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The Impact of No Child Left Behind on Post-Divorce Custody Modification

Steven J. Seem†

In 2001, Congress passed the No Child Left Behind Act ("NCLB"),1 a massive legislative effort in national school reform. The stated purpose of the Act is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."2 In an effort to fulfill this purpose, NCLB requires that local education agencies allow children in "failing" schools to transfer to a non-failing school in the same school district.3 These school choice provisions trigger in every school district after two years of monitoring.4 As the NCLB transfer provisions take effect, they may have significant implications for the determination of child custody.

Courts initially make custody decisions using a combination of factors, but the decisions are almost always within a framework that gives primary consideration to the best interests of the child.5 Similarly, courts modify existing custody decrees either using a traditional best interests standard, or, more frequently, using a restricted best interests standard that requires a substantial change in circumstances.6

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2 20 USC § 6301.
3 See 20 USC § 6316(b)(1)(E)(i).
4 See 20 USC § 6316(b)(1)(A).
5 See Robert H. Mnookin and D. Kelly Weisberg, Child, Family, and the State: Problems and Materials on Children and the Law § 5 at 913 & n 92 (Aspen 2000) (noting that the best interests standard "has been uniformly adopted either by state statutes, which include expanded lists of relevant factors, or by statutes giving courts a general directive," and describing the complexity of factors that may go into a best interests analysis).
6 See Nancy B. Shernow, Comment, Recognizing Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings, 35 UCLA L Rev 677, 680-83 (1988) (noting that most jurisdictions apply either a substantial change in circumstances standard or a best interests standard, regardless of whether there has been a change in circumstances, in modifying custody decrees, and briefly describing those standards).
The NCLB school choice provisions may affect court custody modification decisions under either standard. Under a traditional best interests of the child standard, a noncustodial parent can successfully relitigate custody based on the need for either a better school\(^7\) or a shorter commute\(^8\) for the child. Under a substantial change in circumstances standard, a custody order may also require modification due to either the classification of the child's school as "failing" or the longer commute resulting from school transfer. Thus, the interplay of NCLB and divorce law may disparately impact a divorced custodial parent regardless of whether the child actually transfers schools.

Part I of this Comment describes the public school choice provisions of NCLB. It also examines the various judicial standards used to establish and modify child custody decrees. Part II analyzes hypothetical combinations of factual circumstances and legal standards, and critiques the public school choice provisions of NCLB based on their possible effects on custody litigation. This Comment argues that the interplay between NCLB and custody modification standards may create a number of problematic incentives, including redundant relitigation by noncustodial parents, counterproductive educational decisionmaking by custodial parents, and over-reliance on inappropriate data by judges. Part II also argues that these incentives may create two derivative problems: disparate impact on certain groups and methodological bias within the judiciary.

Part III recommends three possible remedies for the problematic intersection of the NCLB school choice provisions with the common judicial standards for divorce law: a full legislative repeal, a partial legislative amendment, or a judicial presumption. This Comment then argues that while a partial legislative solution might provide more national uniformity and clarity for judges, a judicial solution provides both the most realistic option from an implementation standpoint and the most equitable choice from a parents' and children's rights standpoint.

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\(^7\) See *Beers v Beers*, 710 A2d 1206, 1209-10 (Pa Super 1998) (affirming that school quality is relevant to a best interests of the child inquiry).

\(^8\) See *In the Interest of ZBP and JNP*, 109 SW3d 772, 779 (Tex App 2003) (affirming that a long commute to school may be probative in custody disputes).
I. No Child Left Behind and Common Law Divorce Standards

A. No Child Left Behind Legislation

NCLB requires that all states develop challenging academic standards and then implement a system of annual testing to determine whether schools meet those state-mandated educational standards.\(^9\) States must then use the results of these tests to determine whether their schools have made "adequate yearly progress" in their educational programs.\(^10\) Schools which fail to make adequate yearly progress for two consecutive years are identified for "school improvement."\(^11\) NCLB has created statistical requirements for adequate yearly progress. The law demands either complete achievement of the given state's minimum proficiency levels or, alternately, 10 percent yearly decreases in the number of non-proficient students.\(^12\) NCLB extensively details the conditions needed for state assessments of proficiency, requiring linkage to test scores, disaggregation by demographic factors, and itemization of score analyses.\(^13\)

If a state identifies a school as needing school improvement, the local education agency must provide all students enrolled in the school with the option to transfer to another public school in the district that the state has not identified for improvement.\(^14\) In addition, local education agencies must give priority to transfers involving the "lowest achieving children from low-income families."\(^15\)

B. Law Governing Initial Determination and Subsequent Modification of Custody Decrees

States apply different standards both in making initial determinations of custody and in making orders modifying custody. Consequently, a description of both sets of standards could assist...

\(^9\) See 20 USC § 6311(b)(2)-(3) (mandating the creation of statewide accountability and academic assessment programs, including timelines, definitions of adequate yearly progress for state school systems, and specific educational goals).

\(^10\) 20 USC § 6316(a)(1)(A).

\(^11\) 20 USC § 6316(b)(1)(A).

\(^12\) 20 USC § 6311(b)(2)(I).

\(^13\) See 20 USC § 6311(b)(3)(A)-(C) (delineating the manner in which state education agencies must create programs of academic assessment and use those assessment programs to monitor and evaluate state school systems).

\(^14\) 20 USC § 6316(b)(1)(E)(i).

\(^15\) See 20 USC § 6316(b)(1)(E)(ii).
an analysis of the various interests that courts should weigh in custody litigation. The NCLB school choice provisions, however, more clearly intersect with the standards governing custody modification than with those governing initial decrees. Accordingly, while the standards for initial custody determinations help establish the traditional baseline for analysis in post-divorce custody determinations, the standards dealing with custody modification warrant more attention, and so this Comment focuses on the effect of NCLB during modification proceedings.

1. Initial determinations.

In making initial determinations of custody, states typically apply a best interests of the child standard. The general best interests standard encompasses myriad elements, and states have adopted varying combinations of these elements. Some commentators have referred to other presumptions and factors, such as the primary caretaker presumption or the child's wishes, as "standards" for custody determination, but most of these fall within the best interests inquiry. For instance, the primary caretaker presumption fits into the best interests standard because courts find that it generally serves the best interests of the child for him to remain in the custody of his primary caretaker. Courts treat the child's wishes, on the other hand, as neither a standard nor a presumption, but rather as just one factor among many to consider in the best interests analysis. Of course, a child's preferences may control if the child is old enough for the

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16 See Jeff Atkinson, Criteria For Deciding Child Custody in the Trial and Appellate Courts, 18 Fam L Q 1, 4 (1984) (noting that the best interests standard is the "universal standard" for initial custody determinations).
19 See, for example, Spear v Spear, 506 SE2d 820, 823 (W Va 1998) (noting that with regard to very young children, the law presumes that it is in the child's best interests to place the child with their primary caretaker).
20 See Mnookin and Weisberg, Child, Family, and the State, § 5 at 992-93 (cited in note 5) (describing the various manners in which state statutes incorporate the consideration of the child's wishes in custody decisionmaking, ranging from an outright requirement to complete court discretion, but only as a controlling factor if the child is of a certain age).
court to fully credit his desires. All told, despite the varying subtleties among state laws, courts generally employ some form of a best interests analysis.

The exact definition of "custody," however, remains significantly complex. Two notions of custody have evolved in the law—physical and legal. Legal custody implies responsibility for decisions regarding, for instance, a child's long-term health, welfare, and education; whereas physical custody involves control over a child's home and daily activities. This dichotomy becomes more complex with the addition of joint custody. Joint physical custody is more like divided, time-share custody, whereas joint legal custody implies that both parents share a voice in major decisions regarding the child's upbringing. Courts generally favor joint legal custody over joint physical custody; an empirical study indicated that one court awarded joint legal custody fifteen times more often than it awarded joint physical custody. Another study showed that the percentage of Wisconsin divorce cases ending in joint legal custody increased from 18 to over 81 percent in the twelve year period between 1980-92.

The most dire scenarios arising from the intersection of NCLB and custody modification law arise when physical and legal custody rest solely with one parent and the other parent dislikes the arrangement and is willing to challenge it in court. Accordingly, this Comment addresses cases involving a post-divorce couple with sole legal and physical custody vested in one parent. The word "custodial" as used in this Comment implies both physical and legal custody, except where otherwise specified. Therefore, a "custodial parent" within the meaning of this Comment has sole legal and physical custody of his child.

21 See id at 993 and n 171-72 (describing certain state statutes that mandate a child's preferences as controlling in custody determinations, provided that the child has reached a sufficient age cutoff or maturity level).
22 See id at 913 (noting that the best interests standard has been uniformly adopted by statutes either giving expanded lists of relevant factors or a broad general directive).
23 See id at 951 (describing the existence of both legal and physical custody, and the various aspects of parental decisionmaking encompassed by each).
24 See Mnookin and Weisberg, Child, Family, and the State, § 5 at 951 (cited in note 5).
25 See id.

In determining whether to modify a custody order, courts employ different standards than they apply in initial decree decisions. In modification proceedings, courts typically ask one of two questions: "(1) Has there been a material or substantial change of circumstances since the initial custody decree such that modification will be in the child's best interests? [or] (2) Will modification be in the best interests of the child regardless of whether there has been any change of circumstances?"

In determining whether a substantial change in circumstances has occurred, courts consider such factors as the remarriage or improvement in financial condition of the noncustodial parent, the child's increased age, the child's performance in school, or the possibility that the custodial parent will move out of the jurisdiction. A substantial change in these factors may influence a court to modify a custody determination. The substantial change of circumstances standard remains very vague, however, and generally results in significant judicial discretion. Modifications may flow from "irrelevant, predictable, or even improved changes in the prior custodian's circumstances," or from "unexplained prejudices, which appellate review cannot correct." Accordingly, the substantial change in circumstances standard may create some incentives for noncustodial parents to attempt custody modification, and thus may not act as a deterrent to litigation.

As a practical matter, however, courts systematically disfavor modifying custody decrees. The traditional change in circumstances rule derives from the rationale that "the child's need
for stability militates against relitigation of custody issues.\textsuperscript{35} Furthermore, some states follow the stricter rule of the Uniform Marriage and Divorce Act ("UMDA"), which forbids modification within two years after the initial decree, absent danger to the child’s physical, mental, moral, or emotional health.\textsuperscript{36} Under this analysis, the change in circumstances standard occasionally may deter litigation, due to the apparent institutional disfavoring of modification. Some incentives for litigation may still flow from this standard, however, especially as it interacts with the NCLB school transfer provisions.

Generally, the custodial parent maintains sole control over decisions affecting a child's education unless such a choice creates a substantial change in circumstances.\textsuperscript{37} At least one court has concluded that a custodial parent’s decision to home-school her child can represent a substantial change in circumstances warranting a modification of a custody order.\textsuperscript{38} Other courts, however, have held that a change in a child’s school may not itself constitute a sufficient basis for changing a custody arrangement.\textsuperscript{39} Instead, trial courts have used factors such as the quality of education and length of commute in determining whether to modify custody. For instance, New York courts have treated differences in the quality of the child's education as probative in custody disputes,\textsuperscript{40} and Nebraska courts have used educational quality in determining whether there is "an affirmative showing that the [custodial parent’s] decision regarding schooling has injured or harmed . . . the child’s safety, well-being, or health, whether physical or mental."\textsuperscript{41} Courts also have treated long

\textsuperscript{35} Id.  
\textsuperscript{37} See J. Bart McMahon, Note, An Examination of the Non-Custodial Parent's Right to Influence and Direct the Child's Education: What Happens When the Custodial Parent Wants to Home-Educate the Child, 33 U of Louisville J of Fam L 723, 743 (1995) (noting that “[c]ase law still supports the general proposition that decisions affecting the child's education remain with custodial parent, unless such a choice amounts to a substantial and material change in circumstances warranting a change of custody to protect the child"), citing Gardini v Moyer, 575 NE2d 423 (Ohio 1991).  
\textsuperscript{38} See Gardini, 575 NE2d at 427 (holding, without addressing the propriety of home schooling per se, that there was sufficient evidence in the trial record to support a finding that home schooling was inappropriate and harmful to the children at issue).  
\textsuperscript{39} See Collins v Newton, 362 S2d 174, 175 (Fla App 1978) (holding that the fact that child was about to enter high school was not a sufficient change in circumstances to warrant a change in custody).  
\textsuperscript{40} See, for example, Cassano v Cassano, 612 NYS2d 160, 162 (NY 1994) (holding that real differences in educational quality among a child’s school options should be a factor considered in the determination of custody).  
\textsuperscript{41} Von Tersch v Von Tersch, 455 NW2d 130, 136 (Neb 1990). The court in Von Tersch did not reach the specific question of whether the educational quality of the relevant
daily commutes to school as relevant in deciding whether to modify custody decrees.\textsuperscript{42}

Conflicts of interest frequently arise between custodial and noncustodial parents in determining how to educate their children.\textsuperscript{43} The general custody rule gives the custodial parent default control over the child's education, to the exclusion of the noncustodial parent.\textsuperscript{44} In fact, control of education is part of the bundle of rights generally associated with legal custody.\textsuperscript{45} This rule derives from the notion that custodial parents have more contact with the child, and therefore have a better understanding of the child's needs.\textsuperscript{46}

The noncustodial parent, however, does have some recourse in the face of these presumptions. For instance, courts can craft initial custody decrees such that the noncustodial parent has decisionmaking power over the child's education.\textsuperscript{47} Custodial parents often face significant barriers in attacking such decrees.\textsuperscript{48} Furthermore, the noncustodial parent sometimes can trump the public schools was inappropriate. Yet even when the educational quality is inappropriate, courts still may be reluctant to alter custody arrangements. See Davidson v Colburn, 1994 WL 654634 at *8-9 (Neb App) (unpublished) (holding that despite clear harm to the child stemming from the custodial parent's decision to home school, less restrictive remedies were available than a physical custody shift).

\textsuperscript{42} See In the Interest of ZBP and JNP, 109 SW3d 772, 779 (Tex App 2003) (affirming the trial court's use of a daily two-hour commute to and from school as relevant to the change in physical custody from mother to father); Erickson v Erickson, 1999 WL 1216132 at *2 (Minn App) (unpublished) (holding that a one-hour commute had a significant effect on the child's best interests).

\textsuperscript{43} Consider Gardini, 575 NE2d 423; Zande v Zande, 164 SE2d 523 (NC App 1968); Esteb v Esteb, 244 P 264 (Wash 1926); Davidson, 1994 WL 654634.

\textsuperscript{44} See, for example, Bateman v Bateman, 159 SE2d 387, 390 (Ga 1968) (holding that a non-custodial father lost his right to control the education of his child when he lost custody of the child); Zande, 164 SE2d at 528 (holding that decisions about the extent and place of a child's education are vested in the custodial parent); Esteb, 244 P at 268 (holding that because the custodial parent knows the child's "character and ability," she is in a better position than the non-custodial parent to determine the child's education).

\textsuperscript{45} Mnookin and Weisberg, Child, Family, and the State, § 5 at 951 (cited in note 5) (describing the various parental responsibilities implicated by possessing "legal custody").

\textsuperscript{46} See, for example, Esteb, 244 P at 268 (holding that because a mother is the custodial parent, she knows the child's "character and ability" and is in position to determine the child's education).

\textsuperscript{47} See, for example, Glass v Glass, 37 SW2d 467, 468 (Mo App 1931) (describing a custody decree that gave the father only temporary physical custody, but conferred upon him the ability to choose which school the child would attend).

\textsuperscript{48} Consider Taylor v Taylor, 176 NE2d 640, 643-44 (Ill App 1961) (holding that the right of the non-custodial parent to choose the child's school does not infringe on the custodial parent's right to choose the child's religion, even when the non-custodial parent refuses to choose a parochial school in accord with the custodial parent's religion); Glass, 37 SW2d at 468 (holding that the non-custodial parent's power to select the child's school does not contradict the custodial parent's custody, unless the selected school is a boarding school, and thus takes the child out the care and custody of the custodial parent).
custodial parent's control and influence over the child's education by petitioning to protect the child's best interests.\textsuperscript{49} At least one court has held that the noncustodial parent can override the custodial parent's right to control education upon an affirmative showing of physical or mental injury to the child.\textsuperscript{50} At a minimum, educational quality serves as one of many factors in the best interests calculus.\textsuperscript{51} Even under the difficult "affirmative showing" standard—using educational quality as a possible source of mental injury, for instance—noncustodial parents might be able make good-faith claims for modification of custody decrees based on the child's best interests with regard to education.\textsuperscript{52}

II. ANALYSIS AND CRITIQUE OF THE INTERACTION BETWEEN NCLB AND CUSTODY MODIFICATION

A. The Substantial Interplay between NCLB and Traditional Custody Modification Standards

If a child of divorced parents attends a school that the state has marked for "improvement" under NCLB's provisions, the child's family may face contentious custody modification hearings. NCLB's school transfer provisions may allow the noncustodial parent to relitigate custody under either the best interests or the substantial change in circumstances standards, regardless of whether the custodial parent decides to transfer the child.

Furthermore, a federal statutory basis for educational quality might provide a pretextual justification for noncustodial parents to attempt to transfer their child to schools nearer to them. If the noncustodial parent has retained control over decisions regarding the child's education, she may be able to create a change in circumstances by transferring the child to a school nearer to her, without properly considering the quality of education that her child will receive at a new school. Even if the noncustodial parent retains only partial control over educational decisions, she could attempt such a pretextual move, shielding her

\textsuperscript{49} See, for example, Frizzell v Frizzell, 323 P2d 188, 192 (Cal App 1958) (holding that despite generally giving the custodial parent power to determine what school the child will attend, a trial court may usurp that power if it will serve the best interests of the child).

\textsuperscript{50} See Von Tersch, 455 NW2d at 136.

\textsuperscript{51} See Beers v Beers, 710 A2d 1026, 1209-10 (Pa Super 1998) (affirming a trial court's use of school quality as relevant to the relative advantages between custody arrangements and the best interests of the child).

\textsuperscript{52} See id.
actual motivation from the custodial parent. Thus, NCLB might provide a pretext for noncustodial parents who are not genuinely concerned about their child’s education, but wish to regain custody, to move their child nearer to them.53

Three problematic incentives result from the interaction of NCLB with the common law custody modification standards. First, a noncustodial parent may have incentives to relitigate custody if the state classifies her child’s school as failing. The interplay of NCLB and custody modification may also provide confusing incentives for a custodial parent, pushing him to use the possibility of future custody relitigation as a factor in deciding whether or not to transfer his child to a different school. Finally, courts may use NCLB data as a proxy for deciding the best interests of the child, thus encouraging both custody relitigation on the part of the noncustodial parent and poor educational decisionmaking on the part of the custodial parent.

Analyzing several hypothetical custody situations provides the best way to demonstrate the possible interactions between the NCLB school choice provisions and the common law custody modification standards. This Comment presents four situations, based on one underlying factual pattern. Assume a scenario where two divorced parents, who have one child, live twenty miles apart from one another within one school district.54 Assume further that the state has marked the school that the child currently attends for improvement, and the child—who lives in a low-income family and whose mother retains physical and legal custody—has the choice to transfer schools within the district. In such a situation, four separate scenarios could arise, depending on the actions of the custodial parent and on the custody modification standard used in the jurisdiction. The custodial parent could either transfer the child or not, and the jurisdiction might employ either a substantial change in circumstances standard or a best interests standard. These two bifurcations lead to the four possible scenarios outlined below.

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53 This outcome is not necessarily contrary to the best interests of the child, of course, if the subsequent increase in educational quality outweighs the detrimental effects of relitigation and shift in custody. Since such a beneficial balance of interests will not always exist, however, the creation of pretextual justifications is still worth mentioning.

54 A scenario such as this might be possible in a large rural district, or a particularly diffuse urban area such as Chicago (which extends over twenty-two miles from north to south).
1. Transfer and a substantial change in circumstances standard.

If the custodial parent decides to transfer the child to another school not marked for "improvement," in a jurisdiction using a substantial change in circumstances standard, the noncustodial parent may have an incentive to relitigate custody on the ground that the move to a new school creates a substantial change in circumstances. If the new school is located a significant distance away from the custodial parent's home, the noncustodial parent could make this argument in good faith. Because the change in circumstances standard remains rather vague, the facts of this scenario could give the noncustodial parent another chance to have a court determine the appropriate custody arrangement. Indeed, courts have considered the effects of long commutes in custody modification cases.

Under this scenario, a real danger results from the possible incentives created for the parents, regardless of the merits of relitigation. A rehearing under this fact pattern (or any of the four delineated) would involve substantial court inquiry and balancing of interests. The resulting drain on judicial capacity might or might not be more significant than that which occurs in any custody hearing, and the negative effects of a long commute might or might not justify uprooting the child's home life. But even if the relitigation lacks any chance of success for the noncustodial parent, and the trial court is able to resolve the balancing of interests easily, the change in circumstances resulting from the school transfer might provide an attractive—and quite possibly good faith—cause of action. Thus, a noncustodial parent

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55 See Glass v Glass, 37 SW2d 467, 469 (Mo App 1931) (noting that a boarding school—because of its long distance from the custodial parent—can deprive the custodial parent of rightful custody).

56 Consider Vasterling, 67 Wash U L Q at 930 (cited in note 29) (arguing that the substantial change in circumstances standard is indeterminate and is not a deterrent to relitigation).

57 See, for example, In the Interest of ZBP and JNP, 109 SW3d 772, 779 (Tex App 2003) (taking a long commute into account in balancing a child's interests).

58 See Mnookin and Weisberg, Child, Family, and the State, § 5 at 997-98 (cited in note 5) (noting that some courts, when modifying custody arrangements under a substantial change in circumstances standard, balance child welfare against finality of judgments, and consider a broad range of facts, including those outside of the knowledge of the original trial court).

59 See ZBP, 109 SW3d at 778-79 (balancing a long commute and children's wishes against home environments of varying stability).
could use a transfer merely to harm a custodial parent, either out of vengeance or misguided good faith.

The custodial parent would face problematic incentives as well. The change in circumstances resulting from a school transfer would derive from an ostensibly positive, child-focused decision by the custodial parent, but would create dangerous incentives for the parent not to transfer his child. This incentive could arise out of the fear of facing renewed custody litigation. A dilemma for custodial parents thus looms. A parent who fears transferring her child to a new school because of the increased possibility of custody litigation may consider harming the child's education by keeping him in a "failing" school. But as shown in the next scenario, litigation might proceed irrespective of whether the parent transfers the child.

2. No transfer and a substantial change in circumstances standard.

If the custodial parent decides not to transfer his child from the "failing" school in a jurisdiction using a change in circumstances standard, the parent may still face a custody modification rehearing. For instance, the noncustodial parent could re-litigate the custody decree based on the argument that the child's school's recent classification as "failing" constitutes a substantial change in circumstances, on the basis that such a classification describes the educational quality of that school. Such an argument might rely on decisions that have treated a modification of the educational situation of a child as constituting a substantial change in circumstances, or decisions that require provision of

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60 See Ferrer v Lopez, 610 NW2d 229 (Wis App 1999) (unpublished) (analyzing whether aspects of a divorce litigation were pursued in bad faith, or to "exact revenge" on a party).

61 Determining whether such litigation was being used for vengeful purposes—in other words, whether it was merely being used to maliciously harass the custodial parent—would most likely require factual findings sufficient to determine intent. See id.

62 John Charles Boger, Education's "Perfect Storm"?: Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina, 81 NC L Rev 1375, 1417 (2003) (noting the apparent empirical connection between attending a school with a higher socioeconomic composition and improvements in achievement test scores). Many children given the option of school transfer under NCLB will be from schools with lower socioeconomic composition. Thus, the probability of decreased achievement test scores cited here represents the kind "harm" to the child that might result when a parent chooses not to pursue transfer.

63 See, for example, Cassano v Cassano, 612 NYS2d 160, 162 (NY 1994) (holding that differences in educational quality should be a factor considered in the determination of custody).

64 See, for example, Gardini v Moyer, 575 NE2d 423, 427 (Ohio 1991) (holding, with-
a certain level of education, predicated on the state interest in an educated citizenry. Although some cases in which educational quality has been relevant to a change in circumstances have involved home-schooling or unaccredited institutions, the addition of a federal statutory justification for finding that the current school is failing might provide better support for a court's shift in custody. NCLB might give family court judges an easy anchor, a label which indicates clearly whether a given school is adequate. The NCLB school classification itself thus may provide noncustodial parents with an incentive to relitigate custody under a change in circumstances standard, even when the custodial parent avoids transferring her child.

In this situation, a shift in custody based on a substantial change in circumstances might actually serve the best interests of the child, but deciding this issue would again require significant court inquiry and balancing. Such an inquiry might require the court to directly analyze the precise level of improvement needed in the current school—that is, how close the school is to the "failing" line—and then weigh the school's lack of educational quality against the detrimental effects of a custody shift, such as loss of neighborhood, friends, and stability.

Under the NCLB school choice provisions, this complex balancing may cause judges to adopt inappropriate shortcuts. Though balancing educational quality and family stability lies within judicial capacity, in this context it stems from a government-imposed educational standard. Thus, courts might determine custody by relying on a measure not designed for that purpose addressing the propriety of home schooling per se, that mother's move to home school children could constitute a substantial change in circumstances.

65 See, for example, Vandiver v Hardin County Board of Education, 925 F2d 927, 931 (6th Cir 1991), citing Murphy v Ark, 852 F2d 1039, 1043-44 (8th Cir 1988).

66 See, for example, Gardini, 575 NE2d at 424-25 (describing custodial mother's decision to home school child).

67 See, for example, Peterson v Peterson, 474 NW2d 862, 868-69 (Neb 1991) (addressing the educational implications of custodial mother's decision to enroll her child in an unaccredited school, although eventually holding that enrollment in such a school did not in itself mandate a change in custody).

68 See Mnookin and Weisberg, Child, Family, and the State, § 5 at 997-98 (cited in note 5) (noting considerable balancing of interests under the substantial change in circumstances standard).

69 See Bodine v Bodine, 588 SE2d 728, 730 (Ga 2003) (Sears concurring) (noting that in determining whether to relocate a child, the court must consider factors including: "a child's relationship with the non-custodial parent; his ties to local schools and friends; the child's age; [and] the stress and instability of relocation and the corresponding benefits of consistency and stability for the child").

70 See Beers v Beers, 710 A2d 1206, 1209-10 (Pa Super 1998) (balancing educational quality against family stability in determining a child's best interests).
pose. Judges might use school quality data as a numerical proxy for specific educational harm affecting the children that attend a given school, rather than as a mere measure of whether that school needs improvement. Thus, judges would make custody determinations using a measure that is arguably both inaccurate and overbroad.

Even if courts consider the school’s “failure” to be the change in circumstances, rather than the school’s change in classification to “failing,” (a big difference from a governmental intervention standpoint), the NCLB data dictates a numerical cutoff for defining failing schools. This cutoff creates a non-individualized proxy for determining custody modification upon which judges could over-rely. It may be that a school’s failure warrants reopened custody proceedings, but a court might use NCLB data to the detriment or exclusion of the complex balancing of interests that should occur, most specifically between educational quality and family stability. Even in a scenario where NCLB data is not treated as dispositive in determining a substantial change in circumstances, the numerical certainty of the data might lead courts to overvalue it in their interest-balancing, leaning them towards a significant custody modification without inquiring further as to specific educational harm to the child at hand.

3. Transfer and a best interests standard.

In a third scenario, if the custodial parent decides to transfer his child to another school and the court employs a best interests of the child standard, the noncustodial parent could relitigate custody. If the new school is significantly closer to the noncustodial parent’s home than to the custodial parent’s home, the noncustodial parent could make a best interests argument that a long commute time disserves the best interests of the child, and thus the child should live with the noncustodial parent. Such an argument could arise in two ways. First, the noncustodial

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71 See 20 USC § 6311(b)(2)(E)(i)-(ii) (requiring that the starting point for determining adequate yearly progress be defined according to the state’s lowest achieving groups of students, for example those among the economically disadvantaged, or the bottom 20 percent of schools, based on performance).

72 Consider Carolyn J. Frantz, Note, Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes, 99 Mich L Rev 216, 230 (2000) (arguing that trial courts may overvalue easily quantifiable factors such as parental wealth because of their numerical “certainty”). Judges may overvalue NCLB educational data, due to its easily quantified nature, in much the same way that they overvalue wealth.

73 See ZBP, 109 SW3d at 778-80 (stating that stability resulting from reduced commute is relevant to a best interests inquiry).
parent could claim that the addition of a long commute to the best interests calculus shifts the weight of the factual circumstances and militates in favor of a change in custody.\textsuperscript{74} Second, the noncustodial parent could attempt to make an affirmative showing that the long commute physically or mentally harms the child.\textsuperscript{75}

Creating these possible grounds for relitigation might damage family stability, and thus the child’s welfare, if they provide an incentive for the noncustodial parent to pursue a custody modification unnecessarily. A petition based on the best interests of the child standard might enable the noncustodial parent to have another chance for the court to hear her case.\textsuperscript{76} Moreover, the possibility of relitigation may act as an incentive for the custodial parent not to transfer his child to an ostensibly better school. In such a case, the paradox is that any educational benefits potentially derived from NCLB would be lost when the custodial parent decides not to transfer his child, in order to avoid further custody litigation.

4. No transfer and a best interests standard.

The fourth scenario arises when the custodial parent does not transfer her child in a jurisdiction using a best interests of the child standard. This situation would provide ample opportunity for the noncustodial parent to relitigate custody, and would create incentives for the noncustodial parent to pursue custody modification solely on the basis of her child’s school receiving a NCLB failing classification. Caselaw has shown that despite significant deference to parents' educational choices for their children,\textsuperscript{77} courts aim to establish a minimum quality of education for children and may modify custody decrees to guarantee that minimum level.\textsuperscript{78} A noncustodial parent could raise claims either

\textsuperscript{74} Id.
\textsuperscript{75} See, for example, \textit{Gardini}, 575 NE2d at 427 (using an affirmative harm standard which allows the party seeking custody decree modification to show that "some action by the custodial parent" endangered or would endanger the child) (emphasis added). Under such a standard, it appears that a significant enough commute could conceivably represent an affirmative harm, though no caselaw seems to approach long commutes under such a standard.
\textsuperscript{76} Consider \textit{Frizzell v Frizzell}, 323 P2d 188, 191-92 (Cal App 1958) (allowing trial courts substantial latitude to employ the best interests of the child standard in modifying custody decrees).
\textsuperscript{77} See, for example, \textit{Pierce v Society of the Sisters}, 268 US 510, 534-35 (1925) (holding that the Fourteenth Amendment guarantees to a parent the right to direct the education of her child).
\textsuperscript{78} Consider \textit{Gardini}, 575 NE2d at 427; \textit{Care and Protection of Charles et al}, 504
using educational quality as a factor in the best interests calculus,\textsuperscript{79} or under an affirmative showing standard, which requires demonstration of harm.\textsuperscript{80} The school's failure under NCLB could act either as justification for a reweighing of the child's interests or as an easily quantifiable showing of harm.\textsuperscript{81}

The possibility of relitigation arising from this fourth scenario shows that, given certain factual circumstances, the non-custodial parent could seek a modification of custody under the best interests standard, regardless of whether the custodial parent transfers her child. This possible claim may provide non-custodial parents with the incentive to pursue a mistaken, and potentially harmful, custody modification; but it may also create a dilemma for custodial parents who wish to provide their children with a quality education but who also want to avoid destabilizing litigation.\textsuperscript{82}

B. No Child Left Behind Impacts Divorced Parents and Their Children in a Disproportionate, Biased, and Wasteful Manner

The foregoing analysis demonstrates that NCLB's public school choice provisions have a strong impact on divorced parents and their children. Regardless of whether the custodial parent transfers the child, or whether the court employs a best interests or substantial change in circumstances standard, the

\textsuperscript{79} See, for example, \textit{Cassano}, 612 NYS2d at 162 (stating that any real differences in educational quality among a child's school options should factor into the determination of custody).

\textsuperscript{80} See, for example, \textit{Von Tersch v Von Tersch}, 455 NW2d 130, 136 (Neb 1990) (requiring an affirmative showing of harm to trump the custodial parent's control of the child's education).

\textsuperscript{81} See Part II A 2 (noting the relevance of educational quality to custody decrees and discussing the possible ways a failing classification under NCLB might affect decree modification).

\textsuperscript{82} One might argue that this dilemma may exist even in the absence of NCLB classifications and school quality data, simply on the basis that the school is failing and that the custodial parent should have a duty to her child's education. But in a public school system based around neighborhood schools, one imagines that transferring a child from school to school to escape "failure" is not frequently allowed, at the risk of having a constantly shifting public school population. Furthermore, it would be absurd to require a custodial parent to take the more extreme option, constantly moving her residence to gain the benefits of a quality neighborhood school. Thus, the NCLB transfer provisions and quality data allow this decisionmaking dilemma to exist, by creating the necessary factual circumstances, namely easy school transfer combined with obvious statistical labels relevant to determining whether transfer is warranted.
noncustodial parent likely can relitigate the custody decree when the state classifies the child's school as failing. This incentive for relitigation can threaten family stability, a goal that most courts consider desirable in serving the best interests of most children. Moreover, two factors exacerbate the destabilizing effects of relitigation. First, the mere classification of a school carries with it the possibility of litigation, irrespective of the custodial parent's actions. Second, under NCLB, the classification of failing schools is cyclical. Because states continually analyze annual school data to determine which schools are "failing" under NCLB—certain populations of students may attend multiple schools receiving "failing" classifications. In other words, a child might transfer from a failing school only to have her new school fail a year or two later, beginning the cycle again. If the mere classification of a school as failing constitutes a valid basis for a custody modification claim, this cyclical re-classification system will cause certain families to face the possibility of constantly reopened avenues of litigation. Moreover, if the emotional impact of litigation is itself significant, then cyclical recurrence of litigation may harm children and families significantly due to the prolonged conflict and continual indeterminacy of the custody arrangement and the constant repetition of the litigation process.

Yet, the destabilizing effects of cyclical litigation may be overstated, for two reasons. First, the set of factual circumstances that might lead to such cyclicality is rather limited. Furthermore, the obviously destabilizing effects of cyclical litigation, in combination with family courts' systematic disfavoring of modifying custody decrees, will likely discourage courts from any such repeated modification.

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83 See, for example, ZBP, 109 SW3d at 778 (using "the stability of the home or proposed placement" as determinative in reviewing a custody modification order).
84 See Part II A.
85 See 20 USC § 6316(b)(1)(A)-(B) (stating that any school that fails to make adequate yearly progress for any two consecutive years after the passage of the law will be identified for school improvement, and requiring annual analysis of progress).
86 See id (requiring local educational agencies to monitor annually the progress of schools); Illinois State Board of Education, No Child Left Behind: Timeline, available online at <http://www.isbe.state.il.us/nclb/htmls/timeline.htm> (visited May 3, 2004) (delineating the state's plan for annual monitoring of school progress).
87 The fact pattern which would lead to continuous relitigation is rather narrow and not particularly probable: School A fails, non-custodial parent gains custody and moves child to School B, which fails, allowing the previous custodial parent to reopen litigation to regain custody and move the child to School C (or back to School A after adequate yearly progress), which then fails, and so on.
88 See note 82.
89 See note 34 and accompanying text.
But the problem is subtler than the mere increased possibility of litigation. Two salient critiques of NCLB as it affects divorced parents and their children exist. First, the NCLB school choice provisions have a disparate impact on both divorced custodial parents generally, and on low-income divorced women specifically. Second, the use of a federalized program of educational standards in determining heavily fact-specific custody cases may produce issues of judicial methodological bias. This bias could arise either through the non-individuation of custody claims, or through institutional capacity concerns regarding courts' ability to balance children's best interests against parental gamesmanship.

The disparate impact of the NCLB school choice provisions is almost certainly inadvertent; indeed, the NCLB provision which requires priority for low-income families has positive implications for distributive justice.\(^9\) The statute impacts divorced parents and low-income women, however, by placing them in difficult decisionmaking scenarios that non-divorced parents never face. Likewise, though the judicial methodological bias against custodial parents impacted by NCLB may be incidental, it may nonetheless have a tangible effect, and is certainly remediable. Finally, though judicial capacity questions of increased litigation or improper non-individuated balancing of interests are largely untested quantitatively, their possible impact remains significant.

1. **Disproportionate effect on divorced custodial parents and low-income women.**

NCLB may impact divorced custodial parents disproportionately as compared to non-divorced parents. Congress likely did not intend this disparate impact,\(^91\) but nonetheless, the public school choice provisions of NCLB do not result in a significantly greater chance of litigation for all parents. Rather, the increased chance of litigation affects divorced parents specifically. A custodial parent may have to make a decision between transferring her child to a faraway school, risking loss of custody, opening herself up to litigation, or all three. These problematic options do

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90 See Pub L 107-110, 115 Stat 1425 (2001) (introducing the NCLB as "[a]n Act to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind") (emphasis added); 20 USC § 6316(b)(1)(E)(ii) (giving priority to the lowest-performing, "low-income" children).

91 See id.
not accompany a non-divorced parent's decisionmaking process when faced with the choice of public school transfer. Furthermore, in any given scenario, the no-win aspect of the dilemma may not be immediately obvious, and dangerous incentives may affect parental decisionmaking (for instance, by forcing a parent to choose not to transfer her child to a better school because of the fear of custody relitigation).

Proponents of the NCLB school transfer system might provide justifications for this disparate impact. First, they might claim that often custody relitigation is beneficial, in that changing schools might serve the best interests of the child. This objection is inapposite. The fact that school transfer may benefit a given child does not vitiate the possibly harmful effects flowing from relitigation (or even from mere incentives to relitigate). Furthermore, even if the courts regard a school's failure under the NCLB guidelines as relevant in custody disputes, significant balances of interests still play into a custody determination. Familial stability—which constant cyclical litigation affects—can weigh more heavily in the calculus of a child's interests than does a specific gain in educational quality. NCLB data may be relevant in this balancing of interests, but the problem of disparate impact stems from the fact that only divorced parents are faced with problematic incentives outlined above. Accordingly, even if NCLB data is used in custody modification, at least the aspects which create disparate impact should be remedied or accounted for.

NCLB proponents might also assert that the limited and incidental disparate effect on divorced parents should not raise concern. As a statutory matter, however, disparate impact in the application of the law can be remedied easily—an amendment blocking custody relitigation on the merits of NCLB classifications would vitiate the otherwise thorny problem. If such a blanket remedy would prohibit relevant use of NCLB action, then, even in the absence of congressional action, a judicial standard requiring an affirmative showing of harm might alleviate some of the more recurrent problems. Therefore, even if the problems resulting from NCLB's disparate impact are small or incidental, they can warrant analysis and can be easily remedied.

In a directly related manner, NCLB may also disproportionately affect low-income women. Custody determinations tend to

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92 See ZBP, 109 SW3d at 778-80 (holding that stability resulting from a "traditional family environment" and a reduced commute is determinative in custody modification).
favor mothers.\textsuperscript{93} NCLB targets children from low-income families as the primary candidates for school transfer.\textsuperscript{94} Thus, the decisions that NCLB levies regarding the children of divorced custodial parents will likely impact low-income women disproportionately. This becomes extremely problematic, especially in relation to the fourth scenario, where the custodial parent does not transfer the child and the court uses a best interests of the child standard.\textsuperscript{95} If a poor mother does not transfer her child, she may face litigation, the loss of her child, enforced lengthy school-commute distances,\textsuperscript{96} or a combination of all three.

This effect raises possible Equal Protection issues. A Fourteenth Amendment Equal Protection claim could arise if a state creates a public education system for its citizens but systematically denies to a certain class of citizens equal opportunity to utilize the benefits of that system.\textsuperscript{97} The systemic problems levied against poor mothers—and the concomitant effects on the children involved—do perhaps target a protected class.

Yet these constitutional claims are unlikely to succeed. First, wealth is not a suspect class subject to heightened scrutiny,\textsuperscript{98} and will not stand as the basis for such a claim. Second, though invidious gender-based classifications receive intermediate constitutional scrutiny,\textsuperscript{99} NCLB does not present a facial case of discrimination against women. First, it does not only affect women; just many women. Second, NCLB does not expressly target women at all; there is no statutory link between income, which NCLB does address, and gender, and no mention of divorce in the statute. Thus, NCLB does not facially discriminate against

\textsuperscript{93} See Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S Cal Rev L & Women's Studies 133, 177 (1992) (noting that “judges often tend to favor mothers over fathers for custody,” though qualifying this by arguing that judges favor women who conform to their perceptions of proper mothers).

\textsuperscript{94} 20 USC § 6316(b)(1)(E)(ii).

\textsuperscript{95} See Part II A 4.

\textsuperscript{96} This factor would likely only appear, however, where the trial judge determines that educational quality from an improved school outweighs the detrimental effect from a long commute.

\textsuperscript{97} See McMahon, 33 U of Louisville J of Fam L at 739 (cited in note 37) (citing Plyler v Doe, 457 US 202, 223 (1982)).

\textsuperscript{98} See San Antonio Independent School District v Rodriguez, 411 US 1, 29 (1973) (noting that the Supreme Court has never considered wealth discrimination to be a valid basis for invoking strict scrutiny, and vitiating the use of wealth as a suspect class under Equal Protection analysis).

women, and the statute serves the legislative purpose of improving public education for less fortunate children.\textsuperscript{100}

A constitutional claim based on race would not survive, either. Among American single-mother families, approximately 3.2 million live below the poverty line,\textsuperscript{101} and of those families, almost 1.3 million are African American.\textsuperscript{102} Though all of these families do not involve divorce, the racial balance might create a basis for a possible race-based constitutional claim. Upon closer look, however, such a claim similarly fails. The statute does not facially discriminate on the basis of race; in fact, it makes no mention of race in the provisions that specify which students receive priority in the school transfer system.\textsuperscript{103} The Supreme Court has struck down statutes where other factors serve as obvious proxies for race, even when conveying a purported benefit,\textsuperscript{104} but here the benefit is not pretextual, the intent is educational benefit,\textsuperscript{105} and the interaction with divorce law was almost certainly unforeseen.

Finally, parents bringing such an equal protection claim against NCLB might lack standing. To have standing, low-income divorced women would have to show that they have suffered a concrete injury.\textsuperscript{106} The increased probability of cyclical litigation may not constitute an injury in itself. Furthermore, proving a causal link between any claimed injury and the government's actions may prove difficult. Constitutional claims therefore likely fail both on substantive and procedural grounds.

\textsuperscript{100}See id at 246 (explaining that a "legitimate" legislative purpose cuts against requiring an act to satisfy a demanding level of scrutiny).


\textsuperscript{103}See 20 USC § 6316(b)(1)(E)(ii) (giving priority only to "the lowest achieving children from low-income families").

\textsuperscript{104}Consider \textit{Yick Wo v Hopkins}, 118 US 356 (1886) (reversing a conviction of a Chinese national under a statute that, though facially neutral, was applied in a manner oppressive of Chinese nationals).

\textsuperscript{105}See 20 USC § 6301.

\textsuperscript{106}See \textit{Warth v Seldin}, 422 US 490, 508-09 (1975) (holding that citizens do not have standing as a group of low- and moderate-income individuals, because their injury is not sufficiently particular and causally related to the governmental action).
The overall disparate impact, however, warrants at the very least legislative and judicial attention, despite the lack of constitutional injury. A custody modification hearing involving a low-income mother necessarily forces a court to undergo a complex balancing of interests that requires careful study of current levels of familial stability and review of available educational choices.\(^{107}\) This complexity, and the use of judicial resources that it requires, militates against ignoring the impact of NCLB on low-income single mothers, despite the fact that these effects are incidental to the primary purpose of NCLB.\(^{108}\) In fact, because a custody rehearing may serve the best interests of the child and the balancing of interests may present detailed and fact-specific questions, either a legislative remedy or a preemptive judicial standard is necessary to ensure that custody modifications based on NCLB school classification are truly appropriate. Such an approach would take into account the disparate impact of NCLB on divorced parents while addressing the second problem outlined below—judicial methodological bias.

2. Methodological bias.

Bias may occur in using statistical measures and test scores to determine not just school efficacy, but also the custodial placement of individual children. Because NCLB impacts custody modification laws by effectively forcing a litigable situation, the statute provides the basis for litigation on statistical measures that were not designed for the purpose of assisting in child custody modifications. Thus, using NCLB findings may lead courts to decide the custody of children according to a measure not designed for that purpose. This unintended use of NCLB findings could result in both a poorly-fit remedy and governmental overreaching.

Two problems could arise from the impact of NCLB school classifications on custody relitigation. First, the existence of easily quantifiable data may encourage over-reliance by the judiciary on NCLB school classifications in determining a child's best interests.\(^{109}\) One might argue that such reliance is both justified

\(^{107}\) See ZBP, 109 SW3d at 778-80 (holding family stability as determinative in custody dispute); Peterson, 474 NW2d at 868-69 (analyzing whether a mother's enrollment of her child in unaccredited school represented an affirmative harm to the child).

\(^{108}\) See Part II B 1 (introducing a scenario that challenges the position that incidental effects of the NCLB are of no concern).

\(^{109}\) See Frantz, 99 Mich L Rev at 230 (2000) (cited in note 72) (arguing that trial courts may overvalue easily quantifiable factors such as parental wealth because of their
and efficient because it allows judges to more easily weigh educational quality in the best interests calculus. Even if this position has some merit, it demonstrates the second problem resulting from the use of NCLB data in custody modifications: a possible lack of individualized judicial analysis. Efficiency may advance judicial goals, but the use of minimally relevant data as a proxy for a child’s best interests does not. Judges must avoid the temptation to give disproportionate weight to NCLB classifications when analyzing educational quality, despite their easily calculable nature under NCLB.

Another methodological critique of NCLB’s impact on divorced parents stems from concerns regarding the institutional capacity of family courts. Because the NCLB school choice provisions effectively force a litigable situation, courts may have to devote more resources to custody modification hearings. Moreover, because the test scores and statistical methods of NCLB are not designed for use in the analysis necessary in custody determinations, they provide little guidance for courts attempting to rely on them in custody decisions. Thus, NCLB can drain the resources of family courts, resulting in less accurate decisions in NCLB cases, as well as in all other cases before the courts.

Whether the family courts will suffer under the burdens of potentially increased levels of custody relitigation is unclear, because the NCLB school transfer provisions have only recently taken effect. Any predictions about capacity issues are just that—predictions. The critique of judicial capacity will be much more effective, for instance, in an ex post analysis of divorce court caseload data over the next five years. Furthermore, it stands to reason that judges regularly deal with these sorts of balancing acts when new laws change the amount or character of cases on their docket. Therefore, it is unclear whether NCLB will generate a significant burden.

Judicial capacity concerns not relating to caseload, however, are also worth monitoring. First, one significant concern stems from the ability of judges to analyze and weigh complex educational data. Thus, NCLB classifications may provide incentives for the judiciary to over-rely on more easily quantifiable data, and may also encourage more expert testimony and analysis,
thus lengthening custody modification hearings and taxing judicial capacity in the aggregate.\textsuperscript{112}

Second, a more subtle capacity concern arises out of possible gamesmanship by noncustodial parents. The worries of cyclical litigation expressed above\textsuperscript{113} will become a reality if noncustodial parents can use NCLB school classifications as a basis for relitigating custody. This theory of increased litigation, however, can only be borne out over time and across various jurisdictions, after collecting the empirical data necessary to evaluate these claims.

Still, the issues of disparate impact and bias remain relevant and imminent. The most obvious objection to the claims of disproportionality lies in the fact that within the custody modification context NCLB will probably negatively affect only a small percentage of the population (though that assertion could strengthen the constitutional critique by further crystallizing the definition of the affected class). Regardless, the combined effects do not alleviate the impending possibility of custody relitigation flowing from NCLB school transfers, and the lack of guidance available to judges concerning equitable incorporation of the NCLB school transfer provisions into custody modification proceedings will have forthcoming effects on that relitigation.

Even if courts should pay attention to the harms that might result from the disparate impact of NCLB on divorced parents, one might argue that within the population of citizens most affected—low-income families—concerns of constant litigation are implausible and may be precluded largely due to expense. There is little downside to developing a preventative solution in advance, however. Furthermore, the concerns about cyclical relitigation and problematic decisionmaking incentives may nonetheless affect some number of divorced parents, even if those parents are not low-income. This could occur for two reasons. First, even if a child is low-income for the purpose of NCLB, the noncustodial parent may have the resources and incentives to relitigate custody. Second, and less narrowly, even if both parents are low-income, the problematic incentives created by NCLB, outlined above, may motivate custodial parents to make counterpro-

\textsuperscript{112} See Edward V. DiLello, \textit{Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level}, 93 Colum L Rev 473, 477-78 and n 32-35 (1993) (noting that "expert testimony causes delay in a number of different contexts," and using child custody battles as a particularly "compelling example of delay and expense" caused by using experts that lengthen trials needlessly).

\textsuperscript{113} See Part II B (arguing that the constant reclassification of schools under NCLB may result in cyclical patterns of relitigation).
uctive educational decisions, or motivate noncustodial parents to mistakenly relitigate.

III. POSSIBLE LEGISLATIVE AND JUDICIAL REMEDIES

As suggested earlier, three clear remedies might alleviate the problems of disparate impact, bias, and waste flowing from the intersection of NCLB and modern divorce law. First, through a full statutory remedy, Congress could completely repeal the NCLB school transfer provisions. This is worth mentioning only briefly in the abstract, since eliminating the statute would quite simply eliminate the problems flowing from it. Second, Congress could implement a partial statutory remedy, amending the school transfer provisions to directly address custody issues. Such an amendment could take many forms and would likely create complex implementation issues, but might result in substantial national uniformity of outcome. Finally, courts could pursue a judicial solution—a judge-made standard or standards for dealing with custody modifications that turn on NCLB school transfers.

A. Partial Statutory Remedies

One possible solution for the problems raised above would stem from a partial amendment of the NCLB statute. Such an amendment could have varying degrees of stringency; it could either specify the role of NCLB school classifications in determining custody decrees, mandating their use as a factor in a best interests calculus, or it could create a broad prohibition on using NCLB data as a dispositive or even relevant basis for modifying custody decrees.

1. Specific factor-based use of NCLB data.

Under a legislative amendment that mandated the use of NCLB data as a factor in custody determinations, one substantial benefit would emerge: custody litigation based on that data would assume a higher degree of national uniformity, simplifying such custody disputes to a certain extent. This uniformity would help eliminate some problematic incentives weighing on judicial capacity, but would crystallize the incentives for noncustodial parents to bring suit on the basis of their child's NCLB school classification.

Three significant obstacles, though, would still exist. First, because individual states create their own divorce law, such an
amendment would raise significant problems of federalism. A federal statutory amendment specifying the use of state data in state litigation would amount to a federal determination of a state cause of action, which may be a logical impossibility. Second, a legislative amendment specifically permitting the use of NCLB data in custody modifications would not eliminate all of the problems of methodological bias raised above. Though it would at least tailor the use of NCLB information, it would still encourage judicial habits of non-individualized analysis. Third, a limited amendment of this sort would not curb problems of cyclical litigation. Instead, it would facilitate the noncustodial parents' claims for custody by specifying the proper use of NCLB school classifications. The amendment could prevent this effect by limiting the number of possible claims a noncustodial parent could raise in relying on NCLB, but such a quantified limit would present awkward conflicts between judicial capacity concerns and children's rights to have their best interests determined.\textsuperscript{114}

2. \textit{Prohibition of the use of NCLB data.}

The second possible limited legislative amendment would create a broad prohibition on the use of NCLB school classifications or school quality data in litigating custody modifications. This remedy would have a number of positive effects: it would eliminate the risk of cyclical litigation, it would fully alleviate the judicial capacity problems created by increased custody re-litigation, and it would obviate any possible claims of disparate impact. Such an amendment, however, would be dramatically overinclusive and might infringe on parents' and children's rights. A blanket prohibition on the use of NCLB classifications in custody litigation quite possibly might bar a significant number of valid custody claims; for instance, in some cases, a child's school may be bad enough that the child should be transferred against the custodial parent's wishes, thus requiring a change in custody. By blocking claims, such a statutory remedy would preclude any analysis of the child's best interests, significantly limiting potential litigants' rights. A statutory remedy of this sort could be structured so as not to block valid best interests claims that would have existed even without the NCLB label—that is,

\textsuperscript{114} Note, though, that the UMDA, § 409, 9A ULA 439 (1998 & Supp 1999), does have a ban on modification within two years of the initial custody decree.
where the child attends a school which is objectively and independently bad. In fact, a statute could even be structured as a presumption against relitigation, rather than a blanket prohibition on claims. But even so, a statutory approach would embody the most significant drawback inherent to all legislative remedies, namely the slow response time of the political process, as contrasted with the case-by-case flexibility of the judiciary. A statutory amendment would create uniformity more quickly upon actual passage of the law, but courts could implement a judicial remedy immediately, without deliberation.

B. Judicial Remedy

The courts can implement the most responsive and balanced solution to the problems of disparate impact, bias, and waste. Because the current family law regime already incorporates substantial balancing tests—in determining changes in circumstances or best interests—courts should adopt a more limiting standard, such as a specific presumption, rather than merely folding NCLB into the balance of interests without forethought. Accordingly, courts could require that in custody modification cases flowing from the NCLB school transfer provisions, the noncustodial parent must make an affirmative showing of harm, beyond the harm resulting from the mere classification of the child’s school as “failing.” This standard would encourage a more comprehensive balancing of the child’s interests, and would eliminate the incentives both for judges to over rely on numerical proxies and for noncustodial parents to relitigate custody frivolously.

Requiring an affirmative showing of harm would lessen the power of NCLB school classifications to force litigation, by disallowing litigation based on the proposition that a child per se suffers harm if his school is classified as failing. An affirmative showing standard discourages litigation by raising the threshold bar for a valid claim. This raised bar may alleviate much of the disproportionate effect on divorced parents and low-income mothers, although this is a speculative empirical claim. In addition, it could reduce methodological bias by actually requiring judges to balance the child’s other interests against the school’s educational quality rather than relying on a proxy.

To ensure the effectiveness of an affirmative showing standard, courts also could adopt a rebuttable presumption against
redundant litigation. Once a parent had litigated a custody decree because of a NCLB school classification, courts could adopt a strong presumption against relitigation of the same custody decree on the same grounds. This would provide security and stability for children while eliminating the incentives for cyclical litigation in all but the most egregious of cases—where educational quality remains so poor that it clearly trumps other concerns, and thus rebuts the presumption.

The application of an affirmative showing standard in conjunction with a rebuttable presumption against redundant relitigation would also alleviate concerns about judicial capacity. Courts arguably incorporate an informal standard similar to this when they systematically disfavor custody modification, but formalizing the standard would guarantee an explicit elimination of incentives to over-rely on NCLB school data in analyzing custody determinations.

CONCLUSION

The implementation of NCLB’s school choice provisions may have significant and unexpected consequences for low-income families affected by divorce. The incentives created by the interaction of NCLB and the common law custody modification standards engender substantial concerns about disparate impact and methodological bias for divorced parents and their children. The best solution to these problems lies in a judicial standard that requires an affirmative showing of harm before a court will modify a custody decree on the basis of NCLB school quality classifications. Likewise, the addition of a rebuttable presumption against redundant litigation addresses concerns of cyclical relitigation and gamesmanship on the part of noncustodial parents. Thus, a reasonably simple solution can remedy a fairly complex problem. This solution would minimize problematic incentives and difficult parental judgment calls while allowing courts to continue to protect the best interests of children.

115 See n 34 and accompanying text.
116 Id.
117 The critiques relating to discrimination and bias against divorced parents (excluding federalism concerns) are relevant in any school choice program. Even if a given school does not receive a failing classification, litigation could proceed on the grounds that the best interests of the child could be recalculated using the easily quantifiable and comparable school data used in determining whether each school is failing—that is, merely whether one school “scored” better than another. These universal problems, however, generally are resolved by applying an affirmative showing of harm standard.