

NOTE

HIGHLY QUALIFIED TEACHERS: MOVING FORWARD FROM *RENEE V. DUNCAN*

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I. INTRODUCTION

Federal funding of K-12 education was rare in the United States before the second half of the twentieth century.¹ However, federal education funding has steadily increased over the last fifty years.² The majority of federal funding for public education is distributed through two programs: Title I of the Elementary and Secondary Education Act and the Individuals with Disabilities Education Act. Federal education funds, through those programs and others, come with certain conditions with which the states that accept those funds must comply. The No Child Left Behind Act of 2001 (“NCLB”) imposed many requirements on schools that receive Title I funding. One of these requirements was that all teachers of core subjects at schools that serve large numbers or proportions of low-income or minority students meet federally-proscribed standards to be designated “highly qualified” by the end of the 2005–2006 school year.³

In *Renee v. Duncan*, plaintiffs challenged the designation of intern teachers—teachers who are in the process of completing the requirements for full state certification—as “highly qualified.” Ultimately, the Ninth Circuit found for the plaintiffs, ruling that the disputed regulations, which allowed teachers who had not completed their state’s certification process to be considered “highly qualified,” contradicted the intent of NCLB.⁴ Congress responded by specifying, in an appropriations rider, that teachers who participate in alternative certification programs are “highly qualified.”⁵

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¹ “[N]ot until 1958 and [the passage of the National Defense Education Act] with its special-purpose aid provisions did advocates of federal aid to K-12 education finally score their first big victory” in the fight to distribute general-purpose federal aid to schools. “[B]ills introduced before 1958, like the [1947] Senate proposal to supplement local dollars to establish a national minimum per-pupil expenditure . . . all failed.” Lora Cohen-Vogel, *Federal Role in Teacher Quality: “Redefinition” or Policy Alignment?*, 19 EDUC. POL’Y 18, 33 (2005).

² See generally *id.* at 18–20 (discussing the history of federal involvement in education).

³ 20 U.S.C. § 6319(a)(2) (2006).

⁴ *Renee v. Duncan*, 623 F.3d 787, 796 (9th Cir. 2010). Note that this opinion denied rehearing en banc and represents the second Ninth Circuit decision on the matter. See *infra* note 44 and accompanying text. This Note will refer to the opinion denying rehearing en banc as *Renee II*.

⁵ Continuing Appropriations and Surface Transportation Act, Pub. L. No. 111-322, sec. 1(a)(2), § 163, 124 Stat. 3518, 3521 (2010) (to be codified at 20 U.S.C. § 7801 (2012)).

The Ninth Circuit's *Renee* decision and Section 163 of the Continuing Resolution caused considerable controversy among academics, advocates, and policy experts over what it means to be a "highly qualified teacher."⁶ This Note will argue that NCLB's focus on content knowledge, experience, and pre-certification standardized assessments are not particularly useful in determining a teacher's quality. Instead, an effective education policy should focus on holding teacher preparation programs accountable for producing quality teachers, on enabling administrators to better assess and address teachers' strengths and weaknesses, and on incentivizing and retaining effective teachers in high-needs schools.

Part II of this Note will provide background information on No Child Left Behind and its "highly qualified teacher" standard. Part III will describe the three opinions in *Renee v. Duncan*, while Part IV will explain why *Renee II* would not have significantly affected teacher quality. Part V will discuss Congress's response to *Renee II* and the contemporary possibility of legislative revisions to NCLB. Part VI will evaluate potential policy solutions to the problem of teacher quality, while Part VII will conclude by providing recommendations.

II. BACKGROUND ON NO CHILD LEFT BEHIND AND THE "HIGHLY QUALIFIED TEACHER" STANDARD

Congress enacted the Elementary and Secondary Education Act ("ESEA") of 1965 as part of President Johnson's War on Poverty⁷ and has periodically updated and reauthorized it since then.⁸ Title I of ESEA allocates funding directly to schools and local education agencies ("LEAs") for the purpose of increasing the academic achievement of low-income and minority students.⁹ Congress originally intended for Title I to provide increased educational opportunities to disadvantaged students.¹⁰ However, recent reauthorizations have expanded the role of Title I, using it to prescribe performance requirements for schools.¹¹ NCLB, the most recent update to

Henceforth, this Note will refer to the Continuing Appropriations and Surface Transportation Act as a whole as the "Continuing Resolution" in text, and will refer to the specific provision cited in this footnote as "Section 163."

⁶ See *infra* note 27.

⁷ John F. Jennings, *Title I: Its Legislative History and its Promise*, 81 PHI DELTA KAPPAN 516, 517 (2000).

⁸ See William F. Davis, *The Reauthorization of the Elementary and Secondary Education Act in a Republican-Controlled Congress: A View from the Bishops' Conference*, 3 CATHOLIC EDUC. 97, 100-01 (1999), for a succinct history of prior reauthorizations. ESEA has not been reauthorized since the passage of the No Child Left Behind Act in January 2002. See Arne Duncan, *Reforming NCLB Requires Flexibility and Accountability*, U.S. DEPT OF EDUC. BLOG (Oct. 17, 2011), <http://www.ed.gov/blog/2011/10/reforming-nclb-requires-flexibility-and-accountability>.

⁹ See generally 20 U.S.C. § 6301 (2006).

¹⁰ Jennings, *supra* note 7, at 517-18.

¹¹ Beginning with the 1994 Improving America's Schools Act, which amended Title I and reauthorized ESEA, and continuing with NCLB in January 2002, Title I has required states to

ESEA, forbade all schools that receive Title I funding from hiring teachers that are not “highly qualified”¹² and required that all teachers of core academic subjects¹³ be “highly qualified” by the end of the 2005–2006 school year.¹⁴ For new middle and high school teachers, highly qualified means that the teacher has obtained full state certification or passed the applicable state licensing examination, holds a license to teach in the state,¹⁵ holds a bachelor’s degree or higher, and demonstrates content knowledge of the subject she teaches by passing the state’s subject test or having majored in the subject.¹⁶ As the Ninth Circuit observed in *Renee v. Duncan*, NCLB does not define the term “full State certification.”¹⁷ The definition of “highly qualified” given in federal regulations, however, allows teachers who are currently participating in an alternative certification program to be designated “highly qualified” if the program meets certain requirements.¹⁸ These requirements include ongoing intensive support and training.¹⁹

In order to hold states accountable for teacher quality, NCLB also included reporting requirements. States must disclose and publicly disseminate the percentage of all public school classes that are not taught by highly qualified teachers. This disclosure must include a disaggregation of the data by high-poverty compared to low-poverty schools.²⁰ States must also provide the Secretary of Education with the information found in each State disclosure report.²¹ Local educational agencies²² are responsible for reporting the required information to states²³ and for distributing it to schools, parents, and

create and assess student progress towards uniform achievement standards. Erik W. Robelen, *40 Years After ESEA, Federal Role in Schools is Broader than Ever*, EDUC. WEEK, Apr. 13, 2005, at 1. See Jennings, *supra* note 7, at 520–21 for a history of how Title I expanded federal involvement in public education and reduced traditional state autonomy in that field throughout the 1990’s.

¹² 20 U.S.C. § 6319(a)(1) (2006).

¹³ As defined elsewhere in U.S. Code, the core academic subjects are “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.” *Id.* § 7801(11).

¹⁴ *Id.* § 6319(a)(2).

¹⁵ *Id.* § 7801(23)(A)(i).

¹⁶ *Id.* § 7801(23)(B)(ii).

¹⁷ 573 F.3d 903, 906–07 (9th Cir. 2009).

¹⁸ 34 C.F.R. § 200.56(a)(2)(ii)(A)(1)–(2) (2011). For examples of alternative certification programs, see *infra* notes 29–31 and accompanying text.

¹⁹ 34 C.F.R. § 200.56(a)(2)(ii) (2011).

²⁰ 20 U.S.C. § 6311(h)(1)(C)(viii) (2006).

²¹ *Id.* § 6311(h)(4)(G).

²² A local education agency is

a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

Id. § 7801(26) (2006).

²³ *Id.* § 6311(h)(2)(B).

the public in lay terms through news media and the internet.²⁴ Schools must specifically inform parents if their students are assigned to a teacher who is not “highly qualified” or taught by such a teacher for more than four weeks.²⁵ In addition to reporting requirements, NCLB requires each state to create a detailed plan outlining the steps it will take to ensure that poor and minority children are not disproportionately taught by “inexperienced, unqualified, or out-of-field teachers” and the measures it will use to determine the success of its plan.²⁶

In enacting NCLB, Congress intended to send a strong message about the importance of teacher quality. When Congress enacted NCLB, academics, policy makers, and the general public viewed teacher quality as a crucial, if not the most crucial, piece of education reform.²⁷ One of the goals of NCLB was to push states to reexamine the quality of their teachers, driven by the belief that out-of-field teachers dampen student achievement.²⁸

One way to ensure that teachers have content knowledge is to attract them from within the fields in which they will teach. Who, for example, has more content knowledge about biology than a laboratory biologist? This reasoning motivated the surge in alternative routes to certification programs—to get bright mid-career professionals with a wealth of content knowledge into teaching positions, especially to fill shortages in difficult-to-staff schools.²⁹ Alternative certification programs come in many varieties, but all

²⁴ *Id.* § 6311(h)(2)(E).

²⁵ *Id.* § 6311(h)(6)(B)(ii).

²⁶ 20 U.S.C. § 6311(b)(8)(C) (2006).

²⁷ H.R. REP. NO. 107-63, at 277 (2001); Margaret Spellings, *Letter to Chief State School Officers*, U.S. DEP’T OF EDUC. (Oct. 21, 2005), <http://www.ed.gov/policy/elsec/guid/secletter/051021.html> (“[T]eacher quality is one of the most important factors in improving student achievement and eliminating these achievement gaps.”); see also Chester E. Finn, Jr., *Foreword to BETTER TEACHERS, BETTER SCHOOLS* 6, 6 (Marc Kanstoroom & Chester E. Finn, Jr., eds., 1999), available at <http://eric.ed.gov/PDFS/ED434124.pdf>; HAROLD WENGLINSKY, *HOW TEACHING MATTERS: BRINGING THE CLASSROOM BACK INTO DISCUSSIONS OF TEACHER QUALITY* 10 (2000), available at <http://eric.ed.gov/PDFS/ED447128.pdf>.

²⁸ See, e.g., 147 CONG. REC. 26,145 (2001) (statement of Rep. George Miller (D-Cal.)) (citing the fact that “[twenty-five] percent of teachers . . . are not qualified to teach in their subject area” as a “weakness of our educational system”); *id.* 147 CONG. REC. 26,154 (2001) (statement of Rep. Vern Ehlers (R-Mich.)) (discussing the need for effective science education and opining that “[p]rofessional development for science and math teachers is vitally important”); H. R. REP. NO. 107-63, at 291 (2001) (NCLB is “a signal to school administrators . . . to avoid assigning a teacher to a class in which the teacher has no academic subject knowledge.”); SARAH ALMY & CHRISTINA THEOKAS, EDUCATION TRUST, *NOT PREPARED FOR CLASS: HIGH-POVERTY SCHOOLS CONTINUE TO HAVE FEWER IN-FIELD TEACHERS* 1, 1 (2010), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/Not%20Prepared%20for%20Class.pdf> (describing concern in Congress and the Department of Education as to the large number of teachers who taught a subject in which they did not major and were not certified); GEORGE W. BUSH, *NO CHILD LEFT BEHIND* 14 (2001), available at <http://www2.ed.gov/nclb/overview/intro/presidentplan/proposal.pdf> (the phenomenon of “too many teachers teaching out-of-field” has led to poor performance in math and science).

²⁹ See H.R. REP. NO. 107-63, at 321–22 (2001) (explaining the rationales for the Troops-to-Teachers Program, an alternative certification route designed to facilitate Armed Forces veterans’ entries into teaching, and the Transition to Teaching Program, an alternative certification route designed to recruit and train career-changing professionals to be teachers, and place them

of them provide their participants a way to become teachers without completing a traditional teacher preparation program.³⁰ Usually, alternative certification programs provide intensive training, support, and coursework during the first year of teaching.³¹ Congress made multiple references to alternative routes to certification in NCLB, acknowledging that teachers could obtain state certification through either traditional or alternative routes.³² Now, programs such as Teach for America, The New Teacher Project, and NYC Teaching Fellows are widely recognized, praised,³³ and criticized.³⁴

Policy experts and principals are not the only people thinking about teacher quality. In the past few years, the issue of teacher quality has intensified with highly public and polarizing forces such as Michelle Rhee and the documentary *Waiting for Superman* turning teacher quality into a national debate. The general public worries about teacher quality, as evidenced by the recent Phi Delta Kappa/Gallup poll in which respondents indicated that improving teacher quality is their most important priority.³⁵ Producing “Great Teachers and Leaders” is one of the categories considered in the Education Department’s Race to the Top competitive grant program.³⁶ Race to the Top

in high-needs schools); see also Finn, *supra* note 27, at 22 (describing how traditional certification procedures prevent bright college graduates from entering teaching without first attending a school of education).

³⁰ Because states set teacher certification requirements, traditional teacher preparation varies. Usually traditional certification programs entail obtaining a bachelors degree in education, or in a content area with coursework in teaching methods, typically through a four-year college or university. JILL CONSTANTINE ET AL., U.S. DEP’T OF EDUC., AN EVALUATION OF TEACHERS TRAINED THROUGH DIFFERENT ROUTES TO CERTIFICATION, FINAL REPORT 1 (2009), available at <http://mathematica-mpr.net/publications/PDFs/education/teacherstrained09.pdf>. This Note will use the generally understood meanings of traditional and alternative certification as explained by Constantine et al.

³¹ For examples of alternative certification pathways, see generally U.S. DEP’T OF EDUC., GREAT TEACHERS AND GREAT LEADERS 19 (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/great-teachers-great-leaders.pdf>. See also Amanda Paulson, *Before They’re Teachers, How are They Best Trained?*, CHRISTIAN SCI. MONITOR, Mar. 27, 2009, at 13 (describing some alternative certification programs).

³² 20 U.S.C. § 7801(23)(A)(i) (2006).

³³ See, e.g., Dan D. Goldhaber & Dominic J. Brewer, *Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement*, 22 EDUC. EVALUATION & POL’Y ANALYSIS 129, 132 (2000) (praising alternative certification programs for attracting high-quality teachers who would not have gone through a traditional certification program); Paul E. Peterson & Daniel Nadler, *What Happens When States Have Genuine Alternative Certification?: We Get More Minority Teachers and Test Scores Rise*, EDUC. DIGEST, Sept. 2009, at 57 (claiming that alternative certification programs attract more minority teachers).

³⁴ See, e.g., Barbara Torre Veltri, *Teaching or Service?: The Site-Based Realities of Teach for America Teachers in Poor, Urban Schools*, 40 EDUC. & URB. SOC’Y 511, 533 (2008) (characterizing TFA corps members as culturally unprepared to be effective in high-poverty rural and urban classrooms); Edwin C. Darden, *Qualified Decision*, AM. SCH. BD. J., Jan. 2011, at 34, 35 (“An almost-doctor or near-attorney is not the same as someone holding the credential. Why should teaching be any different?”).

³⁵ William J. Bushaw & Shane J. Lopez, *A Time for Change: The 42nd Annual Phi Delta Kappa/Gallup Poll of the Public’s Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Sept. 2010, at 9, 10.

³⁶ U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 9 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. Race to the Top is a competitive grant program designed to encourage states to pass education reform

awards points for, among other things, “[e]nsuring equitable distribution of effective teachers and principals,” “[i]mproving the effectiveness of teacher and principal preparation programs,” and “[p]roviding high-quality pathways for aspiring teachers and principals.”³⁷ Race to the Top added to the conflict between different camps of education reformers by endorsing and encouraging alternative certification programs that teachers unions oppose because they perceive alternative certification participants as threats to veteran teachers’ jobs, as lacking dedication to the profession, and as vehicles for “union busting.”³⁸

III. *RENEE V. DUNCAN*

It was in the midst of this crescendo of buzz about teacher quality that a group of students and parents in California filed suit against Education Secretary Margaret Spellings. The plaintiffs alleged that 34 C.F.R. § 200.56, which defines “highly qualified teacher” for NCLB, violated the statutory definition of “highly qualified teacher.”³⁹ The trial court found for the Secretary and granted summary judgment, saying that, because NCLB did not specify that “full state certification” required teachers to complete certification prior to teaching, a regulation allowing teachers who are currently enrolled in alternative routes to certification to be considered “highly qualified” did not conflict with NCLB.⁴⁰ Furthermore, observed the court, NCLB’s statutory definition of the term “full state certification” includes “certification obtained through alternative routes to certification.”⁴¹

The *Renee* plaintiffs found their initial appeal to the Ninth Circuit to be equally futile. The Court of Appeals cited NCLB in support of the proposi-

legislation and create plans for comprehensive education reform. The other categories are “State Success Factors,” “Standards and Assessments,” “Data Systems to Improve Instruction,” “Turning Around the Low-Performing Schools,” and “General Selection Criteria.” *Id.* at 3; *see also id.* at 6–11 (discussing specific elements within each category).

³⁷ *Id.* at 9–10.

³⁸ *See, e.g.,* Stephen Sawchuk, *NEA at Odds With Obama Team Over ‘Race to the Top’ Criteria*, EDUC. WEEK, Sept. 2 2009, at 6; Greg Toppo, *Green Teachers or an Elite Corps? Critics Say Teach For America is Costing Jobs*, USA TODAY, July 30, 2009, at 1D (“Detroit teachers union President Keith Johnson also put it bluntly last April, calling TFAers ‘educational mercenaries’ who ‘ride in on their white horses and for two years share the virtue of their knowledge as a pit stop on their way to becoming corporate executives.’”); *CTU President Karen Lewis Calls for Hiring Freeze on New Hires; End Teach For America Contract*, CHICAGO TEACHERS UNION (July 28, 2010), <http://www.ctunet.com/media/press-releases/ctu-president-karen-lewis-calls-for-hiring-freeze-on-new-hires-end-teach-for-america-contract>; *New Business Item 93, New Business Items*, NAT’L EDUC. ASS’N, <http://www.nea.org/grants/33354.htm> (last updated July 5, 2011, 11:25 PM) (The National Education Association “will publicly oppose Teach for America (TFA) contracts when they are used in Districts where there is no teacher shortage or when Districts use TFA agreements to reduce teacher costs, silence union voices, or as a vehicle to bust unions.”).

³⁹ *Renee v. Spellings*, No. C 07-4299, 2008 U.S. Dist. LEXIS 49369, at *9–10 (N.D. Cal. June 17, 2008).

⁴⁰ *Id.* at *19.

⁴¹ *Id.*

tion that the certification status of alternative route participants was a matter of state law.⁴² Thus, the California state regulation declaring that a teacher “currently enrolled in an approved intern program for less than three years” meets NCLB requirements did not violate NCLB.⁴³ However, the Court of Appeals withdrew and replaced its appellate decision, then *Renee v. Duncan*, a year later when it rejected the plaintiffs’ petition for rehearing en banc.⁴⁴

This time, the court found that the regulations allowing teachers in the process of an alternative certification to be considered highly qualified were *not* an appropriate interpretation of NCLB. Though NCLB does not define “full State certification,” the court found that Congress clearly intended “that such certification must have been obtained *before* a teacher can be characterized as ‘highly qualified.’”⁴⁵ Therefore, the court ruled, 34 C.F.R. § 200.56(a)(2)(ii) was “inconsistent with the ‘unambiguously expressed intent of Congress’”⁴⁶ because it allowed teachers who were merely making progress toward full certification to be called “highly qualified.” The regulation contradicted NCLB’s definition of “highly qualified.”⁴⁷ The court expressed hope that the California legislature would change California’s teacher certification laws, which closely mirrored federal regulations, in order to prohibit interns from receiving the “highly qualified” designation.⁴⁸

On December 21, 2010, Congress rendered the Ninth Circuit’s decision moot with two brief sentences of statutory text.⁴⁹ Section 163 of the Continuing Resolution, which Congress passed to fund the federal government while it continued to deliberate on the budget, states that a teacher who is currently pursuing alternative certification as described in 34 C.F.R. § 200.56(a)(2)(ii) is to be considered “highly qualified” for the purposes of NCLB.⁵⁰ The length of this provision’s duration is curious: although the Continuing Resolution only allowed the Federal government to operate without a full budget until March 4, 2011, the provision on teacher quality will remain in effect until June 2013.⁵¹ Critics see the provision as pandering to Teach for

⁴² *Renee v. Duncan*, 573 F.3d 903, 909 (9th Cir. 2009) (citing 20 U.S.C. § 7801(23)(A)(i) (2006)). This Note will refer to the initial appellate opinion as *Renee I*.

⁴³ *Id.* at 910 (citing CAL. CODE REGS. tit. 5 § 6110 (2011)). Further, the court notes that California law requires schools to hire teachers who have completed training programs whenever such teachers are available. *Renee I*, 573 F.3d at 907 (citing CAL. EDUC. CODE § 44225.7(a), (e) (2011)). This is aligned with Congress’s general desire to use alternative certification as a way to fill teacher shortages. *See infra* notes 57–58 and accompanying text.

⁴⁴ *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010).

⁴⁵ *Id.* at 795 (emphasis added). “The difference between having obtained something and merely making satisfactory progress toward that thing is patent.” *Id.* at 796.

⁴⁶ *Id.* at 796 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

⁴⁷ *Id.* at 796 (citing 20 U.S.C. § 7801(23) (2006)).

⁴⁸ *Id.* at 799–800. “Intern” is the title California gives to teachers who are in the process of obtaining their certification. CAL. EDUC. CODE § 44325 (2011).

⁴⁹ Continuing Appropriations and Surface Transportation Act, Pub. L. No. 111-322, sec. 1(a)(2), § 163, 124 Stat. 3518, 3521 (2010) (to be codified at 20 U.S.C. § 7801 (2012)).

⁵⁰ *Id.* at § 163(a).

⁵¹ *Id.* at § 163(b).

America and other alternative certification programs and resent the secrecy with which the provision's sponsor inserted it into the Continuing Resolution.⁵²

The *Renee* plaintiffs had alleged that they, as students who attended schools with a disproportionate number of interns, had received a poorer quality education than they would have if interns did not disproportionately teach in schools with large minority and/or low-income populations.⁵³ The Ninth Circuit agreed that this allegation constituted a legally sufficient injury because, “[i]n adopting NCLB, Congress decided that teachers with ‘full State certification’ are, in the aggregate, better teachers than those without such certification.”⁵⁴ Here, NCLB may at first appear to be in tension with itself. It is absolutely true that NCLB prohibits states from disproportionately placing teachers who are not “highly qualified” with poor and minority students.⁵⁵ However, as Secretary Spellings argued,⁵⁶ not only does Congress support alternative routes to certification, Congress *created* at least two such programs.⁵⁷ Indeed, Congress created these programs specifically to fill staffing gaps at high-needs schools that often have trouble hiring qualified teachers.⁵⁸ The best explanation for this tension is that Congress intended participants in alternative certification programs to be considered “highly qualified.”

By stripping alternative program participants of their “highly qualified” status, *Renee II* could have diminished public regard for alternative certification programs like Teach for America and The New Teacher Project. Currently, alternative certification participants enjoy prestige: many of them hold degrees from selective undergraduate or graduate institutions and were

⁵² See, e.g., Valerie Strauss, A ‘Highly Qualified’ Gift from Congress to Teach for America, THE ANSWER SHEET (Dec. 20, 2010, 12:29 PM), <http://voices.washingtonpost.com/answer-sheet/congress/a-highly-qualified-gift-from-c.html>.

⁵³ *Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2010).

⁵⁴ *Id.* The court expressed some ambivalence as to whether interns are worse than teachers with full certification, especially if the interns are “enrolled in programs such as Teach for America.” *Id.*

⁵⁵ 20 U.S.C. § 6311(b)(8)(C) (2006).

⁵⁶ *Renee v. Spellings*, No. C 07-4299, 2008 U.S. Dist. LEXIS 49369, at *18–19 (June 17, 2008).

⁵⁷ See, e.g., 20 U.S.C. § 6676 (2006) (funding the development of alternative certification programs for members of the Armed Forces (“Troops to Teachers”)); *id.* § 6683 (creating competitive grants for the development of alternative certification programs for mid-career professionals); *id.* § 6613 (c)(3) (authorizing states to use funds to “establish, expand, or improve alternative routes for State certification of teachers and principals”); H. R. REP. NO. 107-63, at 318 (2001) (discussing the characteristics of successful state-sponsored alternative certification programs and encouraging states to “promote these characteristics in any alternative certification program supported with [NCLB] funds”).

⁵⁸ The statute encourages states to create and expand programs “relying on the experience, expertise, and academic qualifications of an individual, or other factors in lieu of traditional course work in the field of education” in order to provide mid-career professionals and recent graduates a way to become “highly qualified” quickly and teach in high-needs schools. 20 U.S.C. § 6681 (2006).

accepted into highly selective teacher training programs.⁵⁹ Much of the public and many education reformers regard such teachers as innovative and energetic.⁶⁰ However, the statutory term “highly qualified” lends itself to being confused with the lay meaning of the phrase, a meaning more akin to “highly competent.”⁶¹ If alternative certification program participants lost their “highly qualified” designation under NCLB, the public could mistakenly conclude that alternative program participants were not highly “capable or competent,” notwithstanding the high regard that alternative programs have heretofore enjoyed. Because *Renee II* requires this result, alternative certification programs could lose significant goodwill if *Renee II* stood in the Ninth Circuit or if other Circuits adopted its reasoning.

Many of the practical impacts of *Renee II*, however, would have been small. Schools would have had to inform parents when their children were assigned an alternative certification program participant as a teacher,⁶² and those teachers would increase the number of non-highly qualified teachers that the state and district would have been required to report.⁶³ This could have impacted California’s budget if the Department of Education decided to enforce the NCLB requirement that one hundred percent of core subject teachers be “highly qualified.”⁶⁴ But, California would hardly be alone in failing to meet this requirement.⁶⁵ It seems unlikely that the Department of

⁵⁹ See, e.g., Sam Dillon, *Teach for America Sees Surge in Popularity*, N.Y. TIMES, May 14, 2008, at A19 (according to Teach for America “with the numbers of applicants increasing faster than the number of teachers placed, it was even more selective [in 2008] than before”); *id.* (“[a]bout 11 percent of the graduating class at Yale applied, 10 percent at Georgetown and 9 percent at Harvard” applied to Teach for America in 2008).

⁶⁰ See, e.g., *Plenty of Praise for Teach for America*, U.S. NEWS ON EDUC. BLOG (June 20, 2008), <http://www.usnews.com/education/blogs/on-education/2008/06/20/plenty-of-praise-for-teach-for-america> (summarizing praise for Teach for America from various sources); John Cloud & Dan Fastenberg, *How to Recruit Better Teachers*, TIME, Sept. 20, 2010, at 46 (discussing the achievements of Teach for America, The New Teacher Project, and the Boston Teacher Residency).

⁶¹ “Qualified” means “[p]ossessing the necessary qualifications; capable or competent,” BLACK’S LAW DICTIONARY 1360 (9th ed. 2009), while “highly” means “in or to a high degree,” OXFORD ESSENTIAL DICTIONARY 275 (Am. ed. 1998). Thus, a reasonable lay understanding of the phrase “highly qualified teacher” is a teacher who possess the necessary qualifications and is capable or competent to a high degree.

⁶² 20 U.S.C. § 6311(h)(6)(B)(ii) (2006).

⁶³ 20 U.S.C. § 6311(h)(1)(C)(viii) (2006); *id.* § 6311(h)(2)(B), (E).

⁶⁴ The Department of Education has the authority to rescind any state’s Title I funds if the state does not meet the requirements set forth in NCLB. 20 U.S.C. § 6311(a)(1) (2006) (requiring states to submit a plan to the Secretary of Education meeting certain requirements in order to receive grant funding under NCLB Title I Part A); *id.* § 6311(e)(1)(F) (granting the Secretary of Education “the authority to disapprove a State plan for not meeting the requirements”); *id.* § 6319(a)(2) (“As part of the plan described in section 6311 . . . each State educational agency receiving assistance under [NCLB Title I Part A] shall . . . ensure that all teachers teaching in core academic subjects within the State are highly qualified not later than the end of the 2005–2006 school year.”).

⁶⁵ *Renee I* observed that “to date, some of California’s school districts have not met the 100 [percent highly qualified teacher] requirement.” *Renee v. Duncan*, 573 F.3d 903, 905 (9th Cir. 2009). According to the most recent data available, most states join California in not having 100 percent of core classes taught by highly qualified teachers. See U.S. DEPT OF

Education would withhold funds from a state if it was prevented from reaching one hundred percent highly qualified only because of alternative certification program participants, which the Administration and Secretary Duncan support.⁶⁶

Conceivably, the *Renee II* holding that alternative program participants are not “highly qualified” until they obtain state certification⁶⁷ could have influenced other states to prioritize hiring fully certified teachers over interns in order to comply with NCLB’s one hundred percent highly qualified teacher requirement.⁶⁸ But California, the state most directly affected by *Renee II*, already mandates such a hiring preference⁶⁹ and thus cannot be driven to adopt one. However, any additional steps California might have taken to comply with the *Renee II* decision could have prevented it from competing effectively in future Race to the Top competitions by making the state appear hostile to alternative certification programs.⁷⁰ This is because the Department of Education awards Race to the Top grants based in part on how states treat alternative certification programs.⁷¹ In a close contest, the fact that other states did not have to follow *Renee II* could conceivably have been the difference between victory and defeat for California.

EDUC., THE SECRETARY’S SEVENTH ANNUAL REPORT ON TEACHER QUALITY 70–73 (2010), available at <http://www2.ed.gov/about/reports/annual/teachprep/t2r7.pdf> (showing data on the number of teachers with certification waivers by state and subject); U.S. DEP’T OF EDUC., A SUMMARY OF HIGHLY QUALIFIED TEACHER DATA 2 (2009), available at <http://www.ed.gov/programs/teacherqual/data2009.doc> (reporting that nearly ninety-four percent of core classes at the secondary level are taught by highly qualified teachers).

⁶⁶ As part of its selection criteria, The Obama Administration’s Race to the Top program considered “[l]egal, statutory, or regulatory provisions that allow alternative routes to certification . . . for teachers and principals, particularly routes that allow for providers in addition to institutions of higher education.” U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 9 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

⁶⁷ See *supra* notes 45–46 and accompanying text.

⁶⁸ 20 U.S.C. § 6319(a)(2) (2006).

⁶⁹ CAL. EDUC. CODE § 44225.7(a) (2011) (explaining the state’s order of preference for recruiting different kinds of non-certified teachers when “a suitable fully prepared teacher is not available”); *id.* § 44225.7(e) (defining “fully prepared teacher” to mean a person who has completed a traditional or alternative certification program).

⁷⁰ For an explanation of the Race to the Top program, see *supra* note 36 and accompanying text. To be eligible for Race to the Top grants, states should ensure that “alternative routes to certification programs . . . be considered different pathways to certification with the same rigor as other State-approved routes,” i.e. treat teachers the same whether they obtain certification through traditional or alternative programs. See Race to the Top Fund, 74 FED. REG. 59,688, 59,748 (Nov. 18, 2009). Race to the Top is meant to incentivize states to reduce the barriers of entry to the teaching profession, notably through alternative certification routes. See *id.* at 59,748.

⁷¹ The Race to the Top Program assesses applications by assigning them points based on various criteria. The program awards twenty-one points, out of a total of 485, to states that have adopted legal, statutory, or regulatory provisions for alternative certification; that make use of alternative certification programs; and that have implemented a process for “identifying areas of teacher and principal shortage and for preparing teachers and principals to fill these areas of shortage.” U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 9 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>; see *id.* at 3 (summarizing total points awarded).

IV. HOW THE DECISION WOULD NOT HAVE SOLVED THE PROBLEM

Of course, denying interns and alternative program participants “highly qualified” status would have caused a problem for California. Since NCLB requires that poor and minority students be taught by “highly qualified teachers” at the same rate as other students,⁷² California would have had to figure out some way to distribute its interns to more affluent schools and lure traditionally certified highly qualified teachers to low-income schools. The problem with this is that many highly qualified teachers are difficult to attract to high-needs schools.⁷³ There is a general shortage of qualified teachers that will continue to worsen as Baby Boomer teachers retire in the next ten years.⁷⁴ This shortage is nowhere more evident than in low-income schools, which frequently have difficulty finding enough teachers to fill their classrooms by the first day of school, let alone worry about qualifications.⁷⁵ High-poverty schools tend to pay less than their wealthier counterparts, providing salaries that are too small for too challenging a job.⁷⁶ It is therefore difficult to inspire enough people to pay the cost of traditional preparation programs (which can include many months of unpaid student teaching), much less to make a lifelong commitment to teaching. If there were enough teachers who had completed their training and wanted to work in high-needs schools, the schools would not have to hire interns in the first place. If California were to redistribute interns, the likely outcome would be large numbers of vacancies in low-income schools, to be filled with long-term

⁷² 20 U.S.C. § 6311(b)(8)(C) (2006).

⁷³ See, e.g., ALMY & THEOKAS, *supra* note 28, at 2–3; Brian A. Jacob, *The Challenges of Staffing Urban Schools with Effective Teachers*, 17 THE FUTURE OF CHILDREN 129, 134–36 (2007); Marjorie L. Webb, *Rural School Districts Struggle to Meet the Demands of No Child Left Behind*, 16 SAN JOAQUIN AGRIC. L. REV. 191, 201–04 (2007). In contrast, alternative program participants overwhelmingly choose to go into teaching specifically to teach at high-needs schools. NAT’L COMPREHENSIVE CTR. FOR TEACHER QUALITY & PUBLIC AGENDA, LESSONS LEARNED: NEW TEACHERS TALK ABOUT THEIR JOBS, CHALLENGES AND LONG-RANGE PLANS, WORKING WITHOUT A NET 15 (2007), available at <http://www.eric.ed.gov.ezp-prod1.hul.harvard.edu/PDFS/ED499415.pdf>.

⁷⁴ See NAT’L COMM’N ON TEACHING AND AMERICA’S FUTURE, LEARNING TEAMS: CREATING WHAT’S NEXT 2 (2008), available at <http://www.nctaf.org/documents/NCTAFLearningTeams408REG2.pdf> (“Over 50 percent of the nation’s teachers and principals are Baby Boomers. . . . In less than a decade more than half of today’s teachers—1.7 million—could be gone.”).

⁷⁵ See John Heintz, *Political Currency and Hard Currency: The No Child Left Behind Act Turns Three*, 40 J. MARSHALL L. REV. 345, 356–57 (2006).

⁷⁶ Douglas E. Mitchell & Lisa S. Romero, *The Politics and Practice of Alternative Teacher Certification*, 46 EDUC. ADMIN. Q. 363, 368–69 (2010); Jacob, *supra* note 73, at 139 (“[W]ages are important both in recruiting and in retaining qualified teachers.”). But see Jacob, *supra* note 73, at 140 (“Working conditions appear to be even more important than wages, particularly for teachers in urban schools.”).

substitutes.⁷⁷ The move would result in a less qualified teaching staff in such schools rather than a more qualified one.⁷⁸

The *Renee* plaintiffs argued that alternative certification program participants are not “highly qualified” within the meaning of § 7801(23) unless and until they have received full state certification.⁷⁹ However, their argument is better understood as being about teacher experience, not perceived teacher skill or formal training.⁸⁰ While many would not consider alternative certification participants highly qualified in the lay sense of the phrase,⁸¹ the same is almost certainly true for first-year teachers certified through a traditional program.⁸² The plaintiffs were upset by the fact that an intern with no prior training or teaching experience could be called “highly qualified” from her first day in the classroom onward.⁸³ Seen in this light, the plaintiffs were not opposed to alternative certification programs in general or to designating alternative program graduates as “highly qualified.” The plaintiffs simply opposed granting alternative program participants the title “highly qualified teacher” before they completed their alternative program.⁸⁴ Yet, without changing the incentives, high-needs schools will continue to have to hire mostly inexperienced and less competent teachers.

⁷⁷ Long-term substitute teachers are substitute teachers that stay with the same class for a significant portion of the school year during the absence of the regular instructor. *See, e.g., Substitute Teachers*, BOSTON PUB. SCH., <http://www.bostonpublicschools.org/subs> (last visited Nov. 10, 2011) (“Long-Term substitute teachers are teachers who are assigned to fill a position anticipated to be vacant for more than 20 consecutive workdays but less than a full school year or teachers actually serving continuously for more than 20 consecutive workdays in the same assignment.”).

⁷⁸ *See Renee*, 623 F.3d at 802 (Tallman, J., dissenting) (“Some have argued that students taught inconsistently by substitute teachers do not receive the same quality education as students consistently taught by permanent teachers, regardless of either teacher’s certification status.”). For example, one study of North Carolina schools found that ten additional days of a regular teacher’s absence were “associated with declines in achievement equal to about one-fifth the advantage of having a teacher with [one to two] years experience, compared to having a novice teacher.” Charles T. Clotfelter et al., *Are Teacher Absences Worth Worrying About in the U.S.?* 21 (Nat’l Bureau of Econ. Research, Working Paper No. 13648, 2007), available at <http://www.nber.org/papers/w13648>.

⁷⁹ *Renee*, 623 F.3d at 793 (plaintiffs “contend[ed] that such teachers are not ‘highly qualified’ within the meaning of § 7801(23).”).

⁸⁰ *Renee*, 623 F.3d at 802 (Tallman, J., dissenting) (“Their alleged injury should therefore be characterized as a lower proportion of experienced to inexperienced teachers instructing them as opposed to those instructing students in affluent areas.”).

⁸¹ *See supra* note 61.

⁸² In fact, research indicates that first-year teachers, regardless of preparation, are significantly less effective than more experienced teachers. *E.g.,* ALMY & THEOKAS, *supra* note 28, at 3; Donald Boyd et al., *The Narrowing Gap in New York City Teacher Qualifications and its Implications for Student Achievement in High-Poverty Schools*, 27 J. OF POL’Y ANALYSIS AND MGMT. 793, 795 (2008).

⁸³ *Renee*, 2008 U.S. Dist. LEXIS 49369 at *9–10 (“Thus, plaintiffs assert, a teacher-in-training with no prior training and no prior teaching experience may be deemed ‘highly qualified’ the very day he or she enters an ‘alternative certification program’ and begins to serve as a classroom teacher.”).

⁸⁴ *See Renee*, 623 F.3d at 792–93 (“Appellants do not object to characterizing an alternative-route teacher who has already obtained ‘full State certification’ through the alternative program “as a ‘highly qualified teacher.’”).

What is clear is that, in general, the teachers at high-needs schools tend to be the least qualified and the least experienced.⁸⁵ There is a long-running and heated debate in education as to what effect a teacher's certification status has on her students' achievement.⁸⁶ Compounding this debate is the fact that most alternative certification participants teach in high-needs schools.⁸⁷ Comments from new teachers suggest that participants in alternative certification programs may need more support and mentoring than traditional teachers in their first year.⁸⁸ However, the return on investing extra support might be worth it if they are more willing to take the difficult assignments.⁸⁹ Overall, drastic reforms need to be made in teacher preparation programs for teachers to consistently be able to improve low-income and minority students' achievement levels.⁹⁰

V. THE CONTINUING RESOLUTION AND THE POTENTIAL FOR REAUTHORIZATION OF THE ESEA

Although the Continuing Resolution raised a stir among advocates, materially it did nothing more than ratify the Education Department's regulation and its current practice. Instead, the Continuing Resolution is significant as an expression of the 111th Congress's affection for alternative certification programs. Given the nearly unanimous praise for Teach for America, various teaching fellows residencies, and other similar programs among Congress,⁹¹ it is hard to imagine that alternative certification will go away anytime soon.

⁸⁵ ALMY & THEOKAS, *supra* note 28, at 2, 3; Boyd, *supra* note 82, at 794.

⁸⁶ Compare Jacob, *supra* note 73, at 138 (“[C]ertified teachers are not consistently more effective than uncertified teachers.”), and T.J. Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City*, 27 *ECON. OF EDUC. REV.* 615, 629 (2008) (“[T]eachers vary considerably in the extent to which they promote student learning, but whether a teacher is certified or not is largely irrelevant to predicting their effectiveness.”), with Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California's Public Schools*, 43 *SANTA CLARA L. REV.* 1045, 1074–78 (2003) (listing numerous national studies proving a link between teachers' certification status and their students' achievement).

⁸⁷ NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY & PUBLIC AGENDA, *supra* note 73, at 9; see Donald Boyd et al., *How Changes in Entry Requirements Alter the Teacher Workforce and Affect Student Achievement*, 1 *EDUC. FIN. & POL'Y* 176, 201 (2006). (explaining the necessity of controlling for the difficult schools where Teaching Fellows and TFA members often teach when analyzing teacher effectiveness data).

⁸⁸ NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY & PUBLIC AGENDA, *supra* note 73, at 20.

⁸⁹ See Boyd et al., *supra* note 87, at 213 (“[W]ithout alternative routes to teaching it is unlikely New York City could meet New York State and federal requirements to have a qualified teacher in every classroom.”).

⁹⁰ See Gershon M. Ratner, *Why the No Child Left Behind Act Needs to be Restructured to Accomplish its Goals and How to Do It*, 9 *UDC/DCSL L. REV.* 1, 36 (2007).

⁹¹ See, e.g., *Department of Education Fiscal Year 2011 Budget: Hearing before the H. Comm. on the Budget*, 111th Cong. 27–28, 47, 53 (2010) (Rep. Doggett (D-Tex.), Rep. DeLauro (D-Conn.), and Rep. Langevin (D-R.I.) questioning Secretary Duncan as to why the Department of Education's 2011 budget reduced Teach for America's funding); *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for*

NCLB, on the other hand, needs modification. Education Secretary Arne Duncan recently wrote that “almost no one believes the teacher quality provisions of NCLB are helping elevate the teaching profession, or ensuring that the most challenged students get their fair share of the best teachers.”⁹² The ideal scenario is that the hastiness of the Continuing Resolution will spur lawmakers to revisit NCLB during the 112th Congress’s term. Despite its extended life, Section 163 of the Continuing Resolution appears to have been designed as a temporary fix until Congress can make permanent changes to NCLB.⁹³ Representative George Miller, Chair of the House Education and Labor Committee, released a statement justifying Section 163 of the Continuing Resolution that said, in part, “The language included in the [Continuing Resolution] is only the beginning of the conversation . . . I look forward to continuing our efforts to rewrite ESEA in the next Congress.”⁹⁴ That was the Obama Administration’s plan, but President Obama has sought ESEA’s reauthorization since he took office and has not yet managed to muster the political will necessary to tackle this particular task.⁹⁵

More recently, the Administration appears to have shifted its emphasis away from the legislative approach. On September 23, 2011, the White House announced that it would allow states to apply for waivers from the accountability measures of NCLB requiring 100 percent of students to be “proficient” in math and language arts by 2014.⁹⁶ In exchange for this flexibility, states that receive waivers will be required to adopt plans regarding “three critical areas.”⁹⁷ Most notably, states must create teacher and principal performance evaluation systems that take student achievement into ac-

Fiscal Year 2011: Hearing before the S. Subcomm. on Labor, Health and Human Services, Educ., & Related Agencies of the Comm. on Appropriations, 111th Cong. 51–52, 57 (2010) (Sen. Landrieu (D-La.) and Sen. Pryor (D-Ark.) questioning Secretary Duncan as to why the Department of Education’s 2011 budget cut Teach for America’s funding); 155 CONG. REC. S3837 (daily ed. Mar. 26, 2009) (statements of Sen. Alexander (R-Tenn.) and Sen. Mikulski (D-Md.) praising Teach for America).

⁹² Arne Duncan, Op-Ed., *School Reform’s Next Test*, WASH. POST, Jan. 3, 2011, at A15.

⁹³ Press Release, Rep. George Miller, Chairman Miller Statement on Spending Measures in the CR (Dec. 21, 2010), <http://democrats.edworkforce.house.gov/newsroom/2010/12/chairman-miller-statement-on-s-9.shtml> (explaining that the provision was put into the Continuing Resolution to avoid “major and unpredictable disruptions” that might be caused by the *Renee* decision if “implemented before Congress [could] fully address issues of teacher preparedness”).

⁹⁴ *Id.*

⁹⁵ President Obama has focused on education reform consistently since taking office; in his 2011 State of the Union Address, he noted the success of Race to the Top in spurring reform and suggested it should be the model to which Congress looks. See Address Before a Joint Session of the Congress on the State of the Union, 2011 DAILY COMP. PRES. DOC. 4 (Jan. 25, 2011) (“Race to the Top should be the approach we follow this year as we replace No Child Left Behind with a law that’s more flexible and focused on what’s best for our kids.”).

⁹⁶ Office of the Press Secretary, *Fact Sheet: Bringing Flexibility and Focus to Education Law*, THE WHITE HOUSE (Sept. 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/23/fact-sheet-bringing-flexibility-and-focus-education-law>.

⁹⁷ *Id.*

count.⁹⁸ As of this writing, a majority of states have already notified the Administration of their plans to apply for a waiver.⁹⁹

The Administration continues to push for its rigorous package of modifications with ESEA's reauthorization.¹⁰⁰ As of this writing, it is uncertain how the waiver program will affect the Obama Administration's political capital or Congress's perception of ESEA.¹⁰¹ However, since the waiver program's announcement, both the Chair and the Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions have expressed a desire to reauthorize ESEA before 2012 so that the waivers will not be necessary.¹⁰² Whether in response to the waiver program or because it was more than four years overdue, the Senate Committee on Health, Education, Labor, and Pensions finally approved a draft rewrite of ESEA on October 20, 2011.¹⁰³ The Harkin-Enzi bill requires states to develop teacher evaluation systems based in part on student achievement data.¹⁰⁴ A coalition of educational organizations¹⁰⁵ sent a letter to Senator Harkin (D-Iowa) and Senator Enzi (R-Wyo.) expressing their concern about the bill's emphasis of standardized test scores in teacher evaluations "at the expense of other important indicators of teachers [sic] and principal effectiveness."¹⁰⁶ However, the

⁹⁸ *Id.* States granted waivers will also be required to develop college- and career-ready standards and to differentiate between the highest- and lowest-performing schools serving disadvantaged students (rewarding the former and vigorously intervening to "turn around" the latter). *Id.*

⁹⁹ Specifically, thirty-five states, the District of Columbia, and Puerto Rico have said they will seek waivers and will file during one of two specified application periods. Michele McNeil, *NCLB-Waiver Hopefuls Notify Education Dept. of Interest in Flexibility*, EDUC. WEEK, Oct. 19, 2011, at 18. Two states "want waivers but didn't indicate when they would apply" and "interviews with officials" of the remaining eleven states "show they are simply undecided." *Id.*

¹⁰⁰ See, e.g., Duncan, *supra* note 8.

¹⁰¹ See Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility*, EDUC. WEEK, Sept. 28, 2011, at 1, for discussion of individual congressperson's reactions to President Obama's waiver announcement.

¹⁰² Joe Brenckle, *Enzi: ESEA Bill Represents Good Starting Point in Legislative Process*, Newsroom, U.S. S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS (Oct. 19, 2011), <http://help.senate.gov/newsroom/press/release/?id=76f3131d-df28-4830-9a1c-bacb385840be&groups=Ranking> (announcement of Sen. Enzi's (R-Wyo.) view); *Harkin Statement on Obama's Announcement of NCLB Waivers*, U.S. S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS (Sept. 22, 2011), <http://help.senate.gov/newsroom/press/release/?id=6bfbbd51-9a40-46ac-a0ef-72d120955775&groups=Chair> (announcement of Sen. Harkin's (D-Iowa) view).

¹⁰³ The Harkin-Enzi bill has not been assigned a number as of this writing. Elementary and Secondary Education Reauthorization Act of 2011, S. ____, 112th Cong. (2011), available at <http://help.senate.gov/imo/media/doc/ROM117523.pdf>.

¹⁰⁴ *Id.* § 2123(b).

¹⁰⁵ Specifically the American Association of School Administrators, National Association of Elementary School Principals, National Association of Secondary School Principals, National Education Association, and National School Boards Association. Letter from American Association of School Administrators, et al. to Sen. Tom Harkin, Chairman of the Health, Education, Labor & Pensions Committee, & Sen. Michael Enzi, Ranking Member of the Health, Education, Labor & Pensions Committee (Oct. 16, 2011) (on file with author).

¹⁰⁶ *Id.*

Obama Administration, through the Secretary of Education, has voiced its concern that not enough emphasis is placed on student achievement data.¹⁰⁷

The Harkin-Enzi bill also proposes to codify the Continuing Resolution's decree that alternative certification program participants are considered "highly qualified."¹⁰⁸ In response, the National Coalition on Teaching Quality,¹⁰⁹ which formed in the wake of the Continuing Resolution, complained that the Harkin-Enzi bill weakens the "highly qualified teacher" provision by setting a lower bar than the Continuing Resolution did for non-certified teachers to be considered "highly qualified."¹¹⁰ Although it was a bipartisan accomplishment to get the bill out of committee, it faces a rocky road to ESEA reauthorization. Education legislation is always controversial;¹¹¹ the recent tension in Congress¹¹² and, most likely, the upcoming election cycle will only exacerbate what was already a monumental challenge. Based on the controversy surrounding the teacher quality provisions and the evaluation scheme, and the amendments offered and rejected in the committee hearing, teacher quality is going to be debated extensively on the Senate floor.

VI. POTENTIAL POLICY SOLUTIONS

The debate over what constitutes a "highly qualified" teacher arises from advocates and policymakers wanting to ensure that every student has

¹⁰⁷ Duncan, *supra* note 8 ("[I]t is equally important that we maintain a strong commitment to accountability for the success of all students, and I am concerned that the Senate bill does not go far enough.").

¹⁰⁸ The bill would amend 20 U.S.C. § 7801 to define the term "highly qualified teacher" to include an elementary, middle, or high school teacher who "has passed a rigorous State test for subject matter knowledge and is making satisfactory progress towards obtaining full certification or licensure within 3 years through participation in a high-quality, State-approved alternative certification program." Elementary and Secondary Education Reauthorization Act of 2011, S. ____, 112th Cong. § 9101(a) (2011), available at <http://help.senate.gov/imo/media/doc/ROM117523.pdf> (amending 20 U.S.C. § 7801(34)(A)(i)(I)(bb)).

¹⁰⁹ An enormous coalition that includes the National Education Association, one of the major national teachers unions, the NAACP, the National PTA, and many other grassroots, education, and civil rights organizations. See *Federal Advocacy: Fully-Prepared and Effective Teachers for All Students*, PUB. ADVOC., <http://www.publicadvocates.org/federal-advocacy-fully-prepared-and-effective-teachers-for-all-students> (last updated Oct. 17, 2011), for the coalition's brief history.

¹¹⁰ The bill's definition of "highly qualified teacher" "does further damage" beyond the Continuing Resolution "by eliminating the CR's supervision and professional development requirements for these teachers-in-training, allowing them to learn to teach on vulnerable children without training, supervision, or support." Letter from the National Coalition on Teaching Quality, to Sen. Tom Harkin, Chairman of the Health, Education, Labor & Pensions Committee, & Sen. Michael Enzi, Ranking Member of the Health, Education, Labor & Pensions Committee (Oct. 17, 2011) (on file with author).

¹¹¹ See generally Jennings, *supra* note 7 (describing the history of ESEA Title I and attendant controversies); Julia Hanna, *The Elementary and Secondary Education Act: 40 Years Later*, ED. MAGAZINE, Summer 2005, at 6 (same).

¹¹² See Alyson Klein, *K-12 Funding, Policy on Radar for New Congress; GOP Intent on Reining in Spending; Obama Maintains Education Agenda*, EDUC. WEEK, Jan. 12, 2011, at 19 (discussing and predicting the effects of recent partisanship on education legislation).

an effective teacher so that every student can achieve at high levels. The disagreement comes in deciding how best to measure teacher quality. In this section, this Note will offer five policy suggestions to further the goal of ensuring that all students have access to effective teachers.

A. *Provide More Flexibility for States to Define What
“Highly Qualified” Means*

NCLB significantly altered the federal-state power dynamic with regards to education.¹¹³ This has resulted in increased inefficiency as states must now comply with the myriad of NCLB requirements including, among others, extensive obligations to report to the federal government.¹¹⁴ In addition, NCLB deprived states of the flexibility to be creative in addressing unique needs.¹¹⁵ The unintended consequences of increased federal involvement¹¹⁶ have impeded the goal of providing every student with a quality education.¹¹⁷ The way to ease the burden is to make NCLB less prescriptive while still maintaining minimum standards. Ironically, state discretion was at issue in *Renee v. Duncan*. The Ninth Circuit originally ruled that NCLB granted states the right to define what full certification meant for their state.¹¹⁸

States need to develop certification requirements with sufficient flexibility to accommodate teacher shortages (whether total or isolated to a specific subject) in schools and districts. Flexibility and autonomy over teacher hiring and development are especially crucial in the current economic climate when states with restricted budgets have to prioritize the expenditures that will most effectively increase student achievement.¹¹⁹ Current practice, as formalized by the Continuing Resolution, allows states to rely on alternatively certified teachers to fill hard-to-staff schools and still meet NCLB's

¹¹³ Gail L. Sunderman & James S. Kim, *The Expansion of Federal Power and the Politics of Implementing the No Child Left Behind Act*, 109 TCHRS. C. REC. 1057, 1063 (2007).

¹¹⁴ *Id.* at 1064.

¹¹⁵ Bess Keller, *NCLB Rules On ‘Quality’ Fall Short*, EDUC. WEEK, May 16, 2007, at 1.

¹¹⁶ See generally Cohen-Vogel, *supra* note 1, at 18–20 (discussing the history of federal involvement in education).

¹¹⁷ See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 976–77 (2004) (arguing that the federal government's practice of rewarding performance or certification levels without regulating the standards by which the performance is measured incentivizes states to set low standards); Cohen-Vogel, *supra* note 1, at 36 (observing that districts spend over eighty percent of the Teacher Quality Grants that they receive under NCLB on salaries and professional development, severely limiting grant expenditures for NCLB programs to increase teacher quality, such as mentoring, paraprofessionals, merit pay, or tenure reform, and to incentivize highly qualified teachers to teach at low-performing schools).

¹¹⁸ *Renee v. Duncan*, 573 F.3d 903, 909 (9th Cir. 2009) (citing 20 U.S.C. § 7801(23)(A)(i) (2006)).

¹¹⁹ See Sunderman & Kim, *supra* note 113, at 1077 (reporting that implementation of NCLB requirements cost many states more money and required more staff than they could afford).

requirements. Providing states with some flexibility in how they meet those minimum standards will allow states to figure out what works best for their communities and develop best practices with other states. For example, many individual districts and states have already implemented successful programs designed to attract and retain teachers in high-needs schools and geographic locations.¹²⁰

B. Provide Incentives to Encourage Teachers to Apply and Remain at High-Needs Schools

Providing incentives for teachers to take positions at high-needs schools could be a means to attract high quality teachers to high-needs schools, or it could backfire by providing teachers who lack passion or commitment with a reason to remain in high-needs positions. One way to ensure that the incentives work properly is to tie them to performance using value-added measures, for example, or National Board Certification.¹²¹ In addition to rewarding strong, effective teachers, an ideal incentive program will provide opportunities for professional growth in addition to monetary perks. Bonuses may be a way to attract good teachers to a school, but mentoring and professional development opportunities, and perhaps future financial incentives based on performance, are necessary to retain those teachers in difficult schools.¹²² In particular, teachers need to feel like a valuable member of the community in which their school is located if they are going to commit to working there long-term.¹²³

C. Reduce Entry Requirements to Teaching in Favor of Better Preparation, Evaluation, Development, and Retention of Good Teachers

This Note proposes to address teacher quality by eliminating some of the hoops teachers must jump through to be certified and instead focusing on evaluating, developing, and retaining teachers while holding teacher preparation programs more accountable for the quality of the teachers that they

¹²⁰ See, e.g., Webb, *supra* note 73, at 206–07 (describing Mississippi’s Critical Needs Teacher Scholarship Program); Cloud & Fastenberg, *supra* note 60, at 50, 52 (describing the Boston Teacher Residency program).

¹²¹ ALMY & THEOKAS, *supra* note 28, at 4.

¹²² E.g., Jacob, *supra* note 73, at 142–43 (providing the example of Massachusetts’s failed attempt to lure teachers to high-needs districts with only monetary incentives and reiterating the importance of professional development opportunities to successful teacher retention); Webb, *supra* note 73, at 207 (summarizing literature which demonstrates that effective teacher retention in rural schools requires helping teachers feel connected in the school and the community).

¹²³ For example, “isolation is a major factor affecting rural teachers.” Webb, *supra* note 73, at 207. Therefore, fostering a teacher’s “[c]omfort and connectedness” to satisfy “the need for teachers to feel rooted to the community” is among the “common characteristics of effective recruitment and retention practices.” *Id.*

produce. Merit-pay proponents would support this policy, as would advocates who call for improvement of teachers colleges. If comprehensive enough, this could be a policy option that alternative certification proponents and opponents could both support. A shift towards lower entry requirements to the profession would appeal to alternative certification programs that would face fewer obstacles placing their participants under such a scenario. However, with the appropriate emphasis placed on more thorough teacher evaluation and development, closer scrutiny of teacher preparation programs, and the importance of teacher retention, this policy should also appeal to alternative certification opponents who would be able to shore up their anti-alternative certification positions with retention statistics. Because many alternative certification programs, especially Teach for America, tend to have higher attrition rates than traditional certification programs,¹²⁴ this policy would give states leverage to push such programs for longer commitments and better retention among their participants. Additionally, there is a large body of research indicating that the pathway a teacher follows to become certified does not provide nearly as accurate a picture of teacher effectiveness as performance on the job or in a training situation.¹²⁵

D. Do Away with Certification Tests Entirely

This proposal provides an opportunity to re-examine how we prepare and “certify” teachers. There is no lack of criticism of the Praxis tests and other iterations of the standardized tests many states require teaching candidates to pass, either before they are certified to teach or before they even enter a teacher preparation program.¹²⁶ Some critics declare the tests to be too easy and claim they allow teachers without a large enough knowledge

¹²⁴ See, e.g., JULIAN VASQUEZ HEILIG & SU JIN JEZ, GREAT LAKES CTR. FOR EDUC. RES. & PRAC., *TEACH FOR AMERICA: A REVIEW OF THE EVIDENCE 8–9* (2010) (discussing and summarizing the literature on Teach For America’s attrition rate).

¹²⁵ See, e.g., Kane, *supra* note 86, at 629–30 (finding that certification status had little to no correlation with effectiveness); Dan D. Goldhaber & Dominic J. Brewer, *Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement*, 22 *EDUC. EVALUATION & POL’Y ANALYSIS* 129, 141 (2000) (finding that science and math teachers who are certified in their content area, through both standard and alternative certification, perform better than those certified out-of-field); Doug Selwyn, *Highly Quantified Teachers: NCLB and Teacher Education*, 58 *J. OF TCHR. EDUC.* 124, 126–27 (2007) (summarizing research on the effectiveness of testing at predicting teaching ability and the effect of testing on the teaching population).

¹²⁶ Praxis tests measure basic skills, teaching skills, and subject-specific content knowledge. *About the Praxis Series Tests*, EDUC. TESTING SERV., <http://www.ets.org/praxis/about> (last visited Oct. 30, 2011). Most states require new teachers to pass a series of Praxis tests as part of the teacher certification process. Dara Wakefield, *Taking Hope Out of Teaching*, 88 *PHI DELTA KAPPAN* 79, 81 (2006) (“Praxis I, adopted by 28 states as well as Guam, the District of Columbia, the U.S. Virgin Islands, and the U.S. Department of Defense, is the most widely used basic-skills test series for screening teacher candidates in the United States.”); *State Requirements*, EDUC. TESTING SERV., <http://www.ets.org/praxis/states> (last visited Oct. 30, 2011) (citing and discussing each state’s teacher certification requirements).

base to be certified.¹²⁷ Others argue the tests are too narrow and that they fail to capture the indicators of a high-quality teacher.¹²⁸ Standardized assessments cater to one type of learner out of many types.¹²⁹ Students whose learning style does not imbue them with the ability to perform as well on tests may not be able to show the extent of their knowledge and skills. There is no reason to think this reasoning does not apply to teacher candidates as well. Certification tests set such a low bar that they are not effective gatekeepers for high quality teachers.¹³⁰ Instead, because they imperfectly measure the effectiveness of teacher candidates,¹³¹ certification tests are more likely to serve as a deterrent for passionate, dedicated individuals who would make excellent teachers but do not have the time or money to enroll in preparation courses.¹³²

E. Hold Teacher Preparation Programs Accountable

NCLB has shifted the burden of ensuring that teachers are well-prepared from the teachers colleges and preparation programs to the schools and districts that employ them.¹³³ But teachers colleges and alternative certification programs should be scrutinized for how well they prepare their students for real classroom experiences and for how well their graduates perform.¹³⁴ These accountability and reporting requirements, similar to the ones NCLB places on states and school districts, would help principals approximate an applicant's preparedness based on the record of the program from which she graduated. It would also put pressure on schools and teacher preparation programs to improve the caliber of their programs, resulting in

¹²⁷ See, e.g., Dan D. Goldhaber & Dominic J. Brewer, *Does Teacher Certification Matter? High School Teacher Certification Status and Student Achievement*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 129, 130–31 (2000).

¹²⁸ E.g., Wakefield, *supra* note 126, at 79.

¹²⁹ See *id.* at 79–82 (discussing the experiences of one Georgia teacher-aspirant diagnosed with a learning disability); *id.* at 81 (“With very few exceptions, educators and psychologists condemn the use of standardized tests as sole indicators of academic aptitude or achievement.”).

¹³⁰ Ryan, *supra* note 117, at 977–78.

¹³¹ See Wakefield, *supra* note 126, at 82 (“[C]ommon sense dictates the use of multiple sources of evidence of successful teaching aptitude in order to minimize questionable rejections and discrimination.”); Dara Wakefield, *Screening Teacher Candidates: Problems with High-Stakes Testing*, 67 EDUC. F. 380, 385 (2003) (“Minority and low income teacher candidates must overcome as many as three [kinds of] biases to overcome high-stakes teacher-screening tests. These candidates can no longer depend on their other strengths to offset weaknesses when the only measure of their ability as a future teacher is a high-stakes test.”).

¹³² See Wakefield, *supra* note 126, at 82 (“[C]andidate screening tests are costly. Many students . . . save for years, work extra jobs, and cut personal expenses in an effort to earn their college degrees. A significant portion of the population will pay their fees and pass teacher-screening tests without any added effort. For those who can’t, the additional testing, preparation, and travel expenses can approach the cost of a semester’s tuition at a state school.”).

¹³³ Cohen-Vogel, *supra* note 1, at 38–39.

¹³⁴ See ALMY & THEOKAS, *supra* note 28, at 4 (proposing that other states follow the lead of Louisiana in assessing programs’ effectiveness by the success of the teachers they produce).

more qualified teachers.¹³⁵ Additionally, ESEA could require teacher preparation programs to give high-needs schools the first chance to hire graduates,¹³⁶ thus promoting more uniform distribution of highly qualified teachers to schools that serve poor and minority students.

VII. POLICY RECOMMENDATION

In updating the teacher quality requirement of ESEA, Congress should focus on three main goals: (1) allowing flexibility and a variety of factors to come into play when determining which teachers are “highly qualified;” (2) attracting effective teachers to high-needs schools; and (3) giving states authority and flexibility in both of the first two elements. ESEA should be about tools and minimum standards, not about binding states, districts, and schools to certain ways of doing things.

In the reauthorization of ESEA, lawmakers should recognize that “highly certified” is not the same as “highly qualified.” Yet in response to NCLB’s reporting requirements, most states have found it easiest to measure teacher certification—test scores and the like—rather than quality.¹³⁷ I propose shifting the focus from highly certified to highly effective.¹³⁸ This is not a statement of sweeping support for value-added assessments based on students’ test scores, though those may have a role.¹³⁹ Instead, the change of focus that I propose should seek to assess the qualities that allow teachers to be successful. Undoubtedly, it is a much more difficult and controversial

¹³⁵ See DAN GOLDHABER & STEPHANIE LIDDLE, CTR. FOR EDUC. DATA AND RES., 2011-2, THE GATEWAY TO THE PROFESSION: ASSESSING TEACHER PREPARATION PROGRAMS BASED ON STUDENT ACHIEVEMENT 31 (2011), available at [http://www.cedr.us/papers/working/CEDR%20WP%202011-2%20Teacher%20Training%20\(9-26\).pdf](http://www.cedr.us/papers/working/CEDR%20WP%202011-2%20Teacher%20Training%20(9-26).pdf) (finding that “the differential in the average effectiveness of the teachers credentialed by various programs is [statistically] meaningful, in fact it is at least as important as years of experience and degree level.”). This correlation suggests that “improving teacher training has the potential to greatly enhance the productivity of the teacher workforce.” *Id.* But see *id.* (“Our findings suggest that where teachers are credentialed explains only a small portion of the overall variation in the effectiveness of in-service teachers.”).

¹³⁶ ALMY & THEOKAS, *supra* note 28, at 4.

¹³⁷ Wakefield, *supra* note 126, at 81.

¹³⁸ See, e.g., Wade A. Carpenter, *The Other Side of Highly Qualified Teachers*, 82 EDUC. HORIZONS 103, 106–07 (2004); Bess Keller, *NCLB Rules On ‘Quality’ Fall Short*, EDUC. WEEK, May 16, 2007 at 1.

¹³⁹ In recent months, many states and districts have created teacher evaluation programs that rely heavily on value-added student achievement data. See Howard Blume, *State Bucks U.S. Teacher Grading Trend; Many Now Consider Student Achievement When Determining Instructors’ Tenure Or Dismissal, Report Finds*, L.A. TIMES, Oct. 26, 2011, at AA3. Indeed, some states base tenure on student test scores. *Id.* On the other side of the debate, school officials in California maintain that standardized student tests are designed to provide broad data about student growth and to improve instruction, not to assess the skills of individual teachers. *Id.* As more states apply for waivers under NCLB, they will be required to incorporate student assessment data into teacher evaluations. Office of the Press Secretary, *Fact Sheet: Bringing Flexibility and Focus to Education Law*, THE WHITE HOUSE (Sept. 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/23/fact-sheet-bringing-flexibility-and-focus-education-law>.

assessment than more objective, standardized measures: even highly criticized tests are straightforward to implement and administer. A large part of what makes such tests so attractive is their universality. Tests can be administered under highly controlled circumstances and scored objectively, guaranteeing data that are suitable for comparison. More flexible types of assessments will not offer ready comparison across an entire population of professionals. What they will offer is the ability for principals to gauge what strengths and weaknesses teachers have;¹⁴⁰ whether certain teachers will fit into their school culture; which teacher training programs do not adequately prepare their graduates; and so on. These subjective evaluations would not be appropriate for national or state level comparisons. They would, however, be appropriate for district-level comparisons, and could be used to hold districts accountable for targeting training and development to the teachers who most need it. Subjective assessments would also align more closely with skills that principals and teachers value as being most helpful in aiding student progress.¹⁴¹ These types of quality assessments would also be much less likely than standardized certification tests to perpetuate the historical exclusion of racial minorities from teaching, perhaps increasing diversity among the pool of teacher candidates. Performance in the classroom during training or in a simulated classroom experience, rather than tests like the Praxis or standardized student assessment data, can illustrate much more about which teachers should be considered “highly qualified.”¹⁴²

NCLB ignores the immeasurable qualities that make good teachers effective.¹⁴³ In reauthorizing ESEA, Congress should consider skills as part of the idea of what makes a teacher “highly qualified.”¹⁴⁴ A world-class physicist who has completed a semester of classes at a teachers college might not be able to scaffold lessons to reach all students or explain concepts in a way students can understand or adjust her lesson plans in response to student data, but if she can pass the certification test, she can still be considered “highly qualified” under NCLB. Effective teachers need to possess content knowledge and teaching skills, but the current certification standards only assess the former.

Additionally, as Congress searches for ways to improve NCLB, it should follow the lead of *Race to the Top* and use competition to encourage states to improve and drastically change teacher preparation programs. Despite the many criticisms of *Race to the Top*, it has been enormously suc-

¹⁴⁰ This knowledge is especially helpful for implementing a professional development system in which an experienced teacher mentors a more junior teacher; mentorships can be targeted to each individual’s strengths and weaknesses.

¹⁴¹ A school district in Idaho uses teachers’ ability to engage parents as a factor in its new merit-pay scheme. Julie Wootton, *Local Teachers’ Merit Pay Hinges on How Well They Engage with Parents*, THE TIMES-NEWS (Twin Falls, Idaho), Oct. 24, 2011, http://magicvalley.com/news/local/twin-falls/article_c445ad21-e34f-5ad0-8f3d-aaf1db459719.html.

¹⁴² See, e.g., Kane, *supra* note 86, at 629–30.

¹⁴³ See Heintz, *supra* note 75, at 357–58.

¹⁴⁴ *Id.* at 365–66.

cessful in inducing gridlocked state legislatures to pass significant education reform legislation. There is no reason to think that using the same type of carrot will not have the same effect when it comes to increasing teacher quality. This could include requiring a one-year residency, as many states have found effective, providing close mentorships for novice teachers, providing teacher tracking so that master teachers are easily identified, or any number of other reforms that states find effective in preparing more highly qualified teachers. Perhaps after a few years of observation of the “state laboratories,” the federal government will be more adequately poised to make specific recommendations about how to ensure that every classroom is headed by a highly effective teacher. Until then, Congress should stop stifling the creativity of states (and teacher preparation programs and community organizations) and allow them the flexibility to figure out how to best prepare teachers. States do not need to be told that it is crucial to have highly effective teachers. With more freedom to define and assess teacher quality, they will be able to develop models of teacher preparation, evaluation, and development that move towards the goal of ensuring that every student has a high-quality teacher.

