, “(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”72 Students with disabilities may have “reasonable adaptations and accommodations . . . necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards.” Thus, a school need not administer the same tests to some students with disabilities as it administers to students without disabilities. Even so, the alternative assessments administered to students with disabilities must be consistent with those students’ individualized education programs (IEPs),74 which are the educational programs that the Individuals with Disabilities Education Act requires schools to design for students with disabilities.75 Those IEPs include a child’s current educational levels, special education needs, and related services.76

Yet, the extent to which proficient or advanced scores on these alternative tests can be included when calculating AYP is limited.

[Proficient and advanced scores of students with the most significant cognitive disabilities based on the alternative academic achievement standards . . . [may be included in AYP calculations] provided that the

70. Id. at § 6311(b)(2)(I). Consider, for example, a school in which the aggregate percentage of students who score at or above proficiency satisfies AYP requirements but the percentage of students within an accountability group who score at or above proficiency does not satisfy AYP requirements. The “safe harbor” provision makes it possible for that school to make AYP so long as two conditions are met. First, the additional academic indicator, be it another locally administered assessment, grade-to-grade retention rates, attendance rates, or some other type of measurable educational standard, must be met by the members of that accountability group. Second, the percentage of students in the accountability group who did score at or above proficiency must be at least ten percent greater than the percentage shortfall by which the prior year’s students in that accountability group failed to make AYP.

71. Id. at § 6311(b)(3)(C)(ix)(II).


number of those students who score at the proficient or advanced level on those alternate achievement standards... does not exceed 1.0 percent of all students in the grades assessed.\textsuperscript{77}

Thus, where students with disabilities score at or above proficiency on \textit{alternative} tests, but the number of students with disabilities so scoring on those alternative tests exceeds one percent of the school's total student population assessed, those alternative test scores in excess of one percent will be counted as merely "basic," rather than the necessary "proficient," when calculating AYP.\textsuperscript{78} It follows that if more than one percent of a school's students have individual education programs that require those students be administered a different test than their state's standardized test, it would be impossible for that school to make AYP.\textsuperscript{79}

Further, the number of students requiring alternative testing could exceed one percent of many schools' total student populations. The number of students with disabilities served by federally supported programs has consistently grown.\textsuperscript{80} During the 2001–2002 school year, 13.4 percent of the total U.S. student population was served by federally-supported programs for students with disabilities.\textsuperscript{81} Of those, 1.2 percent were mentally retarded and 0.2 percent had autism or traumatic brain injury.\textsuperscript{82} Though some of the 13.4 percent may be able score at or above proficiency on the same standardized tests as their peers without disabilities, it seems likely that students with mental retardation, autism, and traumatic brain injury would have IEPs requiring alternative tests. That being the case, some schools will likely serve a number of students in excess of one percent of their overall student populations whose IEPs require that they be given alternative tests.

In addition to the insufficient exceptions NCLB makes for students with disabilities, NCLB also makes some exceptions for students with limited English skills.\textsuperscript{83} Specifically, those students may be assessed "in a valid and reliable manner and provided reasonable accommodations on

\textsuperscript{77}. 34 C.F.R. at § 200.13(c)(1)(ii); see also 20 U.S.C. § 6311(b)(2)(C) (Supp. 2002) (creating an exception if the number of disabled students "is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student").

\textsuperscript{78}. 34 C.F.R. at § 200.13(c)(1); 20 U.S.C. § 6311(b)(2)(B).

\textsuperscript{79}. See 34 C.F.R. at § 200.13(c)(1)(ii); 20 U.S.C. § 6311(b)(2). The U.S. Department of Education has pledged forthcoming regulations to ease this stringent requirement. See \textit{infra} nn. 87–91 and accompanying text.


\textsuperscript{81}. \textit{Id.}

\textsuperscript{82}. \textit{Id.}

assessments," but should typically not be assessed by alternative means after they have attended school in the United States for three or more consecutive years. Thus, non-native English speakers may take alternative tests for a limited number of years, after which their scores on standardized tests will be factored into their schools' AYP calculations.

Suggesting that the U.S. Department of Education realizes the unreasonableness of current NCLB standards, Secretary of Education Margaret Spellings announced on November 10, 2005 that states will be extended greater flexibility in how they calculate AYP. In particular, the Department of Education seeks to modify the current practice of "failing" otherwise satisfactorily performing schools if one or more accountability group within that school does not score well enough on standardized tests. Rather, states will be permitted to calculate accountability group performance more creatively in determining whether AYP has been achieved. Further, the Department of Education indicated that forthcoming regulations will permit greater flexibility in factoring in the performance of students with disabilities and limited English proficiency.

While these adjustments may prevent some schools from being labeled "failures" in the immediate future, they do not address the underlying problem. NCLB requires an ever-greater percentage of students to score at or above proficiency on standardized tests until one hundred percent of students score at or above that level by the 2013–2014 school year. Even as it pledged to ease AYP measurement standards, the Department of Education clung to one hundred percent proficiency by 2013–14 as an essential and indispensable "bright line" of NCLB. In spite of the Department of Education's modifications, NCLB standards remain unreasonable. At best, reconfiguring AYP calculation methods may help some schools elude "failure" for a while longer. Still, nearly

84. Id. at § 6311(b)(3)(C)(ix)(III).
85. Id. at § 6311(b)(3)(C)(x).
86. Id.
88. See id. at 8–11; supra nn. 62–64 and accompanying text.
89. Spellings, Road Map, supra n. 87, at 8–11.
90. Id. at 16–17.
91. Id. at 19.
93. Spellings, Road Map, supra n. 87, at 2.
every school in the U.S. will likely be deemed a "failure" by 2014.94

D. Adequate Yearly Progress Sets Unreasonable Goals That Cannot Be Met

In spite of these limited exceptions to AYP requirements,95 NCLB standards remain unreasonable and, in all likelihood, unattainable. NCLB demands "challenging academic standards"96 measured by assessments that provide an accurate account of how well students meet those challenging standards.97 However, requiring that one hundred percent of students demonstrate "proficiency" by 2014 fails to adequately account for unavoidable differences in student performance. Simply put, students enter schools with a wide range of ability levels. Aptitude, personal adversity, drug abuse, homelessness, illness, disability, and truancy all factor into personal student performance. If standardized tests accurately measure how well students meet demanding academic standards, it follows that some students are likely to score at a "basic" level rather than at or above a "proficient" level.

W. James Popham, professor emeritus of the Graduate School of Education and Information Studies at University of California Los Angeles,98 describes NCLB's goal of one hundred percent proficiency as "a marvelous goal that's clearly not going to be achieved."99 He writes:

"[a]nyone who spends even a few hours in a few of today's public schools will recognize that teachers will be unable to get every single child in school to reach a meaningful proficiency level on any sort of sensible achievement test. 'One hundred percent of children reaching proficiency' has a potent political ring to it, but it is an altogether unrealistic aspiration.100"

Professor Popham goes on to describe the AYP standardized scoring requirement of one hundred percent proficiency as "altogether unrealistic."101

Jay Matthews of the Washington Post agrees, writing that "[t]he 100 percent goal was simply a target, an admittedly unreachable goal...

94. See infra sec. II.D (explaining that AYP establishes unreasonable goals that cannot be met).
95. See supra nn. 68–91 and accompanying text.
97. Id. at § 6311(b)(3)(C).
99. Popham, supra n. 7, at 150.
100. Id.
101. Id. at 151.
designed to motivate schools to stretch themselves to do better . . . . The creators of the law knew they would have to revise it in a few years.”

Indeed, at current rates of improvement and assuming no diminishing marginal return, one hundred percent proficiency would not be met until the year 2166. Realistically, the “probable fact [is that schools] will never reach the ultimate goal [of one hundred percent proficiency] by 2014.” In all likelihood, the unreasonable requirements of NCLB will never be met. As James Popham notes:

[1]In those schools serving upper-level [socioeconomic status (SES)] families, students’ test scores will probably be high enough, early on, to make the state’s AYP annual targets. But let’s say, for instance, that a state-set AYP improvement rate of 5 percent per year has been established. For a few years there will be a number of schools whose students score sufficiently well on state tests to avoid AYP failure, especially for high-SES schools. But as each year goes by, the number of nonfailing schools will get smaller and smaller.

Indeed, many of the schools already deemed “in need of improvement” serve large proportions of minority and low-income student populations. Presumably, these schools will be the first subject to “corrective action,” a designation they could have as soon as the conclusion of the 2005-06 school year. Yet, even schools lauded as exemplary are not immune from failure to make AYP. A few weeks after President George W. Bush visited Vandenberg Elementary of Southfield, Michigan, lauding it as an outstanding school, it was on a list of “failing schools.” In a similar vein, the “Blue Ribbon Schools Program” was established by the U.S. Secretary of Education in 1982 to identify and recognize outstanding schools. After Chief State School Officers

104. Id. at 1130.
105. Popham, supra n. 7, at 150.
106. U.S. Govt. Accountability Off., supra n. 9, at 3.
107. After failing to make AYP for two consecutive years, a school is deemed “in need of improvement” and after failing to make AYP for four consecutive years, a school is subject to “corrective action.” See infra nn. 122-130 and accompanying text.
nominate them, the Department of Education National Review Board visits schools with particularly strong applications. So competitive and exclusive is the program that only twenty schools in the nation were designated “Blue Ribbon School[s] of Distinction” in 2004. Serving as a testament to the unreasonableness of NCLB standards, nineteen “Blue Ribbon Schools” failed to make AYP by the close of the 2003–2004 school year.

Whether schools become “failures” upon being unable to attain a one hundred percent proficiency rate in 2014 or whether they “fail” sooner as the required percentage of students scoring at or above proficiency approaches one hundred percent, the end result will be that nearly every school in the U.S. will likely be deemed a “failure.” Unable to meet NCLB’s increasingly unrealistic goals after failing to make AYP the first time, nearly every U.S. school will soon be deemed in need of “corrective action,” thereby becoming subject to NCLB’s remediation measures.

E. Mandated Action for Schools When They Fail to Make Adequate Yearly Progress

Under NCLB, Title I recipient schools that fail to make AYP must impose federally-created remediation measures or be subject to the loss of federal funding. The remediation measures that a “failing” school must take grow increasingly severe each consecutive year that the school does not make AYP.

When a school fails to make AYP for two consecutive years, it is identified as in need of improvement. As such, the school must develop and implement a two-year improvement plan designed to assess and remediate the reasons the school failed to make AYP.

111. Id.
112. Id.
114. Keele, supra n. 103, at 1130.
115. See supra nn. 98–105 and accompanying text (discussing the unrealistic requirements of NCLB).
116. Id.
118. Id.
119. Id.
120. Id. at § 6316 (b)(1)(A).
121. Id. at § 6316 (b)(3).
Additionally, all students in the failing school must be permitted to transfer to another school within the district that has not been identified as needing improvement.\textsuperscript{122} When the school fails to make AYP for a third consecutive year, it must continue the aforementioned remediation measures and must also make supplemental education services available to that school's students\textsuperscript{123} from "a provider with a demonstrated record of effectiveness."\textsuperscript{124} Such supplemental education services must be in addition to instruction provided during the school day.\textsuperscript{125} The services must include tutoring and other supplemental academic support services specifically designed to increase academic achievement and the likelihood that eligible students will score at or above a proficient level on standardized tests.\textsuperscript{126} When the school fails to make AYP for a fourth consecutive year, it is subject to "corrective action."\textsuperscript{127} This means the school must continue all previous remediation efforts and must also implement at least one of the following:

(I) Replace the school staff who are relevant to the failure to make adequate yearly progress.

(II) Institute and fully implement a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress.

(III) Significantly decrease management authority at the school level.

(IV) Appoint an outside expert to advise the school on its progress toward making adequate yearly progress, based on its school plan.

(V) Extend the school year or school day for the school.

(VI) Restructure the internal organizational structure of the school.\textsuperscript{128}

By 2014, almost every U.S. school will have already failed to make AYP or will fail in that year to have one hundred percent of its students

\textsuperscript{122} Id. at § 6316(b)(1)(E). If no non-identified school exists within that school district, then the district must, to the extent practicable, facilitate transfer of students who so wish to non-identified schools in other school districts, and the district may also provide supplemental education services that would not otherwise have to be provided until a school fails to make AYP for a third consecutive year. 34 C.F.R. at § 200.44(h).

\textsuperscript{123} 20 U.S.C. § 6316(b)(5).

\textsuperscript{124} Id. at § 6316(c)(1).

\textsuperscript{125} 34 C.F.R. at § 200.45(a).

\textsuperscript{126} Id.

\textsuperscript{127} 20 U.S.C. § 6316(b)(7)(C).

\textsuperscript{128} Id. at § 6316(b)(7)(C)(iv) (emphasis added); see also 34 C.F.R. at § 200.42.
score at or above a "proficient" level on standardized tests. Whether or not schools can postpone their "failure" until 2014, the end result is quite predictable: nearly every U.S. school will fail to meet NCLB test score requirements, nearly every U.S. school will fail to do so repeatedly during subsequent consecutive years, and nearly every U.S. school will be subject to "corrective action" by 2017. Thus, at some time prior to 2018, nearly every teacher and administrator in the U.S. faces the possibility of losing his or her job if deemed "relevant to the failure" of the students in his or her school to meet NCLB's required testing scores. Educators have been set up to fail, and when they do, their jobs will be at risk. Granted, schools subject to corrective action are required to implement "at least one" of the corrective actions established by NCLB. Thus, local school districts will not be required to "[r]eplace the school staff who are relevant to the failure to make adequate yearly progress." However, at least one corrective action must be implemented in schools that fail to make AYP for four consecutive years and replacing school staff remains one of the six measures from which schools must choose. To the extent that this corrective measure seems the least overwhelming of the six from which local education agencies must choose, it is likely to be the most frequently implemented.

Teachers and administrators serving students of low socioeconomic status will likely be the first educators subject to the NCLB corrective measure of termination. More vulnerable to job loss if they work at a school with a greater percentage of low-performing students, teachers and administrators who work at schools able to postpone being designated as in need of improvement or subject to corrective action are

129. See supra nn. 98–104 and accompanying text.
130. See supra nn. 98–104 and accompanying text.
131. Schools are subject to "corrective action" after failing to meet NCLB's test score requirements for four consecutive years, 20 U.S.C. § 6316(b)(7)(C), and, as is argued in section 0, nearly every U.S. school will fail to meet NCLB test score requirements by 2014 at the latest. See supra nn. 98–104 and accompanying text; see also Popham, supra n. 7, at 150; Matthews, supra n. 102. Since schools will likely remain unable to meet NCLB's unreasonable test score requirements thereafter, nearly every U.S. school will have failed to meet NCLB requirements for four consecutive years in 2017 if not sooner. See supra sec. 11.D (discussing the likelihood of widespread failure to meet NCLB requirements by 2014).
132. Id. at § 6316(b)(7)(C)(iv)(I).
133. Id. at § 6316(b)(7)(C)(iv).
134. Id. at § 6316(b)(7)(C)(iv)(I).
135. Id. at § 6316(b)(7)(C)(iv).
136. See U.S. Govt. Accountability Off., supra n. 9 (indicating that schools serving students from low socioeconomic backgrounds were less likely to meet NCLB standards); see also Popham, supra n. 7, at 150 (stating that schools serving students from lower-level socioeconomic families are more likely to fail).
likely to have somewhat better job security. Thus, the job vulnerability introduced by NCLB may pull talented educators away from the very schools that need them most. Even within schools, teachers may be reluctant to teach non-native English speaking students, students with poor attendance, low-performing students, poor test takers, or any other type of student who may jeopardize a teacher's students' overall standardized test score results. After all, a teacher with students who do not meet NCLB scoring requirements risks being deemed relevant to the failure of the school to meet NCLB's standards. Willingness to take a job working with students who may never meet federal testing standards should not subject an educator to the risk of termination. Such educators should be praised and supported for tackling the hardest jobs in education. Their careers should not be threatened by unreasonable standards and unfair consequences.

III. TENURE AND JUST CAUSE

Tenure protects educators from arbitrary actions by school officials. Accordingly, a tenured teacher or administrator may be dismissed only through due process and for just cause. The process by which a teacher obtains tenure is generally established by state law, but tenure may also be established "by custom." The U.S. Supreme Court held in *Perry v. Sinderman* that a teacher "who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."

Though tenured educators are protected from arbitrary dismissal,

137. See Popham, *supra* n. 7, at 150 (Since schools serving students from lower-level socioeconomic families are generally more likely fail to make AYP before schools serving students from high-level socioeconomic families, it follows that educators in the former group will be subject to NCLB corrective actions before educators in the later group.).

138. Fischer et al., *supra* n. 18, at 16.

139. *Perry v. Sinderman*, 408 U.S. 593, 601-02 (1972) (Though possible to demonstrate constructive tenure from circumstances surrounding employment, a teacher failed to do so where his employment contract specified that he had been appointed for merely a series of one-year terms); see also Fischer et al., *supra* n. 18, at 34 (tenured educators may be terminated only for just cause).

140. *Perry*, 408 U.S. at 601-02; Fischer et al., *supra* n. 18, at 18. In New York, a teacher or administrator generally receives tenure by serving a school district for three years and being recommended for tenure by the superintendent of schools. N.Y. Educ. Law § 3012 (Consol. 2006). In California, a teacher generally acquires permanent status [or tenure] if asked to return for a third year to a job he or she successfully performed for the two prior consecutive years. Cal. Educ. Code Ann. §44929.21(b) (West 2006).

141. Fischer et al., *supra* n. 18, at 18

142. 408 U.S. at 601-02.
there exist valid reasons for discharging such individuals.\textsuperscript{143} The most frequently mentioned grounds for dismissal of a tenured teacher or administrator include insubordination, incompetence, immorality, unprofessional conduct, or other just cause.\textsuperscript{144} Several states that offer tenure to educators have found that just cause exists for terminating a tenured educator who fails to maintain his or her certification,\textsuperscript{145} who is insubordinate,\textsuperscript{146} who engages in immoral conduct or conduct that places students at a risk,\textsuperscript{147} or where economic necessities of the school

\textsuperscript{143} Fischer et al., \textit{supra} n. 18, at 27.

\textsuperscript{144} Id. For example, New York permits dismissal of a tenured teacher for insubordination, immoral character, conduct unbecoming of a teacher, inefficiency, incompetency, physical or mental disability, neglect of duty, or failure to maintain certification. N.Y. Educ. Law § 3012(2); see e.g. Smith \textit{v. Bd. of Educ. Wallkill C. Sch. Dist.}, 65 N.Y.2d 797, 798–99 (1985) (tenured teacher who failed to maintain his certification was properly suspended from his job); Root \textit{v. Bd. of Educ. of the Fulton Consol. Sch. Dist.}, 399 N.Y.S. 2d 785, 786 (App. Div. 4th Dept. 1977) (where, after a warning, a tenured teacher failed to improve upon deficiencies in his teaching performance, to bring his teaching into alignment with required curriculum, to cooperate better with administrators, to improve the quality of education in classes and where the teacher distributed printed epithets to colleagues, teacher was properly terminated); \textit{Matter of Worley}, 1 Educ. Dept. Rep. 475 (1960) (tenured teacher who refused to file lesson plans with principal was properly discharged as insubordinate). Maryland permits dismissal of a tenured teacher for immorality, misconduct in office, insubordination, incompetency, or willful neglect of duty. Md. Educ. Code Ann. § 6-202(A)(1) (2004); see e.g. Resetar \textit{v. State Bd. of Educ.}, 399 A.2d 225, 226 (Md. 1979) (tenured teacher who used "jungle bunnies" as a racial epithet toward junior high students was properly dismissed).

In Connecticut, the causes for which a tenured teacher may be dismissed are inefficiency, incompetence, insubordination, moral misconduct, disability as shown by competent medical evidence, elimination of the teacher's position, or other due and sufficient cause. Conn. Gen. Stat. Ann. § 10-151(d) (West 2002); see e.g. Rogers \textit{v. Bd. of Educ. of the City of New Haven}, 749 A.2d 1173, 1175, 1183 (Conn. 2000) (tenured teacher acting as assistant principal properly terminated for overseeing strip search of sixth grade students to uncover allegedly stolen money); Rado \textit{v. Bd. of Educ. of the Borough of Naugatuck}, 583 A.2d 102, 108 (Conn. 1990) (tenured teacher who tampered with school telephone system for purpose of eavesdropping, a class D felony, was properly terminated on grounds of moral misconduct). Tennessee permits dismissal of a tenured teacher based on "incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination." Tenn. Code Ann. § 49-5-511(a)(2) (2002); see e.g. Morris \textit{v. Clarksville-Montgomery County Consol. Bd. of Educ.}, 867 S.W.2d 324, 330 (Tenn. App. 1993) (tenured teacher who slept in same bed with students and engaged in intimate activities was properly dismissed on grounds of unprofessional conduct).

\textsuperscript{145} See e.g. Rogers \textit{v. Ala. St. Tenure Commn.}, 372 So.2d 1313, 1313 (Ala. Civ. App. 1979) (school board had "good and just cause" to terminate tenured teacher where the teacher failed to meet certification requirement(s)); Snyder \textit{v. Jefferson County Sch. Dist.}, 821 P.2d 840, 841–42 (Colo. App. 1992) (teacher's failure to hold "a valid and current teacher's certificate... at a time when she was ordered to report to a teaching position... constituted 'other good and just cause' for [her dismissal]" (quoting Frey \textit{v. Adams County Sch. Dist. No. 14}, 804 P.2d 851, 855 (Colo. 1991))).

\textsuperscript{146} See e.g. Ellenburg \textit{v. Huntsville City Bd. of Educ.}, 349 So.2d 605, 609–11 (Ala. Civ. App. 1977) (holding that board of education properly cancelled tenured principal's contract where principal's failure to cooperate on several occasions with those who administered the school system amounted to insubordination).

\textsuperscript{147} See e.g. \textit{Governing Bd. of the ABC Unified Sch. Dist. v. Haar}, 33 Cal. Rptr. 2d 744, 748–51 (App. 2d Dist. 1994) (tenured teacher dismissed for sexually harassing students); see also Fischer et
Tenured teachers who are shown to be incompetent have also been properly terminated. Thus, state legislatures and courts insist that educators be qualified, competent professionals of sound moral character who effectively perform their jobs. It is entirely appropriate that tenured educators who fall short of these standards should and do lose their jobs. Conspicuously absent from the reasons supporting dismissal of a tenured educator is the failure to ensure that students score at a certain level on standardized tests.

Though tenured teachers can be dismissed, they enjoy significant job protection. In order to dismiss a tenured teacher, "school officials [must] prove that the teacher's actions violated state law." Accordingly, a tenured New York teacher who used corporal punishment and applied physical restraints upon students could not be fired because "inflicting corporal punishment" is not specifically listed in New York's Education Law as grounds for dismissing a tenured teacher. The school district in that case also argued in the alternative that the teacher's actions amounted to conduct unbecoming of a teacher; however, the district ultimately failed to demonstrate that the use of physical force was unnecessary in the situation at issue. In Connecticut, a tenured teacher who took a two-day leave of absence could not be fired, even though she was explicitly denied permission to do so. Also, California courts have held that a teacher's possession of marijuana, without more, does not constitute immoral conduct as a matter of law and is therefore insufficient grounds for dismissal of a tenured teacher. California has

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148. See e.g. Work v. Mount Abraham Union High Sch. Bd. of Dirs., 483 A.2d 258, 260 (Vt. 1984) (just cause existed to terminate a teacher whose position was no longer available due to economic reasons).
149. See e.g. Pratt v. Ala. St. Tenure Commn., 394 So.2d 18, 20-21 (Ala. Civ. App. 1980) (tenured teacher legitimately terminated for: failure to provide administrative leadership, failure to establish a stable lunch period schedule, failure to cooperate in the solution of school problems, neglect of duty, and failure to administer students' individualized education programs); Hagerty v. St. Tenure Commn., 445 N.W.2d 178, 181-82 (Mich. App. 1989) (tenured teacher legitimately discharged based on: unsatisfactory evaluations of her performance, complaints from students and parents, failure to remedy shortfalls in her teaching when critiqued by administration, low enthusiasm, giving unclear directions to students, her former students generally struggling with information she was supposed to have taught them, inability to communicate with and motivate students, and overall adverse effect on students' educational process).
150. See supra nn. 143-149 and accompanying text (listing valid reasons for dismissal).
151. Fischer et al., supra n. 18, at 27.
153. Id. at 177.
155. Von Durjais v. Bd. of Trustees Roseland Sch. Dist., 148 Cal. Rptr. 192, 196 (App. 1st Dist.)
also concluded that the commission of sex offenses unassociated with the school environment or students does not demonstrate unfitness to teach per se. Thus, tenured educators enjoy a high level of job protection since school districts must demonstrate that an educator's actions violated state law in order to dismiss such an individual. Although tenured educators may be properly terminated for being insubordinate, incompetent, immoral, unprofessional, or unfit, failure to satisfy the unreasonable demands of NCLB is not a legitimate reason for their dismissal.

IV. FAILURE TO MAKE AYP IS NOT JUST CAUSE FOR DISMISSAL OF A TENURED TEACHER OR ADMINISTRATOR

Though there are valid reasons for a tenured educator to be terminated, no one should lose his or her job for being deemed “relevant to the failure” of his or her students to meet NCLB's testing requirements. Since NCLB demands attainment of unrealistic test results that almost all schools will inevitably fail to achieve, a failure to meet these unrealizable standards does not provide just cause for termination.

In Scheelhaase v. Woodbury Central Community School District, the District Court for the Northern District of Iowa found that a non-tenured teacher could not be terminated on the grounds that her students failed to achieve standardized state test scores that met school district goals. On appeal, the Eighth Circuit Court of Appeals reversed and remanded the District Court's decision. The Eighth Circuit held that the lower court incorrectly heard the case because the teacher received all the due process to which she was entitled under Iowa state law and no federal constitutional issue existed. After all, Ms. Scheelhaase was given a hearing that fulfilled the due process to which she was entitled under Iowa statute. Further, the Court stated that the District Court should not have interfered with the standards by which the school determined

157. Fischer et al., supra n. 18, at 27.
158. See supra nn. 143-149 and accompanying text (listing valid reasons for dismissal).
159. See supra nn. 143-149 and accompanying text (listing valid reasons for dismissal).
160. See supra sec. II.D (outlining unrealistic AYP expectations of NCLB).
162. Scheelhaase v. Woodbury Central Community Sch. Dist., 488 F.2d 237, 244 (8th Cir. 1973).
163. Id. at 240.
164. Id. at 244.
that Ms. Scheelhaase should be dismissed.\textsuperscript{165} "Such matters as competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions."\textsuperscript{166} Thus, the Eighth Circuit maintained that a teacher \emph{without tenure}, after being given whatever due process was due to her by statute, could be fired by the school board for failing to meet the board's goals for student scores on standardized tests.\textsuperscript{167} The Court noted that the termination was valid because the standard upon which the termination was based—the failure of Ms. Scheelhaase's students to score at a certain level on a state standardized test—was neither arbitrary nor capricious.\textsuperscript{168}

However, since \emph{just cause} is required to terminate a \emph{tenured} teacher or administrator, termination of a tenured educator on the basis of failure to meet NCLB test score requirements is a completely different situation.\textsuperscript{169} A higher standard must be met before schools can dismiss tenured educators than is required to terminate those who are untenured, such as Ms. Scheelhaase.\textsuperscript{170} It is not enough to merely meet due process obligations; schools must also have just cause to terminate a tenured educator.\textsuperscript{171} Surely, being relevant to a school's failure to have \emph{unattainable} percentages of students scoring at a "proficient" level on standardized tests does not alone constitute just cause. As the Eighth Circuit pointed out in \textit{Scheelhaase}, "competence of teachers, and the standards of its measurement are not, \emph{without more}, matters of constitutional dimensions."\textsuperscript{172}

Clearly, there is more at work here. "Failure" under NCLB does not constitute the requisite insubordination, incompetence, immorality, unprofessional conduct, or other just cause required to terminate a tenured educator.\textsuperscript{173} Consequently, school officials seeking to replace school staff relevant to the failure of the school to make AYP are unlikely to succeed in meeting their burden for terminating a tenured educator, since they probably will not be able to prove "that the teacher's actions violated state law."\textsuperscript{174} As discussed previously, the Board of Education in Conklin, New York, could not dismiss a teacher on the grounds that he

\begin{thebibliography}{99}
\bibitem{165} Id.
\bibitem{166} Id.
\bibitem{167} Id. at 242 (emphasis added).
\bibitem{168} Id. at 241-42.
\bibitem{169} \textit{Perry}, 408 U.S. 593, 602 (1972). \textit{See also} Fischer et al., \textit{supra} n. 18, at 34.
\bibitem{170} \textit{Scheelhaase}, 488 F.2d at 237, 242.
\bibitem{171} \textit{Perry}, 408 U.S. at 602. \textit{See also} Fischer et al., \textit{supra} n. 18, at 34 (summarizing the protections of tenure).
\bibitem{172} \textit{Scheelhaase}, 488 F.2d at 242 (emphasis added).
\bibitem{173} See \textit{supra} nn. 143-149 and accompanying text (listing valid reasons for dismissal).
\bibitem{174} Fischer et al., \textit{supra} n. 18, at 27.
\end{thebibliography}
used corporal punishment because “inflicting corporal punishment” is not statutorily enumerated as grounds for termination of a tenured teacher. Since NCLB corrective action dismissals are not sanctioned by the general reasons for tenured educator dismissal, it follows that states with tenured educators should not be able to dismiss those individuals unless “being relevant to the failure of a school to make AYP” is enumerated in the statutory provisions for dismissal of tenured educators.

Indeed, if tenure protected the job of a teacher who used corporal punishment after being told by his principal not to do so, a teacher who defied her administrators by taking days off after being denied permission, a teacher who possessed marijuana, and a teacher who committed a sex offense unrelated to his capacity as an educator, then tenure should certainly protect a tenured educator whose students “fail” to meet unreachable testing standards. Recognizing the job protections afforded tenured educators, the New York State School Boards Association notes that the corrective measure advocating the replacement of school staff relevant to the failure of the school to make AYP “is limited where it involves the termination of tenured teachers and administrators . . . .” Indeed, tenured educators are protected against termination without just cause, and failure to meet an unattainable testing requirement is not just cause.

The Eighth Circuit supported Ms. Scheelhaase’s termination, in part, because it held that the standards she failed to meet were neither arbitrary nor capricious. Yet, the test scores that students must achieve under NCLB seem arbitrary and capricious inasmuch as they are unattainable. It is, indeed, a political whim to decree that one hundred percent of students will score at or above a “proficient” level on

175. Clayton, 375 N.Y.S.2d at 173. The school district in that case also failed to win the teacher’s dismissal through its alternative argument that the teacher’s actions amounted to conduct unbecoming of a teacher; the school district failed to make a strong enough case that the use of physical force was not necessary in the situation in which it was applied. Id.

176. See supra nn. 143–149 and accompanying text (listing valid reasons for dismissal).

177. Clayton, 375 N.Y.S.2d at 173.


179. Von Durjais, 148 Cal. Rptr. at 196.


182. Perry, 408 U.S. at 602. See also Fischer et al., supra n. 18, at 34 (summarizing the protections of tenure).

183. Scheelhaase, 488 F.2d at 241–42.

184. See supra sec. II.D (outlining unrealistic AYP expectations of NCLB).
standardized tests. Such a requirement disregards the realities of different student abilities, cognitive challenges faced by some disabled students, students’ personal adversities, the challenges non-native English speaking students encounter when presented with a test written in English, and countless other factors that negatively affect student performance on standardized tests.

Finally, the corrective measure itself is likely void for vagueness. Though local school districts will not be required to “[r]eplace the school staff who are relevant to the failure to make adequate yearly progress,” the mere availability of this measure is problematic. Neither the NCLB statutes nor the associated regulations promulgated by the U.S. Department of Education specify what renders an educator “relevant to the failure” of a school to make AYP. Since NCLB was ratified in 2002 and since the first educators to lose their jobs for being relevant to the failure to make AYP will not be dismissed until after the close of the 2005-06 school year, courts will not determine the validity of the NCLB provision until it causes actual injury. Without statutory or regulatory guidance explaining the “relevant to the failure” provision, educators cannot know in advance what might make them “relevant to the failure” of their schools to make AYP and can do little to avoid this job-threatening stigmatization.

Undefined as the statutes and regulations have left it, the corrective action measure calling for the replacement of “the school staff who are relevant to the failure [of a school] to make AYP” will likely be applied

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185. Popham, supra n. 7, at 150.
186. See supra sec.II.D (outlining unrealistic AYP expectations of NCLB).
189. Schools do not become subject to “corrective action,” including the remediation measure of replacing school personnel relevant to the failure of the school to make AYP, until they fail to make AYP for four consecutive years. 20 U.S.C. § 6316(b)(7)(C). Since NCLB was first in effect during the 2002-03 school year, the earliest that a school could fail for four consecutive years to make AYP would be with the conclusion of the 2005-06 school year.
190. Kegerreis v. U.S., 2003 WL 22327188 at *3 (D. Kan. Oct. 9, 2003) (A teacher sued the United States claiming that NCLB is unfair and unconstitutional because it holds only school personnel accountable if students at a school fail to meet NCLB testing requirements. The case was dismissed, in part, because no case or controversy yet exists. Plaintiff failed to show “(1) that he has suffered ‘injury in fact’ that is ‘concrete’ rather than ‘conjectural or hypothetical;’ (2) that the facts reveal a ‘causal connection between the injury and the conduct complained of;’ and (3) that it is ‘likely’ and not merely ‘speculative’ that the injury complained of will be ‘redressed by a conceivable decision.’” The injury is “hypothetical and depends on (1) the performance of students at his school on standardized tests over the next 11 years and (2) the Department of Education’s future choice of any remedy to be imposed as a result of student test scores.”) (citing Horstkoetter v. Dept. of Pub. Safety, 159 F.3d 1265, 1279 (10th Cir. 1998)).
in different ways by different school districts. As stated in *California Teachers' Association v. State Board of Education*, "[v]ague statutes are objectionable... [because] they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."\(^{192}\) Because the corrective action calling for the replacement of "school staff who are relevant to the failure to make adequate yearly progress,"\(^{193}\) seems likely to foster both of the objectionable outcomes described in *California Teachers' Association*, that corrective action will likely be found void for vagueness.

Tenured educators should be protected against losing their jobs due to NCLB's corrective action that endorses replacement of school staff deemed relevant to a school's failure to make AYP. Failing to meet an unattainable goal does not satisfy the just cause requirement necessary to justify termination of a tenured educator. Further, the corrective measure, itself, remains so poorly defined that it should be deemed void for vagueness.\(^ {194}\)

**V. RECOMMENDATIONS**

Lawmakers will likely revise the unrealistic standards of NCLB as soon as an unacceptable number of U.S. schools are deemed "failing."\(^ {195}\) Congress is unlikely to tolerate the political upheaval that would likely accompany having nearly every school in the U.S. deemed "in need of improvement" or subject to "corrective action."\(^ {196}\) Indeed, "many state-level education officials believe that, after enormous numbers of public schools are labeled failing, NCLB might disappear completely!"\(^ {197}\) W. James Popham predicts:

Complaints from disgruntled parents whose children are attending a failing school will loudly ricochet around state capitals and Washington, D.C. Common sense alone tells us that so many of our nation's public schools just aren't that bad! At such a moment, I predict, our federal lawmakers will be forced to rethink the wisdom of

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194. See *Cal. Teachers' Assn.*, 271 F.3d at 1150.
195. Id.; see also Popham, *supra* n. 7, at 151.
196. Id.
NCLB’s “dozen-years-to-proficiency” requirement and will establish more realistic annual improvement goals.  

Yet educators in schools that fail sooner rather than later could have their jobs threatened before the need for reform is realized. Since many schools will likely make AYP for the first few years that NCLB is in effect and since the first schools to be subject to corrective action will likely be those serving students from families of low socioeconomic status, the unreasonableness of NCLB might not be immediately evident to the general population. Thus, NCLB’s corrective action advocating replacement of school personnel relevant to a school’s failure to make AYP will likely remain in effect until evidence of its unfairness becomes widespread. Since the first schools to fail for four consecutive years to meet NCLB testing standards could be subject to corrective action by the end of the 2005-2006 school year, some school districts might attempt at that time to terminate teachers and administrators deemed relevant to the failure of those schools to make AYP. This should not be permitted.

The NCLB provision calling for the “replacement of school staff who are relevant to the failure to make adequate yearly progress,” should be severed from the law. In this way, no tenured educator will suffer an illegitimate job loss for failing to meet unattainable standards. When, after the first schools become subject to corrective action as early as 2006, tenured educators challenge their NCLB-sanctioned dismissals, courts should rule in their favor. Until large-scale public demand compels Congress to reform NCLB, no tenured teacher or administrator should lose his or her job for failing to meet NCLB’s unattainable standards.

VI. CONCLUSION

On January 8, 2002, George W. Bush signed NCLB into law

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198. Popham, supra n. 7, at 151.

199. Schools do not become subject to “corrective action,” including the remediation measure of replacing school personnel relevant to the failure of the school to make AYP, until they fail to make AYP for four consecutive years. 20 U.S.C. 6316(b)(7)(C). Thus, the first schools to become subject to corrective action could do so as early as the end of the 2005-2006 school year.

200. Popham, supra n. 7, at 150.

201. See U.S. Govt. Accountability Off., supra n. 9. See also Popham, supra n. 7, at 150 (discussing the requirements that must be met by 2014).

202. Popham supra n. 7, at 150.

203. See id. at 151.


surrounded by students at Hamilton Public High School in Hamilton, Ohio. During his speech marking the occasion, the President told his audience, "[W]e’ve got to thank all the teachers who are here. I thank you for teaching. Yours is indeed a noble profession, and our society is better off because you decided to teach. . . . We trust you. . . . [T]hank you for what you do." Yet even as Bush lauded educators at that assembly and throughout the United States, the enactment of NCLB put their jobs at risk. By requiring students to achieve unattainable standardized test results and by advocating the dismissal of educators deemed relevant to students’ failure to do so, NCLB dooms educators to fail and threatens their jobs when they do.

Tenured teachers and administrators should not lose their jobs when the schools in which they work fail to meet NCLB requirements. Their students’ “failure” to achieve unattainable test results does not provide the just cause required for their termination. Further, the lack of specificity embodied in the corrective action calling for the replacement of school staff “who are relevant to the failure to make adequate yearly progress” should render that provision void for vagueness. Educators’ jobs should not be jeopardized by NCLB’s unreasonable requirements. Accordingly, the NCLB provision calling upon schools subject to corrective action to “replace the school staff who are relevant to the failure to make adequate yearly progress,” should be severed from the law. In the meantime, no tenured educator should lose his or her job pursuant to this corrective measure. When the first schools become subject to corrective action as early as 2006 and tenured educators challenge their NCLB-sanctioned dismissals, courts should rule in their favor. If the United States truly wishes to leave no child behind, it cannot unjustly terminate the very individuals who dedicate their professional lives to carrying all children forward.

Timothy P. Crisafulli *

207. Id.
208. See supra sec. II.D (explaining that NCLB standards are unreasonable).
209. See supra sec. IV.
211. See supra nn. 187–193 and accompanying text (suggesting that the corrective action provision should be found void for vagueness).

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