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Actually, We Are Leaving Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students' Needs

Emily Suski*

To many advocates for low-income families, it seems like a matter of common sense that children from low-income backgrounds are likely to arrive at school with problems that both result from their poverty and negatively affect their ability to learn.¹ Social science studies, among others, support this seemingly common sense notion. Such studies have found that children from low-income backgrounds have worse health than children who come from higher income backgrounds.² Childhood poverty is correlated not only with poor physical health but also with poor mental health.³ Low-income children often live in disorganized,⁴ violent neighborhoods where they feel a near-constant sense of threat,⁵ which both negatively impacts their physical functioning⁶ and increases

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1. For example, Patrick Cooper, the Superintendent of the McComb Separate School District in Mississippi, has implemented a program in McComb to address the problems with which poor children arrive at school in order to better enable them to learn. In a conversation with me on May 19, 2005, he explained the work he had done in McComb and repeatedly said that "it just makes sense" to take care of the needs of low-income students in order to promote their learning. Telephone Interview with Patrick Cooper, Superintendent, McComb Separate School District (May 19, 2005).

2. Anne Case et al., *Economic Status and Health in Childhood: The Origins of the Gradient*, 92 AM. ECON. REV. 1308, 1308 (2002). The relationship between income and health "becomes more pronounced" as children grow older. *Id.*

3. Guang Guo & Kathleen Mullen Harris, *The Mechanisms Mediating the Effect of Poverty on Children's Intellectual Development*, 37 DEMOGRAPHY 431, 431 (2000). Childhood poverty is also correlated with teenage pregnancy and childbearing, dropping out of school, and unemployment in adolescence and early adulthood. *Id.*

4. Catherine E. Ross & John Mirowsky, *Neighborhood Disadvantage, Disorder, and Health*, 42 J. HEALTH & SOC. BEHAV. 258, 260 (2001).

5. Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619, 640 (1996). High poverty areas have been found to have unusually high levels of violent crime. *Id.*

6. Ross & Mirowsky, *supra* note 4, at 266. The health of people living in disadvantaged neighborhoods is harmed because those neighborhoods are highly disordered. Persons in such

the likelihood that they will exhibit symptoms of depression, anxiety, oppositional defiant disorder, and conduct disorder.⁷ Because low-income students cannot leave the effects of these problems at the schoolhouse door, it is unsurprising that low-income status has a negative impact on their academic achievement.⁸ It is similarly unsurprising that, given the effects of poverty on their physical and mental health, children from low-income backgrounds also miss more days of school than other children.⁹

These problems are particularly urgent because the number of children in poverty continues to grow,¹⁰ and the negative effects of poverty are not limited to the poorest children.¹¹ The scope of poverty and its negative effects raises the question of who bears responsibility for addressing these negative effects so that children who are disadvantaged by poverty can achieve academically.¹² Title I of the Elementary and Secondary Education Act of 1965 ("ESEA") provided an

neighborhoods face "a noxious, threatening, and dangerous environment which negatively impacts health directly and indirectly because it is associated with fear." *Id.* at 268. Stress, including the stress resulting from fear of one's neighborhood, can decrease a person's immunity to diseases and resistance to cancer. *Id.* at 261. It can also hasten an irregular heart beat and a heart attack. *Id.* Additionally, people living in low-income neighborhoods are more likely to have chronic health problems and are less likely to feel healthy than people in higher income neighborhoods. *Id.* at 266.

7. Carol S. Aneshensel & Clea A. Sucoff, *The Neighborhood Context of Adolescent Mental Health*, 37 J. HEALTH & SOC. BEHAV. 293, 305 (1996). Ambient hazards, or adolescents' perceptions of them in their neighborhoods, negatively affect adolescents' mental health. *Id.* Symptoms of mental health disorders increase as the neighborhood becomes more threatening. *Id.*

8. A study done by the Institute for Research on Poverty at the University of Wisconsin concluded that income has "a significant effect on a child's math and reading test scores." Gordon Dahl & Lance Lochner, *The Impact of Family Income on Child Achievement* 3 (Inst. for Research on Poverty, Discussion Paper No. 1305-05, 2005), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp130505.pdf>. It also found that increases in the income of low-income parents can significantly increase their children's academic achievement levels. *Id.* at 30. Indeed, "external" factors" such as the stability of health care, housing, and family determine a large proportion of academic achievement. NAT'L CONFERENCE OF STATE LEGISLATURES, TASK FORCE ON NO CHILD LEFT BEHIND FINAL REPORT 41 (2005), available at <http://www.hartfordinfo.org/issues/documents/education/nclb.pdf>.

9. See Case et al., *supra* note 2, at 1331. Poor children also enter adulthood in poorer health and with more serious chronic health conditions than other children. *Id.*

10. The latest data from the Census Bureau shows that the number of Americans living in poverty, including children, grew for the fourth consecutive year in 2004, with 12.7% of the population, or thirty-seven million people, living in poverty. In 2004, thirteen million children were living in poverty. CARMEN DENAVAS-WALT, ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE US: 2004, at 9 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>. Overall, 15.7% of the population was uninsured. *Id.* at 16.

11. See U.S. GOV'T ACCOUNTABILITY OFFICE (FORMERLY U.S. GEN. ACCOUNTING OFFICE), TITLE I PROGRAM: STRONGER ACCOUNTABILITY NEEDED FOR PERFORMANCE OF DISADVANTAGED STUDENTS 14 (2000), available at <http://www.gao.gov/archive/2000/he00089.pdf>. Studies show that regardless of personal economic background, children who attend schools with high percentages of low-income students experience some of the negative effects of poverty on education. *Id.*

12. While it could be argued that this responsibility falls squarely and exclusively on the shoulders of parents, this argument oversimplifies the problems of poverty. Even the most conscientious low-income parents cannot fully address all of the ways in which poverty negatively affects their children and their children's academic performance, including the violence in their neighborhoods and lack of affordable childcare. *Infra* note 68. Therefore, in order to more completely address the negative effects of poverty on children and their education, the responsibility cannot rest solely with parents of low-income children.

answer to this question. Specifically recognizing “the special education needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs,” Title I originally aimed “to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means”¹³

For nearly forty years, Congress broadly defined the ways in which public schools could use Title I funds to improve educational programs in order to better serve disadvantaged students.¹⁴ In essence, Congress required only that public schools design the programs they developed with Title I funds to meet the needs of disadvantaged students.¹⁵ Because for many years Congress did little else to qualify which needs of disadvantaged students could be met through Title I programs, Title I provided public schools both with broad latitude to focus on virtually any of the needs of disadvantaged students that negatively impacted their education and with funds to access services or develop programs to address those needs. Under Title I, therefore, a public school could have determined that disadvantaged students felt stressed and distracted by violence in their neighborhoods, and that the stress and distraction interfered with their learning. This public school could have consequently identified a need for increased psychological counseling for those students and used Title I funds to hire counselors to provide it. Intentionally or not, Title I thus allowed, and arguably even invited, public schools to do something radical. It invited schools to take care of disadvantaged students in very dynamic ways—in ways most typically expected of or associated with parents. By identifying public schools as the site at which this caretaking—which I call “dynamic caretaking”—of disadvantaged students could occur, by making public schools’ personnel participants in the process of dynamic caretaking, and by creating the capacity for public schools to do dynamic caretaking, Title I helped answer the question of who is responsible for addressing the negative effects of poverty on disadvantaged students. It placed at least some of the responsibility for the dynamic caretaking of those students’ needs on public schools.¹⁶

13. 20 U.S.C. § 201 (1965) (current version at 20 U.S.C. § 6301 (2002)).

14. I use the term “disadvantaged” students in this article to cover all of the students Title I has historically attempted to serve. From 1965-1994, Congress directed Title I funds at students who attended schools with concentrations of low-income students and who struggled the most to achieve academically. 20 U.S.C. § 205(a)(1)(1965) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2734(a) (1978) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2723(a) (1988) (current version at 20 U.S.C. §§ 6311-16 (2002)). The Title I revisions and reauthorizations of 1994 and 2002 expanded the scope of Title I beyond programs targeted at schools with concentrations of low-income students who struggled the most to achieve academically to all low-income students as well as other categorical groups of students. 20 U.S.C. § 6315(b) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 6315(b) (2002).

15. 20 U.S.C. § 205(a)(1)(A) (1965) (current version at 20 U.S.C. §§ 6311-16 (2002)).

16. *Infra* Part II.A (explaining the concept of “dynamic caretaking”).

From when Title I was enacted to when it was most recently reauthorized in 2002, public schools generally did not embrace the potential to do dynamic caretaking, and Title I did not succeed in truly addressing the needs of disadvantaged students and improving their learning.¹⁷ The current version of Title I, which is a part of what is now called the No Child Left Behind Act ("NCLB") of 2002, attempted to resolve the problems of Title I's ineffectiveness.¹⁸ Yet instead of addressing the reasons why public schools were not meeting the needs of disadvantaged students by doing dynamic caretaking, the revisions to Title I shifted the law's focus away from addressing the needs of disadvantaged children in some fairly dramatic ways. Under NCLB, Title I no longer recognizes that serving concentrations of low-income families can negatively impact a school's ability to educate its students, and it no longer states that its purpose is to provide financial assistance to such schools to help them better serve low-income or educationally deprived students.¹⁹ Rather, its stated purpose is, among other things, to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at minimum, proficiency on challenging state academic achievement standards and state academic assessments."²⁰ Although this purpose seems laudable, as a matter of policy and practice, the effect of focusing Title I more broadly on all children rather than on disadvantaged students has been to minimize or eliminate the potential Title I had prior to 2002 to meet the needs of disadvantaged students.

This Article will analyze these changes to Title I. It argues that the changes to Title I under NCLB have effectively diminished the ability of public schools to do what I have termed "dynamic caretaking" for disadvantaged students, which has made the responsibility for dynamic caretaking, and public schools themselves, less public. Part I outlines the amendments to Title I of the ESEA-cum-NCLB that represent a shift in policy, participation requirements, and resource allocations away from a focus on addressing the needs of students disadvantaged by poverty. Part II analyzes these changes by identifying them as changes in the degree to which public schools are responsible for and able to do dynamic caretaking, and it describes how these changes make dynamic caretaking and public schools less public for disadvantaged children. Part III then identifies the reasons underlying this particular evolution in Title I. This part challenges those reasons as insufficient and argues that they generally either ignore or do little to address the needs of disadvantaged children—the very children Title I was originally enacted to assist. Finally, Part IV argues in favor of reshaping Title I in such a way that it truly addresses the problems Title I experienced prior to 2002 and truly promotes dynamic caretaking in public schools. This part suggests

17. *Infra* Part III.A (outlining some of the problems Title I was experiencing prior to 2002).

18. *See infra* Part III.A (describing how lawmakers changed Title I in an attempt to address its problems).

19. 20 U.S.C. § 6301 (2002).

20. *See* 20 U.S.C. § 6301 (2002).

changes to Title I that will not only recreate the potential for public schools to do dynamic caretaking, but will also allow public schools to develop that potential so that they can be more accessible, more public, and better able to teach children disadvantaged by poverty.

I. SHIFTS IN TITLE I: FROM A FOCUS ON MEETING THE NEEDS OF DISADVANTAGED STUDENTS TO A FOCUS ON THE ACADEMIC ACHIEVEMENT OF ALL CHILDREN

When it was originally enacted, Title I, which was part of a larger effort by the federal government to allay the problems of poverty, was considered a revolutionary piece of legislation in part because it focused attention on the needs of disadvantaged students.²¹ From 1965 through 2002, Title I—at least as a matter of policy, if not always of practice—stayed mostly true to its original goal of improving education for disadvantaged students.²² In 2002, however, Congress reauthorized and revised Title I in such a way that the statute has strayed—both in policy and practice—far from its original goal of helping public schools to better assist and educate students disadvantaged by poverty. This section will describe these changes by first outlining the policies and participation requirements of Title I from 1965 until 2002. It will then describe how, in 2002, Congressional amendments to Title I changed its general character by shifting the focus of its policies, participation requirements, and resource allocations away from the needs of disadvantaged students.

A. Title I: 1965-2002

From 1965 through 2002, the overarching focus of Title I was on meeting the needs of disadvantaged students.²³ In Title I, Congress declared that it was the policy of the United States to assist public schools and school districts serving concentrations of low-income students to meet “the special educational needs” of those students.²⁴ In other words, Congress had concluded that the effects of

21. See Harvey Kantor, *Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s*, 100 AM. J. OF EDUC. 47, 49 (1991). Title I was revolutionary because it dramatically altered the federal government's role in education in order to “equalize educational opportunity for disadvantaged children and eliminate poverty . . .” *Id.* In testifying before the House Subcommittee on Education in 1965, U.S. Commissioner of Education Francis Keppel called the Elementary and Secondary Education Act a way to use education to “end the paralysis that poverty breeds . . .” *Id.*

22. That Act, of course, has been revised and reauthorized a number of times since 1965. It has had more than one official name as well. Prior to 2002, for example, Title I was part of the Improving America's Schools Act of 1994, 20 U.S.C. § 6301 (1994) (current version at 20 U.S.C. § 6301 (2002)).

23. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 14. Because children from low-income backgrounds “face obstacles that can reduce their chances for success in learning,” Congress established Title I to help meet the needs of disadvantaged students to help increase their chances for academic success. *Id.*

24. 20 U.S.C. § 201 (1965) (current version at 20 U.S.C. § 6301 (2002)); 20 U.S.C. § 2701 (1978) (current version at 20 U.S.C. § 6301 (2002)); 20 U.S.C. § 2701(a) (1988) (current version at 20 U.S.C. § 6301 (2002)). The term “special education” is probably most associated with children with disabilities

poverty on education were so detrimental and so pervasive that it had to take action to help state and local educational agencies address the problem.²⁵

Over the years 1965-2002, the participation or compliance requirements—that is, those conditions with which states needed to comply in order to receive Title I funds—focused broadly on meeting the needs of disadvantaged students, and left the definition of what constituted “needs” largely open and flexible.²⁶ The language of Title I only limited the type of needs that could be met to the particular, or “special education,” needs of disadvantaged students that negatively impacted their learning.²⁷ From 1965 through 2002, therefore, public schools could use Title I funds to address the myriad needs of disadvantaged students as long as those otherwise unmet needs negatively affected their learning.²⁸ Indeed, throughout this period, the language of Title I encouraged

because it is also used in the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1401-1419 (2004), which is the federal law that provides states with funding to educate students with disabilities. However, Congress used the term with respect to disadvantaged students’ educational needs in Title I before it enacted the original version of the IDEA, the Education for Handicapped Children Act, in 1973. 20 U.S.C. § 201 (1965) (current version at 20 U.S.C. § 6301 (2002)). In the context of Title I and disadvantaged students, the special education needs referred to are simply those particular and unique needs that disadvantaged students have because of their exposure to poverty.

25. With the reauthorization of 1994, Congress changed Title I to state that it was the policy of the United States that “a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, [and] are a moral imperative.” 20 U.S.C. § 6301(a)(1) (1994) (current version at 20 U.S.C. § 6301 (2002)). However, Title I still recognized that “the most urgent need for educational improvement is in schools with high concentrations of low-income families” and that the “educational needs are particularly great for low-achieving children in our Nation’s highest-poverty schools.” 20 U.S.C. § 6301(b)(2-3) (1994) (current version at 20 U.S.C. § 6301 (2002)).

26. When Congress first enacted Title I, it purposefully did not mandate that schools use the funds in specific ways so as to encourage them to develop new, creative ways to meet the needs of disadvantaged students and thereby better help them learn. Kantor, *supra* note 21, at 67, 70.

27. From 1965 through 1994, states had to comply with only two general conditions in order to receive Title I funding. The first requirement, discussed in the text, was that schools use Title I funds to meet the “special educational needs” of disadvantaged students. 20 U.S.C. § 205(a)(1)(A) (1965) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2734(a) (1978) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2722(c)(1) (1988) (current version at 20 U.S.C. §§ 6311-16 (2002)). The other related requirement was that the programs that schools accessed or developed to meet those needs be of “sufficient size, scope, and quality to give reasonable promise of substantial progress towards” doing so. 20 U.S.C. § 205(a)(1)(B) (1965) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2734(d) (1978) (current version at 20 U.S.C. §§ 6311-16 (2002)); 20 U.S.C. § 2721(a)(1) (1988); 20 U.S.C. § 2722(c)(1) (1988) (current version at 20 U.S.C. §§ 6311-16 (2002)).

28. The 1994 revisions to Title I added new participation requirements. Included among these new, additional requirements were academic standards and testing requirements. 20 U.S.C. § 6311(b)(1-3) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)). However, all of the new requirements remained largely focused on disadvantaged students. Title I still required that the standards be adopted only for “children served under this part,” 20 U.S.C. § 6311(b)(1)(C) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)), that is, disadvantaged students; that they be used to determine the yearly performance of “children served under this part,” 20 U.S.C. § 6311(b)(3) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)); and, that the yearly progress goals of schools be “sufficient to achieve the goal of all children served under this part meeting” academic proficiency standards. 20 U.S.C. § 6311(b)(2)(B)(i) (1996) (current version at 20 U.S.C. §§ 6311 (2006)). Moreover, the requirements for programs targeted at meeting the needs of disadvantaged students remained flexible in that the definition of which of those students’ needs could be met remained flexible. Although Title I no longer explicitly

schools to meet the broad, comprehensive needs of disadvantaged students. In the 1978 revisions to Title I, for example, the language of the statute suggested that schools could use Title I funds to meet the health or social needs of disadvantaged students.²⁹ Under the 1988 revisions to Title I, high poverty schools could, but did not have to, use Title I funds to develop school-wide programs that would meet the needs of the entire population of the school, not just the most disadvantaged students.³⁰ These school-wide programs, as well as the programs targeted towards the most disadvantaged students, could also be used to fund "pupil services."³¹ Like the term "need," the term "pupil services" was flexible in that it was undefined and thus gave schools the latitude to provide a wide variety of services, including mental health or other medical services, if needed, to advance the learning of disadvantaged students in high poverty schools.³² Therefore, during the years 1965-2002, if schools identified a need of practically any kind that impeded the ability of disadvantaged students to learn, then schools could use Title I funds to address that need.³³

Throughout the period from 1965-2002, one could take issue with, as many

required public schools with concentrations of low-income students to use Title I funds to access or develop programs to meet the particular needs of disadvantaged students, it instead required that schools use the funds to access or develop programs that would help students meet the academic performance standards the schools developed in order to receive Title I funding. 20 U.S.C. § 6315(c)(1)(A) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)). The change in this requirement did not affect the overall flexibility of potential Title I programs because the programs that would help meet the particular education needs of disadvantaged student as called for under Title I prior to 1994 varied little, if at all, from the programs that might help the same students meet performance standards in 1994. Indeed, the flexible definition of what schools might do to ensure that disadvantaged students would meet performance standards in the 1994 version of Title I explicitly suggested that schools could access programs to meet comprehensive health needs of disadvantaged students in an effort to help them meet the performance standards. 20 U.S.C. § 6315(e)(2) (1994) (current version at 20 U.S.C. §§ 6311-16 (2002)).

29. 20 U.S.C. § 2734(f)(2) (1978), *amended by* 20 U.S.C. §§ 6311-16 (2002)).

30. 20 U.S.C. § 2725 (1988), *amended by* 20 U.S.C. §§ 6311-16 (2002). The 1994 amendments to Title I again called for school-wide programs. In 1995-96, if at least 60% of a school's population was low-income, then that school could establish a school-wide program. 20 U.S.C. § 6314(a)(1)(A)(i) (1994), *amended by* 20 U.S.C. §§ 6314 (2002). For 1996-97 and subsequent years, 50% of a school's population had to be low-income. 20 U.S.C. § 6314(a)(1)(B)(i) (1994), *amended by* 20 U.S.C. §§ 6314 (2002)).

31. 20 U.S.C. § 6314(b)(1)(B)(iii)(I)(aa) (2006) (original version at 20 U.S.C. § 2725(b)(1)(C) (1988)); 20 U.S.C. § 6314(b)(1)(B)(iii)(I)(aa) (2006) (original version at 20 U.S.C. § 6314(b)(1)(B)(iv)(I)(aa) (1994)).

32. 20 U.S.C. § 6314(b)(1)(B)(iii)(I)(aa) (2006) (original version at 20 U.S.C. § 2725(b)(1)(C) (1988)); 20 U.S.C. § 6314(b)(1)(B)(iii)(I)(aa) (2006) (original version at 20 U.S.C. § 6314(b)(1)(B)(iv)(I)(aa) (1994)).

33. From 1965-2002, Title I encouraged schools to develop innovative programs by broadly defining the programs and projects that schools could undertake with Title I funds. In 1978, in the section that stipulated schools could use Title I funds for planning purposes if they were planning "innovative" projects, Title I also explicitly encouraged schools to develop innovative programs. 20 U.S.C. §§ 6311-16 (2002) (original version at 20 U.S.C. § 2734(c) (1978)).

did, the way Title I funds were distributed³⁴ and how schools used those funds.³⁵ For the most part, however, the funds went to serve disadvantaged students. The funds had to flow in that direction because under the participation requirements of Title I, schools were obliged use Title I funding to meet the particular needs—again, defined broadly—of disadvantaged students.³⁶

B. 2002: Changes to Title I Under the No Child Left Behind Act

In theory, programs targeted toward meeting the needs of disadvantaged students are still possible under the current version of Title I. However, because the focus of Title I has shifted to serving all students, and because its participation requirements have expanded, such programs are for the most part not practically possible. Under the No Child Left Behind Act (“NCLB”), the purpose of Title I is to serve “all children”³⁷ and ensure they meet academic proficiency standards on state academic achievement tests.³⁸ The only mention of low-income children in the statement of Title I’s purpose is an acknowledgement that the educational needs “of low-achieving children in our nation’s highest-poverty schools” have to be met.³⁹ Given that the primary purpose of Title I under NCLB is now to ensure that all children meet academic proficiency standards, and meeting those standards logically requires meeting the education needs of all children, including low-income children, the additional and separate acknowledgement that low-income children’s education needs should be met seems little more than redundant.

The participation requirements of Title I under NCLB have expanded and fall in line with the purpose of Title I under NCLB. They are largely focused on requiring that states develop academic proficiency standards and goals for all students,⁴⁰ test all students,⁴¹ and develop accountability systems for any school that fails to make adequate yearly progress (“AYP”) toward meeting proficiency goals.⁴² Although the testing requirements were introduced into Title I in 1994,⁴³

34. Critics argued that the distribution-of-funds system of Title I spread the funds so widely that it was difficult for school districts, particularly those districts with large populations of low-income students, to use the funds effectively. See Marci Kanstoroom & Tyce Palmaffy, *Using Market Forces to Make Title I More Effective*, in EFFICIENCY, ACCOUNTABILITY, AND EQUITY ISSUES IN TITLE I SCHOOLWIDE PROGRAM IMPLEMENTATION 3, 7 (Kenneth K. Wong & Margaret C. Wang, eds., 2002); Kantor, *supra* note 21 at 61. Furthermore, experts point out that Title I money goes to wealthy schools. Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, in BROOKINGS PAPERS ON EDUCATION POLICY 2004 201, 212 (Diane Ravitch ed., 2004).

35. A majority of schools used Title I funds to implement “pull-out”; that is, separate, often remedial, programs for Title I students. Kantor, *supra* note 21 at 71.

36. See *supra* notes 26-28.

37. 20 U.S.C. § 6301 (2002).

38. *Id.*

39. 20 U.S.C. § 6301(2) (2002).

40. 20 U.S.C. § 6311(b)(1)(C)-(D) (2002).

41. 20 U.S.C. § 6311(b)(3)(A) (2002).

42. 20 U.S.C. § 6311(b)(2)(A) (2002).

the testing and related requirements have expanded to include not only all children but additional academic subjects as well.⁴⁴ The accountability requirements focus on sanctioning any school, regardless of the income status of its student population, for failing to make AYP.⁴⁵

To the extent that Title I's participation requirements still focus on disadvantaged students, they focus almost exclusively on tutoring or other purely academic services for them. Schools with concentrations of low-income students that fail to meet AYP face specific, graduated sanctions.⁴⁶ For example, if a school fails for two consecutive years to make AYP, it must provide parents of low-income students the option to select another school for their children to attend, unless a state law prohibits such school choice.⁴⁷ If a school fails for a third consecutive year to meet AYP, it must provide supplemental education services ("SES") to low-income students,⁴⁸ which are essentially some sort of academic tutoring provided by a qualified outside organization.⁴⁹

The participation requirements of Title I under NCLB are so expansive and generally apply to such a large population—all students—that the funding for

43. See *supra* note 28.

44. 20 U.S.C. § 6311(b)(1)(C) (2002). Title I now requires testing in science as well as reading and math. *Id.* By the academic year 2007-2008, schools must measure the proficiency of students in science at least once during the period of time students are in grades 3-5, grades 6-9, and grades 10-12. 20 U.S.C. § 6311(b)(3)(C)(v)(II) (2002).

45. 20 U.S.C. § 6311(b)(2) (2002). Title I now requires that each state have "developed and [be] implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph. Each State accountability system shall . . . include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress in accordance with the State's definition." *Id.*

46. 20 U.S.C. § 6316(b) (2002).

47. 20 U.S.C. § 6316(b)(1)(A)(v)–(E)(ii) (2002).

48. After four and five consecutive years of failing to make AYP, schools face administrative restructuring. 20 U.S.C. § 6316(b)(7-8) (2002). Corrective action, which Title I requires after a school fails for a fourth consecutive year to meet AYP, consists of, among other things, replacing the school staff relevant to the failure of students to progress, instituting a new curriculum, or decreasing significantly management authority at the school level. 20 U.S.C. § 6316(b)(7)(C)(iv) (2002). Restructuring, which Title I requires after a school fails for a fifth consecutive year to meet AYP, consists of, among other things, reopening the school as a public charter school; replacing all or most of the school staff relevant to the failure of the students to progress; entering into a contract with a private entity to operate the school; or turning the operation of the school over to the state educational agency. 20 U.S.C. § 6316(b)(8)(B) (2002).

49. 20 U.S.C. § 6316(b)(5)(B) (2002). A qualified provider is one with a "demonstrated record of effectiveness in increasing student achievement." 20 U.S.C. § 6316(e)(12)(B)(i) (2002). By way of example, in the District of Columbia, such qualified providers include companies like the Princeton Review and Kaplan, which are perhaps best known for providing Scholastic Aptitude Test ("SAT") preparation services, among others. D.C. Pub. Sch., Supplemental Educational Service Providers, http://www.k12.dc.us/dcps/dcpsnclb/pdfs/SEA_REV_SUPP_SERV_PROVIDE_2005-06.pdf (last visited Mar. 13, 2006).

Title I is stretched extremely thin.⁵⁰ Although funding has increased under Title I since 2002,⁵¹ much, if not all, of that funding goes to implementing the standards, testing, school sanctions, and SES types of participation requirements for all students.⁵² State and local educational agencies consequently have little or no money to do much, if anything,⁵³ with Title I funds other than comply with these standards, testing, school sanctions, and related participation requirements of Title I.⁵⁴ Therefore, although Title I still provides some latitude for schools to

50. The president of the National Education Association, Reg Weaver, stated in a New York Times article that “[s]chool budgets have been eaten up by the requirements of [Title I].” Sam Dillon, *Teachers’ Union Sues Over No Child Left Behind*, N.Y. TIMES, April 20, 2005, at A1 [hereinafter Dillon, *Teachers’ Union*]. As a consequence, the National Education Association and eight school districts in Michigan, Texas, and Vermont sued the Department of Education, alleging that Title I provisions limit states from having to carry out any requirement of Title I that is not funded by the federal government. *Id.*

51. THOMAS W. FAGAN & NANCY L. KOBER, CTR. ON EDUC. POLICY, TITLE I FUNDS: WHO’S GAINING, WHO’S LOSING & WHY 3 (June 2004), available at http://www.cep-dc.org/pubs/TitleI_Funds_15June2004/Title_1_Funds_15June2004.pdf. In the 2004-05 school year, for example, federal funding under Title I increased by approximately \$647 million from the prior year. *Id.* at 3. In 2005, Title I grants increased by 3%. CTR. ON EDUC. POLICY, TITLE I FUNDS—WHO’S GAINING AND WHO’S LOSING SCHOOL YEAR 2005-06 UPDATE 1 (2005), available at http://www.cep-dc.org/pubs/TitleI_Funds_6July2005/Title_I_Funds_6July2005.pdf. Notably, however, the three percent increase in Title I funds did not keep “pace with the 6% rise in the number of children in poverty, so fewer Title I dollars were available for each poor child.” *Id.*

52. The National Conference of State Legislatures (“NCSL”) analyzed the costs of implementing Title I by distinguishing between compliance costs and proficiency costs. Compliance costs are those costs related to implementing the testing and other requirements that states must implement in order to receive funds under Title I. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 8, at 41. Proficiency costs are those related to meeting the academic achievement goals of Title I. *Id.* The NCSL determined that in the best-case scenario, federal funding is only close to providing enough money to cover the compliance costs of Title I. *Id.* at 46. The funding does almost nothing to cover the costs of meeting proficiency goals. *Id.* at 48. Additionally, according to a study by the nonpartisan Congressional Research Service, fully funding Title I requires \$24.7 billion. FAGAN & KOBER, *supra* note 51, at 9. However, Congress only appropriated \$12.3 billion for Title I in 2004, or approximately half of the amount that is needed to fully fund Title I. *Id.*

53. To implement the requirements of Title I will require that the state of Connecticut spend \$112.2 million between 2005 and 2008, but the federal government only provides Connecticut with \$70.6 million in Title I funding. Sam Dillon, *Connecticut to Sue U.S. Over Cost of School Testing Law*, N.Y. TIMES, Apr. 6, 2005, at B1 [hereinafter Dillon, *Connecticut to Sue*]. Accordingly, Connecticut will have to spend \$41.6 million of its own money to comply with Title I by expanding the scope of its testing and assisting local educational agencies implement Title I requirements. *Id.* Similarly, a study commissioned by the Virginia General Assembly found that the state of Virginia and its school districts have spent \$264 million to supplement federal funding for implementing Title I, including the costs of developing tests and imposing sanctions for failures to meet achievement goals. Rosalind Helderma & Maria Glod, *Va. Sees Shortfall in Federal Aid for ‘No Child’ Law*, WASH. POST, September 22, 2005, at B1. With either just enough or less than enough Title I funding to implement the testing and related requirements of the law, States have no Title I funds to meet the needs of disadvantaged students in order to help them achieve on those tests. *Id.*

54. The Government Accountability Office (“GAO”) found that the most expensive requirements in Title I are the administration and scoring of the tests, not in the development of the tests. U.S. GOV’T ACCOUNTABILITY OFFICE (FORMERLY U.S. GEN. ACCOUNTING OFFICE), CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 14 (2003), <http://www.gao.gov/new.items/d03389.pdf>. The GAO further found that most states, thirty-six in all, use tests with both multiple choice and open-ended questions, which require a written response. *Id.* at 10. If

access programs to meet disadvantaged students' needs,⁵⁵ the testing and related requirements of Title I are so costly that implementing any such programs is practically very difficult.⁵⁶ Indeed, states struggle even to fund the testing and related requirements. Few are in any position to provide additional services to meet disadvantaged students needs. In part because states and local education agencies are having such a difficult time meeting the costs of these requirements, a number have filed lawsuits and considered opting out of Title I.⁵⁷

II. MARGINALIZING DYNAMIC CARETAKING AND MAKING PUBLIC SCHOOLS LESS PUBLIC

This section will analyze the implications of this evolution in Title I. It will argue that Title I used to call upon public schools to provide a particular form of caretaking—one that I have termed 'dynamic' caretaking—for disadvantaged students. Because 'caretaking' has multiple forms, this section will first identify and describe the forms of caretaking, both dynamic and passive, before using these concepts to analyze the changes in Title I. It will then argue that the changes to Title I under NCLB have limited the dynamic caretaking schools can do, which in turn limits public schools' responsibility for dynamic caretaking, and have left the process of dynamic caretaking—both identifying the need for it and securing access to it—to be done more privately by individuals or families.

states continue to use their current tests (and do not switch to using tests with only multiple choice questions), 2002 is the only year that the appropriations benchmark for Title I would have covered the costs of the statute. *Id.* at 20. From the years 2003-2008, the appropriations benchmarks cover increasingly less of the costs of Title I's requirements. *Id.* at 20-21. By 2007-2008, if states continue to use a mix of multiple choice and open-ended questions, Title I will only cover about two-thirds of the costs of testing. *Id.*

55. Under the current version of Title I, schools, for example, can still develop school-wide programs, which may include "counseling, pupil services, and mentoring services." 20 U.S.C. § 6314(b)(1)(B)(iii)(I)(aa) (2002).

56. In addition to the problem of lack of Title I funding for programs to meet the needs of disadvantaged students, revisions to Title I in 2002 narrowed the definition of what needs schools could use Title I funds to meet rather than providing schools with broad latitude to comprehensively meet almost any of the needs of disadvantaged students that impede their learning. 20 U.S.C. § 6315(c)(1) (2002). The ways that Title I permits schools to assist disadvantaged students focus on providing instructional services, such as by extending instruction time, more so than on meeting their comprehensive needs. *Id.*

57. The state of Connecticut announced in the spring of 2005 that it would sue the federal government for failing to fully fund the requirements of Title I. Dillon, *Connecticut to Sue*, *supra* note 53, at B1. In addition, eight school districts in Michigan, Texas, and Vermont sued the Department of Education essentially over the lack of sufficient federal funding to implement the requirements of Title I. Dillon, *Teachers' Union*, *supra* note 50, at B1. In part because Virginia had to supplement so much of the costs of implementing the requirements of Title I, the state studied the possibility of withdrawing from participation in the law and its funding. Rosalind Helderman, *Cost Analysis of 'No Child' Law Backed; Study in Virginia Precedes Weighing Withdrawal*, WASH. POST, Feb. 25, 2005, at B1. Ultimately, Virginia instead decided to request waivers from complying with certain Title I requirements, some of which the U.S. Department of Education granted and some of which it denied. Rosalind Helderman & Nick Anderson, *Maryland, Virginia Win 'No Child' Flexibility*, WASH. POST, June 16, 2005, at B5.

By doing so, Title I also makes the schools less public by making them less accessible to disadvantaged students.

A. *The Meanings of Caretaking*

Caretaking has more than one form. The various forms of caretaking exist on a continuum. At one end of the continuum is what I call dynamic caretaking, and at the other end is what I call passive caretaking. All of the forms of caretaking involve some degree of observation. But dynamic caretaking also involves action based on observation, a process that is dynamic because it is energized by the concern, tenderness, or love the caretaker has for the person cared for.⁵⁸ Consequently, the observation and action attendant to the process of dynamic caretaking are of particular types. The observation is close, keen, alert, and vigilant. This observation has many purposes, including identifying the needs of the person cared for. The action involved in dynamic caretaking is based on and tailored to that observation, and it is hopeful. It holds the hope of, among other things, meeting the needs identified by the observation. An example of such caretaking is that of parents for their children.⁵⁹ The love and concern parents have for their children often drives their sense of personal responsibility for their children's well-being. Therefore, parental caretaking involves close watchfulness over one's children, and when a parent identifies that his or her children's well-being is in danger, it involves action to address that situation.

Passive caretaking is distinct from dynamic caretaking in that it primarily involves observation and little, if any, action. The observation involved in passive caretaking has the goal of seeing that no harm is done to the person cared for. The observation is driven not by personal concern of the caretaker for the person cared for, but by contract or another impersonal connection between the caretaker and the person cared for. Therefore, the observation is often detached and limited. Rarely is any action required from or based on the observation. An example of such caretaking is that done by a resident assistant ("RA") in a dorm. Typically, RAs are college students who are paid to make sure that the other students living in the dorm do not break the rules of the dorm or harm themselves. This caretaking generally involves detached observation and little or no action based on it. RAs are not responsible, for example, for noting when a dorm resident needs to eat dinner and then meeting that need by providing dinner. Their

58. Of course, this caretaking could be focused on some entity other than a person. Because this article focuses on the caretaking of disadvantaged children, I have focused the descriptions of caretaking on persons.

59. Robin West has eloquently described an image of caretaking, that of the mother's protective embrace of her newborn. ROBIN WEST, *CARING FOR JUSTICE* 31 (1997). She describes the mother as being in a curved, not upright, posture. By doing so, the mother "provides care, protection, warmth, comfort, and love." *Id.* at 31. I would add that this posture is observant and watchful, and its purpose is in part to also identify those very needs as well as provide them. In other words, it is a posture of dynamic caretaking.

caretaking is driven by the employment contract they have with the college or university they attend, and thus the related sense of duty to the students they care for is weak in comparison to the sense of duty involved in dynamic caretaking.⁶⁰

B. Caretaking, Both Dynamic and Passive, and the Evolution of Title I

From 1965 until 2002, Title I invited public schools to do dynamic caretaking for children disadvantaged by poverty. By creating the broad, flexibly stated participation requirement that schools use Title I funds to meet the needs of students disadvantaged by poverty, and by not limiting the definition of what needs could be met, Title I gave public schools the means to access or develop and implement virtually any program disadvantaged students needed to learn more effectively. To fulfill this potential under Title I and to determine which of the manifold programs to take on under Title I, public schools and public schools' personnel had to closely observe their students, as dynamic caretakers do, to determine disadvantaged students' unmet needs and identify programs to meet those needs. Title I thereby encouraged public schools and their personnel to be concerned about the needs of disadvantaged students, and to let this concern drive any action they took to meet those needs. In this way, Title I allowed for a more collective concern for the needs of disadvantaged students. With Title I funds, public schools then could access or develop programs designed to meet those identified needs, as is involved in dynamic caretaking. By providing the means to perform these activities and by allowing public schools to exercise collective concern for students in this hopeful way, Title I encouraged public schools to be dynamic caretakers of disadvantaged students. By doing so, it also identified public schools as entities appropriately responsible for at least some dynamic caretaking of disadvantaged students.

To the extent that public schools took on the responsibility for this dynamic caretaking and made efforts to meet the special education needs of their disadvantaged students, they became more public in the sense that they became more accessible to disadvantaged students.⁶¹ This increased accessibility was not just physical in nature. To the extent schools did dynamic caretaking, their curriculum became more accessible to disadvantaged students because schools

60. On this caretaking continuum, there are forms of caretaking that are more or less dynamic or passive. The caretaking a person does for personal possessions such as a car, for example, may be relatively passive in comparison to the caretaking that same person does for his or her beloved pet.

61. In a 1992 article, Ruth Gavison identified at least some of the senses of the terms "public" and "private" in an effort to clarify their meanings and the discourses in which they are used. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6-7 (1992). As Gavison points out, there is more than one sense in which the term "public" is used. One sense of "public" is that it describes that which is accessible. This sense of "public" relates to that which can be known or observed or both. *Id.* at 6. In addition, I would add that this sense of "public" also relates to availability or that which is readily available to many or all.

assisted the students in coping with the negative effects of poverty.⁶² That is, the schools became more accessible by addressing the negative effects of poverty that impeded learning for disadvantaged students, which in turn increased disadvantaged students' access to learning or their ability to avail themselves of it.⁶³ It also made dynamic caretaking public in that it was the responsibility and concern of the group, that is, the public schools and local education agencies.⁶⁴

When Title I was revised in 2002, the invitation to public schools to do dynamic caretaking was largely rescinded.⁶⁵ NCLB requires public schools to comply with testing and related requirements for all students regardless of income level in order to receive Title I funds. Fulfilling these testing and related requirements consumes most of states' Title I funding,⁶⁶ and stymies the ability of public schools to do dynamic caretaking for disadvantaged students.⁶⁷ Public schools simply have little to no Title I funds to access or initiate programs to meet the needs of disadvantaged students.⁶⁸ Because they cannot practically access or

62. In places where it was done, meeting disadvantaged students' needs made schools more public—or accessible to students—in a variety of ways. For eight years, the McComb Separate School District in Mississippi has been meeting the comprehensive needs of disadvantaged students in an effort to improve their educational outcomes. It has seen a decrease in the number of students dropping out of school, an increase in the number of students attending school, and a rise in test scores. *See infra* Part IV.A.

63. *Id.*

64. Another sense of “public” identified by Ruth Gavison relates to groups or societies. This sense of “public” encompasses both those things that are of concern to the collective and those things that are the responsibility of the collective. Gavison, *supra* note 61, at 7.

65. Because Title I is the largest infusion of federal funds into public education, it has a significant impact on how public schools and their personnel educate disadvantaged and other children. Francis X. Shen, *Does Title I Money Matter? Federal Compensatory Funding and Student Achievement*, in *EFFICIENCY, ACCOUNTABILITY, AND EQUITY ISSUES IN TITLE I SCHOOLWIDE PROGRAM IMPLEMENTATION* 57, 57 (Kenneth K. Wong & Margaret C. Wang eds., 2002). Therefore, if Title I does not support dynamic caretaking, broad support for it in the context of public education is limited.

66. *See supra* notes 50-54.

67. *See* 20 U.S.C. § 6315(c)(1)(A) (2002); *see supra* notes 50-54.

68. Although Title I has a provision calling for states to coordinate programs that provide services to children and families to meet comprehensive needs that affect student achievement, states only have to do so to the extent “feasible and necessary” as determined by the State educational agency.” 20 U.S.C. § 6311(b)(9) (2002). Therefore, the provision relating to state coordination has little force of its own because even if states have the resources to do such coordination, they only need do so if they want to. *See id.* Moreover, if schools choose not to coordinate programs, or do anything else required under Title I, parents of public school students or others who are aggrieved by such noncompliance have no way to try to force states to comply with Title I because it has no private right of action. *See Ass’n of Cmty. Orgs. for Reform Now v. New York City Dep’t of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (holding that the NCLB does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights because it does not contain the necessary rights-creating language; its focus is on children collectively, not individually; and its enforcement scheme shows an intent for centralized, not individual, enforcement). Therefore, if schools do not coordinate programs or do anything else required by Title I, the only way that they can be forced to do so is if the United States Department of Education, which can withhold funds from states for failing to comply with Title I requirements, so enforces its provisions. *See* 20 U.S.C. § 6311(g)(2) (2002). Historically, though, the Department of Education has been lax about enforcing Title I. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 947 (2004).

develop these programs, schools also no longer closely observe students to determine what programs are needed; such observation without the ability to act would be futile. In making this change to Title I, Congress discouraged public schools from being concerned about the unmet needs of disadvantaged students and refocused public schools' concern on the goal of ensuring that all students achieve at a particular level on particular tests.⁶⁹ In this way, Title I also has effectively relieved schools of the responsibility for performing the functions of dynamic caretaking for disadvantaged students.⁷⁰ Essentially by default, schools have become more passive caretakers. Lacking the responsibility or resources for dynamic caretaking, they can only observe students to ensure no harm is done to them during the school day.

Because schools now for the most part only have the duty and ability to do passive caretaking under Title I, the responsibility for dynamic caretaking of disadvantaged children has become much more private. It has become more private in the sense that it is almost the sole concern and responsibility of an individual or a small group of individuals:⁷¹ the disadvantaged child's family or the persons with whom he or she lives.⁷² Almost by definition, the persons with whom disadvantaged children live are disadvantaged themselves, and one of the

69. Even if these two goals could overlap—if focusing schools' attention on students' test scores resulted in forcing them to address students' unmet needs as a means to achieving strong test scores—they do not under Title I. This is true at least in part because Title I funding is not sufficient to test students and meet their needs. *See supra* notes 52-56 and accompanying text.

70. Broadening the population of students on which Title I focuses arguably constitutes a politically acceptable way to shift focus and resources away from disadvantaged students because it does seem hard to disagree with a goal of ensuring that all students achieve academically. However, all students do not need the assistance of the federal government to ensure that they achieve academically. Some students do well on academic assessments irrespective of federal intervention or assistance. If they did not, there would not be an achievement gap. *See generally* Sam Dillon, *Bush Education Law Shows Mixed Results in First Test*, N.Y. TIMES, Oct. 20, 2005, at A24 [hereinafter "Dillon, *Mixed Results*"]. So, spreading Title I funds out over the entire population of school age students serves to deny the disadvantaged students—the students who most need federal assistance—the full benefit of increased funding under Title I, and it makes the law and the policy of Title I less focused on serving this particular, vulnerable population of students.

71. Ruth Gavison has also teased out the various senses of "private." "Private" can be that which relates to the individual. Gavison, *supra* note 61, at 7. This sense of "private" includes that which is intimate, such as the choice of a life partner; that which is related to self-identity, such as one's sexual orientation; and that which is self-regarding, that is, that which affects only the individual or small groups of individuals. *Id.* I would add that this last sub-category of "private" covers both concerns that are individual in focus and responsibilities that are of the individual.

72. The federal government still assists public schools in doing some of what I would call relatively dynamic caretaking. The school breakfast program, in which the government provides funding for schools that provide breakfast for low-income students at no charge, is an example. 42 U.S.C. § 1773 (2006). Another example is the school lunch program funded by the federal government so that schools can provide free lunches to low-income students. 42 U.S.C. § 1758(b) (2006). These types of caretaking programs are relatively dynamic, not fully dynamic, because they only require schools to do little, if any, close observation of students to identify their needs. A child's eligibility for school breakfast and lunch programs is determined by family income. Therefore, if a child comes from a family that earns below less than a certain income, that child is enrolled in the program. Schools thus need only observe students to identify if they are income eligible, which is a simple assessment requiring little more than a question of

effects of poverty is difficulty accessing services.⁷³ Placing most or all caretaking responsibility for disadvantaged students on likewise disadvantaged individuals will not ensure that these children gain access to services that meet their needs—needs that impede learning if unmet.⁷⁴ The effects of these needs going unmet is the lessening of the degree to which a public school education is available and accessible to disadvantaged students, and that public schools become less public for them.⁷⁵

III. MARKET THEORIES, ASSESSMENT AND ACCOUNTABILITY THEORIES, AND PUBLIC EDUCATION

This section will offer some explanations for why this evolution in Title I occurred. This section will begin by describing the problems Title I experienced prior to 2002 and will then describe two of the predominant theories that attempted to address the problems. These theories, market theories and assessment and accountability theories, underlie the changes to Title I and permeate Title I as it now exists.⁷⁶ This section contends, however, that these theories are insufficient for solving the problems Title I experienced prior to 2002, because they rest on faulty assumptions that do not address the problems Title I experienced prior to 2002 and ignore the needs of disadvantaged students.

A. *The Problems and the 'Solutions'*

By the mid- to late 1990s, Title I did not appear to be working. To assess the

parents upon registration, and not to determine whether they have specific unmet needs that might be impeding their learning.

73. Low-income families have pervasive problems accessing services and doing caretaking. Low-wage, low-skilled workers "disproportionately face nontraditional work schedules that may include early morning, evening, and weekend hours, split shifts, and frequently changing schedules over which they have limited control." Julia R. Henly, *Informal Support Networks and the Maintenance of Low-Wage Jobs*, in *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* 179, 180 (Frank Munger ed., 2002). Because children are in school for most of the traditional working day, they must access caretaking services, such as health and mental health needs, during late afternoons, evenings, and weekends. This presents a conflict with the work schedules of low-income parents and, hence, a difficulty for accessing those services. This difficulty is exacerbated by the fact that these parents are rarely in jobs that accommodate work and family demands. *Id.* A 2001 article in the *New Yorker* magazine, for example, tells the story of a single mother, Elizabeth Jones, who lives in a low-income neighborhood of Washington, DC, and who has to work many hours as a police officer. Her job keeps her from being able to take care of all of her children's school, after-school care, and other needs. Katherine Boo, *After Welfare*, *NEW YORKER*, Apr. 9, 2001, at 93, 99. The article notes that Elizabeth Jones's story is not uncommon in their neighborhood. *Id.* at 100.

74. *Supra* notes 2-8 (explaining how the unmet needs of disadvantaged students negatively impact their ability to learn).

75. One sense of "private" is that which is inaccessible in that it is unknown or unobservable or both. Gavison, *supra* note 61, at 6. This sense includes that which is unavailable to all or many. *Id.*

76. *Infra* notes 78-88.

effectiveness of Title I, Congress called for a study of Title I.⁷⁷ The results of that study were published in 1997.⁷⁸ The study, called *Prospects: The Congressionally Mandated Study of Educational Growth and Opportunity*,⁷⁹ found that the achievement gap between disadvantaged students and other students had not closed through the use of Title I funds.⁸⁰

Around the same time the *Prospects* study was published, other studies also showed that although Title I had provided flexibility to schools in determining what they could do with funds in an effort to encourage more creativity,⁸¹ Title I funds were largely being used in conventional ways.⁸² Title I also provided little guidance to schools as to how to do practically anything other than simply more of what they were already doing—employing teachers and aides and using conventional instruction methods.⁸³ Thus, in most cases, schools used Title I funds to support services like conventional remedial instruction and pull-out services for some, generally small, part of the school day.⁸⁴ Schools also hired extra staff with Title I funds, but half of those hired staff members were instructional aides, and 80% of those aides did not have college degrees.⁸⁵ An additional problem Title I programs experienced was that they generally were not well-coordinated with regular instruction services.⁸⁶

Because Title I had been so ineffective for so long, ideas and theories were proposed to improve it.⁸⁷ Two of the predominant categories of theories that were

77. Shen, *supra* note 65, at 59. Congress called for two studies of Title I. The first, done from 1976 to 1979, was called the *Sustaining Effects Study*. *Id.* The second study was conducted from 1991 to 1994. *Id.*; see also Maris A. Vinovskis, *Do Federal Compensatory Education Programs Really Work? A Brief Historical Analysis of Title I and Head Start*, 107 AM. J. EDUC. 187, 191 (1999).

78. Vinovskis, *supra* note 77, at 191. The *Prospects* study followed the same students in first, third, and seventh grades over a three-year period. Shen, *supra* note 65, at 59.

79. *Prospects* is a flawed study in that it was not a controlled study. *Id.* at 60. However, it nonetheless contains a wealth of data about Title I and its effects. *Id.*

80. Vinovskis, *supra* note 77, at 192. The study did not and could not address whether the children would have done even worse absent Title I funding. *Id.*

81. See, e.g., Kantor, *supra* note 21, at 66-67.

82. See DAVID K. COHEN & SUSAN L. MOFFITT, CTR. ON EDUC. POLICY, TITLE I: POLITICS, POVERTY, AND KNOWLEDGE 81-82 (2001), available at http://www.cep-dc.org/pubs/futurefederal_esa/future_fed-role_cohen_moffitt.pdf.

83. See Kanstoroom & Palmaffy, *supra* note 34, at 9.

84. *Id.* at 18. By the 1990s, between 70 and 80% of Title I funds were used to pay for extra school staff. *Id.* The instruction provided students often involved pull-out services for approximately thirty minutes per day each school day. *Id.*

85. *Id.*

86. See *id.*

87. The idea of changing the system of public education as a whole, as opposed to changing only Title I programs, to a market-based institution was put forth several years before Title I was changed under the NCLB. John E. Chubb and Terry M. Moe advanced such an overhaul to the entire public education system in 1990. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 216-219 (1990). Some of those kinds of ideas were incorporated to an extent in Title I in 1994. See *supra* note 28. Subsequently, in the late 1990s and early part of this Century, educational policy experts proposed incorporating even more of those ideas into Title I. See DIANE RAVITCH, BROOKINGS PAPERS ON EDUCATION POLICY 1999 4 (Diane Ravitch ed., 1999). See also William L. Taylor, *Assessment as a Means*

offered for improving Title I were market theories and assessment and accountability theories.⁸⁸ The market theories rested on the idea that competition between schools would improve education.⁸⁹ Proponents of the market theories argued in favor of turning Title I funding into portable grants that would attach to students.⁹⁰ They also argued for school choice for parents.⁹¹ The proponents of the market theories proposed that the portable grants would attach to students and follow the students to the schools selected by their parents.⁹² Such a system would allow parents to act as consumers of particular goods—schools—about which they could express preferences.⁹³ The expressed preferences would send signals to schools about what parents considered important, presumably the schools' abilities to produce academic achievement, and these signals would motivate schools to produce academic achievement for all students, including disadvantaged students.⁹⁴ In time, schools that could produce academic achievement would be popular and prosper, and schools whose methods did not produce academic achievement would fail and eventually shut down.⁹⁵

The assessment and accountability theories held that if teachers and schools faced consequences for their failure to produce academic achievement, they would be motivated to change or improve their techniques in order to produce academic achievement for all students, including disadvantaged students.⁹⁶ In

to a *Quality Education*, 8 GEO. J. ON POVERTY L. & POL'Y 311, 317 (2001) (arguing for the value of assessments in education); Kanstoroom & Palmaffy, *supra* note 34, at 20-25 (supporting the idea of turning Title I into portable grants, which would attach to and follow students); Masato Aoki & Susan F. Feiner, *The Economics of Market Choice and At-Risk Students*, in *ASSESSING EDUCATIONAL PRACTICES: THE CONTRIBUTION OF ECONOMICS* 75, 77-79 (William E. Becker & William J. Baumol eds., 1996) (summarizing the theory of market choice in education). Some versions of these proposals were then incorporated into the requirements of Title I as a way to improve education as a whole when it was revised and when the Act was retitled the No Child Left Behind Act in 2002.

88. See, e.g., Kanstoroom & Palmaffy, *supra* note 34, at 21 (describing the benefits of "portable grants," which would "follow the eligible student" to the school of the family's choice, as providing a disadvantaged student's family wider choice among schools and providing a higher quality education to all students because schools will compete for "students who carry extra funds with them"); Taylor, *supra* note 87, at 317 (asserting that education providers will find ways to improve student performance if they face consequences for assessments showing "low student performance").

89. Kanstoroom & Palmaffy, *supra* note 34, at 21. The idea of bringing market forces to bear on education, proponents argued, would "address two distinct problems with Title I: that it is not producing results for the students it serves and that it does not serve needy children." *Id.*

90. See *id.*

91. *Id.* The theory seemed simple: attaching portable grants to children "would give disadvantaged families a wider range of choices for their children, and the competition for students who carry extra funds with them would raise the quality of services provided for all." *Id.*

92. *Id.*

93. Aoki & Feiner, *supra* note 87, at 80. According to the market theory of education, "the absence of a free market in educational commodities denies consumers (and society) the principal benefits of effective expression of their preferences (through their consumption choices)." *Id.*

94. See *id.* at 81.

95. *Id.* For proponents of the market theory, turning the educational system into a close approximation of the free market was "the logical solution." *Id.*

96. Taylor, *supra* note 87, at 316. Taylor argued that "obviously, if teachers and principals may suffer consequences as a result of low student performance, they will take steps they believe will induce

order to sanction teachers and schools for their failure to produce academic achievement, schools would have to assess, or test, all students' academic achievement.⁹⁷ Schools and local and state educational agencies then would have to track students' progress on those tests to determine whether particular teachers and schools were producing academic achievement for all students.⁹⁸

The market and assessment and accountability theories pervade Title I under NCLB. The market theories can be found in the school choice options that parents of disadvantaged students can exercise if their students attend schools that have failed to make adequate yearly progress for two consecutive years.⁹⁹ The assessment and accountability theories have made their way into Title I to an even greater extent. They can be found in the requirements that schools develop academic standards and tests for all students.¹⁰⁰ They also exist in the requirement that states sanction schools and local educational agencies that fail to produce academic achievement as measured by those tests.¹⁰¹ These theories are even in Title I's statement of purpose.¹⁰²

B. The Problems with the 'Solutions'

Although the changes to Title I under NCLB certainly have some merit,¹⁰³ the market theories and the assessment and accountability theories underlying many of them also rest on certain faulty assumptions. These faulty assumptions limit the ability of the revisions to Title I under NCLB to produce increased academic achievement for disadvantaged students. The market theories assume that given

students to perform better." *Id.* Cohen and Moffitt similarly state that assessing students and holding schools accountable for students' performance "is what presumably will animate school improvement in the new Title I." COHEN & MOFFITT, *supra* note 82, at 95.

97. COHEN & MOFFITT, *supra* note 82, at 87.

98. *Id.* at 95.

99. 20 U.S.C. § 6316(b)(1)(E) (2002). Notably, school choice need only be offered if it state laws do not prevent it. 20 U.S.C. § 6316(b)(1)(E)(i) (2002).

100. 20 U.S.C. § 6311(b) (2002).

101. 20 U.S.C. § 6311(b)(2)(iii) (2002).

102. 20 U.S.C. § 6301 (2002). The primary purpose of Title I is to ensure that all student "reach, at minimum, proficiency on challenging state academic achievement standards and state academic assessments." *Id.* Title I proposes to do so by "holding schools, local educational agencies, and states accountable." 20 U.S.C. § 6301(4) (2002).

103. The assessment and accountability theories, for example, can have the effect of forcing schools to focus on the achievement (or lack thereof) of particular subgroups of students because Title I requires schools to disaggregate test scores by racial and ethnic groups, low-income status, and other subgroups. See Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 *How. L. J.* 243, 275 (2004); see also Thomas J. Kane & Douglas O. Staiger, *Unintended Consequences of Racial Subgroup Rules*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 152, 168 (Paul E. Peterson & Martin R. West eds., 2003). Title I requires states and local educational agencies to publish an annual report card on student achievement on state assessments in the aggregate, and those assessment results must also be disaggregated by "race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged." 20 U.S.C. § 6311(h)(1)(C)(i) (2002).

the choice of which schools their children can attend, parents of disadvantaged students—the only parents under Title I who have the option to exercise school choice—will make that choice based on a school's ability to produce academic achievement.¹⁰⁴ However, this assumption does not hold true. Instead, both low-income parents and parents of means can and do choose schools based on factors other than a school's potential for, or capability of, encouraging their children's academic achievement.¹⁰⁵ The market theories also assume that exposing schools to the market system will motivate them to improve their abilities to produce academic achievement.¹⁰⁶ In at least some cases, such exposure has the opposite effect.¹⁰⁷

Similarly, the assessment and accountability theories assume that the greatest impediment to student progress and academic achievement is the methodology employed by teachers and schools.¹⁰⁸ According to these theories, if teachers and schools change their unsuccessful methods, then students will achieve academically.¹⁰⁹ These theories, however, ignore the problems that students bring with them when they walk in the schoolhouse door, such as health and mental health concerns. Problems like these are caused by, or related to, poverty and negatively impact their learning.¹¹⁰ These theories also assume that local and state educational agencies will not simply make tests easier and lower the standards by which progress is measured in order to avoid sanctions.¹¹¹ This assumption has been shown to be faulty by the fact that some local and state education agencies have already responded to the Title I accountability scheme in this way.¹¹²

Unfortunately, and unsurprisingly, given the faulty assumptions of these theories, the changes to Title I under NCLB have done little to improve the educational achievement of disadvantaged students and others. The results of a national standardized test, the National Assessment of Education Progress

104. Aoki & Feiner, *supra* note 87, at 84.

105. Aoki & Feiner, *supra* note 87, at 82-83. Parents have been found, for example, to prioritize a school's methods of discipline in making school choice. *Id.* Anecdotal, as an educational advocate for low-income parents of students with disabilities, I know parents who have prioritized safety, proximity of the school to home or places of work, discipline, and feelings about the staff at a school, among other things.

106. *Id.* at 84.

107. *Id.* A 19th century experiment in England, which lasted thirty-five years, exposed schools to the market system by paying them on a scale calibrated to students' test results. A 1992 review of this experiment found that in response to this system schools simplified the curriculum, limited the pedagogy to "teaching to the test," and ignored the needs of weak students because it was assumed that they would not pass the tests and therefore teachers' educational energies would be wasted on them. *Id.*

108. *Supra* note 96.

109. *Id.*

110. *See supra* notes 2-9.

111. *See Ryan, supra* note 68, at 948.

112. *Id.* James Ryan has persuasively made the case that Title I of the NCLB encourages these "perverse effects." *Id.* He also notes that in response to the risk of sanctions under Title I, Colorado, Connecticut, Louisiana, and Texas have taken this approach by either making the tests easier or lowering the standards for what constitutes adequate yearly progress. *Id.* at 948.

("NAEP"), illustrate this insufficiency. Although the results show that fourth- and eighth-grade reading and math scores for disadvantaged students increased slightly between 2003 and 2006, the achievement gap between those students and more advantaged students either increased or remained essentially flat between 2003 and 2005.¹¹³ For example, the gap between disadvantaged and non-disadvantaged eighth grade students in reading essentially remained flat, decreasing by only one point, and test scores in reading for all eighth-grade students dropped overall.¹¹⁴

C. The Unacknowledged Problem

Not only have the changes to Title I under NCLB not produced improved academic achievement, but they also failed to address the problems that existed in Title I programs prior to 2002. Prior to 2002, schools were not doing the dynamic caretaking that Title invited them to do, and they were not meeting the needs of disadvantaged students.¹¹⁵ The changes to Title I under NCLB have not resolved the problems of Title I's ineffectiveness with respect to encouraging schools to creatively and comprehensively meet the needs of disadvantaged students, that is, engage in dynamic caretaking.

The explanation for why public schools did not take on the responsibility for doing dynamic caretaking, and for why the changes to Title I did not address this problem, lies in part with liberal theory. Liberal theory is very much a part of American political and cultural thought. As feminist legal theorists, particularly Maxine Eichner, have explained, liberal theory places a primacy on the autonomy of the individual and the individual's own responsibility for his or her actions.¹¹⁶

113. In terms of the change in the size of the achievement gap, the fourth-grade math and reading scores remained essentially flat between 1996 and 2005. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Average Mathematics Scale Scores and Achievement-Level Results by Student Eligibility for Free/Reduced-Price Lunch, http://nces.ed.gov/nationsreportcard/nrc/reading_math_2005/s0027.asp?printer= (last visited Feb. 5, 2007). The gap between disadvantaged and non-disadvantaged fourth-graders in math increased by one point, and the gap in reading decreased among fourth-graders by one point. *Id.* The gap between disadvantaged and non-disadvantaged eighth-grade students in math decreased, but disadvantaged eighth-grade students' math scores grew at a slower rate between 2003 and 2005 than they did prior to the time Title I under the NCLB became effective. *Id.* Jack Jennings of the Center on Education Policy reacted to these results by saying, "There is a question as to whether No Child is slowing down our progress nationwide." Dillon, *Mixed Results*, *supra* note 70. Additionally, the achievement gap between minority and white students continues across many categories to be as large as it was in the early 1990s. *Id.*

114. Dillon, *Mixed Results*, *supra* note 70.

115. *Supra* Part III.A.

116. Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 151-52 (1998) [hereinafter Eichner, *Square Peg*] (noting that according to liberal theory, "society is composed of a collection of discrete, autonomous individuals" and "attachments and obligations, including to children, must be considered the product of choice"); see Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1288-89 (2005) [hereinafter Eichner, *Dependency*] (noting that feminist theorists "have demonstrated that liberal theory's heavy reliance on the image of the autonomous individual and the societal structures

Accordingly, the individual is responsible for the choice to have children and for the effects of that choice, including the need for caretaking of the child.¹¹⁷ Thus, the individual and the family,¹¹⁸ and not public institutions such as schools, are presumed to be responsible for the caretaking of children.¹¹⁹ Indeed, the Supreme Court has upheld such principles. In *Pierce v. Society of Sisters*, the Supreme Court held that parents or guardians have a right, a fundamental liberty right guaranteed by the Fourteenth Amendment, to the care and control of their children.¹²⁰

Liberal theory thus places the responsibility for caretaking, and arguably particularly the caretaking I have identified as 'dynamic caretaking,' squarely on the shoulders of private individuals.¹²¹ Under liberal theory, then, parents are responsible for doing the dynamic caretaking of their children. Consequently, parents are strongly presumed to be responsible for addressing any problems that might affect their children, including anxiety, depression, or other mental or physical health problems.¹²² This assumption holds true even after the children enter the schoolhouse door. Unless the students have a recognized disability that affects them in school,¹²³ almost all other problems that negatively impact their ability to learn, even those that result from the disadvantaged status of their families, are considered the responsibility of the parents. This assumption of liberal theory is so firmly embedded in American political and social thought that absent explicit statements shifting responsibility for caretaking away from parents, it will likely not be recognized.

Such was the case with Title I. Although Title I made public schools appropriately responsible for dynamic caretaking, it did not do so explicitly. Therefore, although potential for dynamic caretaking existed, schools failed to recognize or embrace that potential and did not do it.¹²⁴ This problem, coupled

built on this image far better reflect the social role historically assigned to men rather than women, and that it ignores dependents' need for care"); see also Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L., 13, 13-14 (2000) (pointing out that "jurisprudential constructions of justice or liberty, for example, consider the individual as the relevant unit of analysis . . . [and the] fact that individuals exist in family or relational contexts are largely ignored").

117. Eichner, *Square Peg*, *supra* note 116, at 151-53. In her article, Eichner argues that conceiving of parenting as a "'choice' not only misconstrues the way that many parents conceive of their parenting responsibilities" but "also detaches parenting from its social relevance." *Id.* at 153.

118. Fineman, *supra* note 116, at 14. Fineman argues that the concept of the family as independent and private, a concept she calls "the assumed family," "allows us to privatize individual dependency and pretend that it is not a public problem." *Id.*

119. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

120. *Id.*

121. See *supra* note 116.

122. See *supra* notes 2-8 for a discussion of how health problems can negatively affect learning.

123. See 20 U.S.C. §§ 1401-1417 (2004). The Individuals with Disabilities Education Improvement Act requires that schools meet the unique needs of children with disabilities whose disabilities adversely affect their educational performance.

124. *Supra* Part III.A.

with the other problems Title I experienced prior to 2002, such as the lack of guidance as to how to go about more comprehensively addressing the needs of disadvantaged students that negatively impacted their ability to learn, caused schools to use Title I funds in conventional ways rather than embrace the dynamic caretaking potential in Title I.¹²⁵

IV. REALLY LEAVING NO CHILD BEHIND: ENABLING DYNAMIC CARETAKING IN THE PUBLIC SCHOOLS

Prior to 2002, the problems of Title I made it ineffective at achieving its intended purpose of meeting the needs of disadvantaged students that negatively affected their learning. Now, though, Title I under the No Child Left Behind Act actually operates to leave disadvantaged children behind by divesting schools of the responsibilities for dynamic caretaking and ensuring the needs of these children are met. This effect of the changes to Title I under the No Child Left Behind Act is particularly tragic because these children are the very children Title I was originally enacted to assist in 1965.¹²⁶ The effect is also tragic because without assistance, at least some of these children's needs will likely go unmet.¹²⁷ This section will advance ideas and rationales for revising Title I in order to shift the focus back to disadvantaged children and to allow schools to actually do the dynamic caretaking low-income children need in order to learn. It will also advance ideas for doing so in such a way that some of the problems, such as funding and guidance for meeting local needs, are addressed under Title I.¹²⁸

A. *Revising Title I: Calling Dynamic Caretaking What It Is*

Although, prior to 2002, Title I encouraged public schools to become dynamic caretakers, it also enabled them to resist doing so by not explicitly identifying the dynamic caretaking as such.¹²⁹ The resistance to public institutions taking on such caretaking is too firmly embedded in American political and social norms for such subtlety to work.¹³⁰ In order to effectively make schools do dynamic caretaking of disadvantaged students, Title I must explicitly require that state and local education agencies become dynamic caretakers of disadvantaged students

125. *Id.*

126. Kantor, *supra* note 21.

127. *See supra* text accompanying notes 73-74.

128. None of the revisions called for in this section depend on the current testing scheme in Title I. Thus, the testing and related accountability requirements could be removed from Title I and the changes called for herein would still have an impact on the education of disadvantaged students because they would still meet their needs. If the testing structure were to remain in Title I along with the addition of the proposed changes, Title I funding would have to be increased in order to fully support all of these objectives. Additionally, changes to the accountability structure would need to be made to address current problems, such as lowering standards to ensure schools make AYP. *See* Ryan, *supra* note 112.

129. *Supra* Part III.C.

130. *Id.*

in order to receive funding.¹³¹

Of course, such language in a federal statute could meet with resistance. Certainly this idea could, for example, be subject to accusations of creating a “nanny state.”¹³² However, this is a weak excuse for failing to assist disadvantaged students for at least a couple of reasons. First, schools would only be required to do the caretaking for disadvantaged children and only for those unmet needs that negatively impact learning. Second, the alternatives to explicitly identifying dynamic caretaking as an obligation imposed by the statute are simply too abhorrent. One alternative is to try to do what Title I historically did, which was to implicitly encourage public schools to do dynamic caretaking for disadvantaged students, and the other option is to simply not encourage schools to do dynamic caretaking at all. Under either alternative, disadvantaged students’ needs go unmet, and they are unlikely to achieve in school.¹³³ Under the former alternative, this result is predictable because it is precisely what happened under Title I prior to 2002—the failure to explicitly call on schools to take on the process of dynamic caretaking of disadvantaged students enabled schools to resist doing so, and it was not done. Under the latter alternative, no dynamic caretaking is called for, and therefore it almost unquestionably will not occur in public schools.¹³⁴

By explicitly calling on schools to take care of the comprehensive needs of disadvantaged students that negatively affect their learning, it will be hard for public schools to fail to do it. If doing dynamic caretaking is an explicit condition of participation in Title I, schools will be forced to do it or forfeit their Title I funds. Although adopting this more active approach may meet with resistance, those who resist the idea of public schools taking on this role with respect to disadvantaged students will have to confront what they are actually opposing: the provision of needed assistance to disadvantaged children, who will likely not learn without it.¹³⁵

In schools and school systems that have done what I call dynamic caretaking, the efforts have resulted in significant successes. For example, the McComb

131. I am not wedded to the term “dynamic caretaking.” I am not calling for Title I to be revised to include the language “dynamic caretaking.” Rather, I am calling for the addition of some language that explicitly captures a caretaking process characterized by energized, concerned observation, and action based on that observation on behalf of disadvantaged students.

132. The idea of the government or public systems taking on child care responsibilities has met with resistance in American culture. See, e.g., Darcy Olsen, *The Advancing Nanny State: Why the Government Should Stay Out of Child Care*, POL’Y ANALYSIS (Cato Inst., D.C.), Oct. 23, 1997, http://www.cato.org/pub_display.php?pub_id=1144&full=1 (arguing that the government should not be involved in child care regulation or subsidies).

133. Title I is currently not meeting disadvantaged students’ needs. Indeed, more than a quarter of schools nationwide are failing to meet adequate yearly progress. Paul Basken, *States Have More Schools Falling Behind*, WASH. POST, March 29, 2006, at A17.

134. *Supra* Part III.C (explaining how liberal theory promotes the idea of only the family or the individual doing such activities as caretaking (“dynamic caretaking”).

135. See *supra* notes 2-8.

Separate School District ("McComb") in Mississippi has spent the last nine years attempting to identify and meet the needs of disadvantaged students' that impede their learning.¹³⁶ Over the last nine years, McComb has observed that its low-income students have unmet primary health care needs, and this problem was negatively impacting their education.¹³⁷ Although the students were enrolled in Medicaid, their parents' work schedules often prevented the parents from taking their children to the doctor.¹³⁸ McComb consequently put Medicaid clinics in the schools.¹³⁹ McComb also determined that adolescent parents were dropping out of school in order to care for their own children.¹⁴⁰ So, it provided daycare to school-aged parents in the schools.¹⁴¹ McComb made these and other changes over a period of years.¹⁴² The success has been remarkable. By 2004, McComb doubled its graduation rate to ninety-two percent, and it saw its dropout rate go from thirty percent to under two percent.¹⁴³ In addition, McComb went from having only eleven percent of second graders reading on grade level to eighty-two percent by 2001.¹⁴⁴

Similarly, the District of Columbia decided to provide doctors and dentists in one low-income elementary school, and students' test scores have gone up.¹⁴⁵ In short, meeting the needs of disadvantaged students works, and it works by the terms Title I under NCLB sets—by achievement on standardized tests. Indeed, I am not advocating that the current testing structure of Title I is wholly without merit. To the contrary, it has its benefits.¹⁴⁶ Instead, I am arguing that the testing and related requirements of Title I do not address disadvantaged students' needs, and without meeting those needs by doing dynamic caretaking of them in schools, disadvantaged students' ability to do well on these tests will be hampered.

136. Patrick B. Cooper, *Our Journey to Good Health: A Mississippi Educator Details What His District Does to Connect Healthy Bodies to Strong Mind*, 2003 SCH. ADMIN., http://www.findarticles.com/p/articles/mi_m0JSD/is_1_60/ai_95954345; Dennis Fiely, *Nutrition; Success Traced to Menu in District*, COLUMBUS DISPATCH, Aug. 4, 2004, at 3F.

137. Telephone Interview with Patrick Cooper, *supra* note 1.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Ilene Olson, *Presentations Challenge Traditional Education Views*, WYO. TRIB. EAGLE, Nov. 20, 2004, at A4.

143. Fiely, *supra* note 136.

144. *Id.*

145. V. Dion Haynes, *Schools Plan Would Shift Power; Janey to Propose Overhaul Based on Canadian Governing Style*, WASH. POST, Jan. 22, 2006, at C7.

146. In Virginia, for example, the results of the testing required by Title I showed, in the spring of 2005, that black elementary schools students in Fairfax County Public Schools, which is one of the most respected school systems in the country, performed worse on reading and math tests than black students in the relatively less affluent school districts of Norfolk and Richmond, Virginia. Maria Glod, *Fairfax Success Masks Gap for Black Students; Test Scores in County Lag Behind State's Poorer Areas*, WASH. POST, Apr. 14, 2006, at A1. Without the testing required by Title I, this information may never have come to light.

B. Revising Title I: Creating Guidance for Schools as to How to Do Dynamic Caretaking

Because schools failed to use Title I to do dynamic caretaking, in part because they lacked guidance from the statute as to how to do so, any revision to the statute aimed at motivating schools to do dynamic caretaking must provide schools with guidance as to how to go about it. Schools need guidance in identifying those needs of disadvantaged students that negatively impact their ability to learn and in accessing or developing programs to meet those needs. Fortunately, another federal statute already requires public schools to take on this type of role for another population of students and therefore provides a model for Title I.

The Individuals with Disabilities Education Act ("IDEA") requires local education agencies and public schools to identify disabled children,¹⁴⁷ determine what services they need to learn,¹⁴⁸ and then to provide those services by way of individualized education programs.¹⁴⁹ The IDEA requires that local education agencies and schools develop individualized education plans ("IEPs") outlining these needs and services for each disabled child living in the areas served by the local education agencies or schools.¹⁵⁰ These IEPs must be developed annually and must be in place at the beginning of each school year.¹⁵¹

Although the IDEA has certainly not been implemented perfectly and many problems exist today,¹⁵² the IDEA in many ways has been very successful. Prior to the enactment of the IDEA, children with disabilities were being excluded from school.¹⁵³ Today, excluding children from school simply because they have disabilities is unacceptable. The reasons for excluding them prior to the enactment of the IDEA included that their needs were very difficult and costly to

147. 20 U.S.C. § 1412(a)(3) (2004). The IDEA requires all states to identify, locate, and evaluate all children with disabilities in the state. *Id.*

148. 20 U.S.C. § 1414(d)(1) (2004).

149. 20 U.S.C. § 1414(d)(2)(A) (2004).

150. *Id.*

151. 20 U.S.C. § 1414(d) (2004).

152. For example, in 2001, 2402 due process hearing requests were filed in the District of Columbia over an alleged failure of the special education in the District of Columbia Public Schools. D.C. APPLESEED, A TIME FOR ACTION: THE NEED TO REPAIR THE SYSTEM FOR RESOLVING SPECIAL EDUCATION DISPUTES IN THE DISTRICT OF COLUMBIA, 16-17 (June 2003), available at http://www.dcappleseed.org/projects/publications/Special_Ed_Rprt.pdf. Although the District of Columbia has many, many more hearing requests than most, if not all, other school systems in the country, such numbers reflect that problems do exist with the special education system and how it is implemented.

153. The IDEA was originally passed in 1975. Prior to that time, students with mental retardation were being excluded from school because of their disabilities. Not until the Pennsylvania Association for Retarded Children sued the Commonwealth of Pennsylvania and specific school districts in Pennsylvania, and a court order was issued by consent in 1971, was it determined that such children could not be excluded from school on the basis of their disabilities. *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971). In the District of Columbia, in 1971-72, an estimated 12,340 students with disabilities were not served by the public education system, and the District's excuse for its failures was the cost of educating them. *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

meet.¹⁵⁴

In much the same way, Title I should be revised to require public schools to meet the needs of disadvantaged students. Title I should be revised to require schools to serve disadvantaged students in one of two ways: either individually, as does the IDEA, or on a school-wide basis in the case of schools with concentrations of disadvantaged students. Schools with concentrations of disadvantaged students could decide whether to serve students individually or develop a school-wide program of service. If such schools decided to serve disadvantaged students' needs individually, then Title I should require them to develop written plans in which they identify the particular needs that arise from each student's poverty and how the school will address those needs. If such schools decide to serve students on a school-wide basis, then Title I should require them to determine annually one or two problems that arise from the poverty of the population and that most negatively affect the students' learning. Then, the schools would have to develop a plan to access services or develop programs to meet those needs on a school-wide basis. For schools without concentrations of low-income students, Title I can provide funding for schools to participate in the program if the schools develop written needs assessments for individual disadvantaged students and plans to meet those needs.

C. Revising Title I: Providing More Funding and a Private Right of Action

Of course, accomplishing these changes in a way that is effective will require funding above and beyond what Title I already provides. The model proposed here, the IDEA, requires that schools spend a great deal of money to educate students with disabilities.¹⁵⁵ In fact, prior to its passage, schools argued that they could not meet the needs of students with disabilities because meeting their needs cost too much money.¹⁵⁶ Similarly, meeting the needs of disadvantaged students by doing dynamic caretaking will cost sums far greater than what schools spend on those students now. Although these proposals could be criticized on this point, the response to such financial concerns is to point out again the alternatives to not spending the money required to remedy the problems that impede the learning of disadvantaged students. The alternative to doing so leaves disadvantaged students without effective opportunities to learn. It leaves them behind.

To ensure that children are not left behind, even with these proposed changes to Title I, the statute also needs to include a private right of action. A private right

154. See, e.g., *Mills*, 348 F. Supp. at 876.

155. On average, schools spent close to twice as much to educate a student with disabilities as a non-disabled student in 1999-2000. COUNSEL FOR SPECIAL EDUC. FINANCE SPECIAL EDUC. EXPENDITURE PROJECT, EDUCATING STUDENTS WITH DISABILITIES: COMPARING METHODS FOR EXPLAINING EXPENDITURE VARIATION 5 (2004), available at <http://www.csef-air.org/publications/seep/national/Rpt7.pdf>.

156. *Mills*, 348 F. Supp. at 876.

of action does not currently exist under Title I.¹⁵⁷ Again, the IDEA provides a useful model, as it allows for aggrieved parents to have complaints resolved under the IDEA through an administrative due process hearing, and they have a right to appeal those hearing decisions in federal or state courts.¹⁵⁸ This same model could easily be followed by Title I. Revisions to the statute should include a private right of action for parents or guardians of disadvantaged students to exercise against a school that does nothing at all, on either an individual student or school-wide basis, to identify and meet the needs of their disadvantaged children.

CONCLUSION

This paper has attempted to call attention to the changes to Title I under NCLB that do a disservice to disadvantaged students. The shift in Title I from its original focus on meeting the needs of disadvantaged students is alarming not only because of its history but also because such effects are so contrary to what the entire NCLB purports to do: leave no child behind. Instead, the changes to Title I have removed practically any responsibility at all for dynamic caretaking from schools, leaving disadvantaged students walking through the schoolhouse door with problems that impede their learning. Revising Title I to again require schools to do dynamic caretaking in ways suggested here would likely do much to improve disadvantaged students' access to education in public schools. Although the proposed revisions to Title I may not be entirely sufficient to meet that very goal, they provide far more for disadvantaged students than Title I does now, which is sadly little.

157. *See Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (holding that NCLB does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights because it does not contain the necessary rights-creating language).

158. 20 U.S.C. § 1415 (2005).