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### Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act To Fulfill *Brown's* Promise

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#### INTRODUCTION

The adoption of the No Child Left Behind Act of 2001 (NCLB)<sup>1</sup> was billed as a watershed moment in education policy.<sup>2</sup> Yet, NCLB did not mark the federal government's first major foray into education policy; in fact, it was just the most recent incarnation of the Elementary and Secondary Education Act of 1965 (ESEA).<sup>3</sup> Enacted at the height of the civil rights movement and as part of America's "War on Poverty," the ESEA is a federal civil rights statute at its core, designed to level the playing field and expand educational opportunity for poor children and children of color.<sup>4</sup>

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1. Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301-7941 (2006)).
2. U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 9 (2002), available at <http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf>; Press Release, U.S. Dep't of Educ., Statement by Spellings Following the Congressional Black Caucus Education Summit (July 23, 2007), available at <http://www.ed.gov/news/pressreleases/2007/07/07232007a.html>.
3. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).
4. See WASH. RESEARCH PROJECT and NAACP LEGAL DEFENSE & EDUC. FUND, INC., TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? 29 (1969), available at <http://www.eric.ed.gov/PDFS/ED036600.pdf> (noting that "[w]here school officials fail to use [Elementary and Secondary Education Act of 1965 (ESEA)] Title I for the special educational needs of poor children, they are not only violating Title I, they also discriminate against these children, whether they be black, brown or

While it was ostensibly designed to continue the ESEA's legacy of advancing equitable educational opportunities,<sup>5</sup> NCLB has been treated in its implementation more as a vehicle for a particular approach to "education reform" than as a means to further civil rights principles such as inclusion and equal opportunity.<sup>6</sup>

Across the political and ideological spectrum, experts agree that NCLB must be revised in order to remain viable, but these experts differ on precisely which direction to take.<sup>7</sup> Spurred in part by corporate-driven reform proposals<sup>8</sup> and a particularly conservative moment in history, some have called for the reauthorization to reduce the federal government's footprint in education policy.<sup>9</sup>

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white"); Gail L. Sunderman & Gary Orfield, *Massive Responsibilities and Limited Resources: The State Response to NCLB*, in HOLDING NCLB ACCOUNTABLE: ACHIEVING ACCOUNTABILITY, EQUITY, & SCHOOL REFORM 124 (Gail L. Sunderman ed., 2008) (connecting the ESEA to the civil rights movement's focus on achieving equity through education for poor and minority students).

5. The Act states that part of its purpose is "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." 20 U.S.C. § 6301(3).
6. See DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 21 (2010) (arguing that, under NCLB, "school reform was characterized as accountability, high-stakes-testing, data-driven decision making, choice, charter schools, privatization, deregulation, merit pay, and competition among schools").
7. Compare RICHARD D. KAHLENBERG, *FIXING NO CHILD LEFT BEHIND* (2008), available at [http://tcf.org/media-center/pdfs/pr141/agenda\\_rk.pdf](http://tcf.org/media-center/pdfs/pr141/agenda_rk.pdf) (demanding increased funding for NCLB mandates), with Edward M. Kennedy, *How To Fix "No Child"*, WASH. POST, Jan. 7, 2008, at A17 (lamenting NCLB's "one-size-fits-all" approach to accountability and lack of resources); see also Regina R. James, *How To Mend a Broken Act: How To Capture Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683, 691 (2009) (arguing that NCLB has narrowed curricula and fueled the drop-out crisis).
8. Education historian Diane Ravitch describes corporate education reformers as those who draw "false analogies between education and business" and who "think they can fix education by applying the principles of business, organization, management, law, and marketing and by developing a good data-collection system that provides the information necessary to incentivize . . . principals [and] teachers . . . with appropriate rewards and sanctions." RAVITCH, *supra* note 6, at 11.
9. See, e.g., Gail L. Sunderman, *The Federal Role in Education: From the Reagan to the Obama Administration*, 24 VOICES URBAN EDUC. 8, available at [http://www.annenberginstitute.org/VUE/wpcontent/pdf/VUE24\\_Sunderman.pdf](http://www.annenberginstitute.org/VUE/wpcontent/pdf/VUE24_Sunderman.pdf); George F. Will, *The GOP Sends in a Marine for Education Reform*, WASH. POST, Apr. 20, 2011, at A17 (noting that many freshman members of the 112th Congress campaigned on platforms that called for abolishing the U.S. Department of Education); Lindsey M. Burke, *Reducing the Federal Footprint on Education and*

This Essay makes the case that policy makers grappling with the pending reauthorization of NCLB should return to the ESEA's core civil rights principles and offers proposals that could help convert NCLB from an unfocused measure for "education reform" into a key vehicle to advance civil rights and fulfill the promise of equal educational opportunity first heralded in *Brown v. Board of Education*.<sup>10</sup>

#### I. THE FEDERAL LEGISLATIVE ROLE IN PUBLIC EDUCATION—THE BIRTH OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

A decade after the U.S. Supreme Court's landmark decision in *Brown*, and at the height of the civil rights movement, the federal government began to take decisive steps to act on the Court's mandate to end de jure segregation and also to address the vestiges of America's racial caste system. Through a series of legislative enactments, Congress and the executive branch carved out a new role for the federal government in protecting the civil rights of its citizens. Statutes such as the Civil Rights Act of 1964,<sup>11</sup> the Voting Rights Act of 1965,<sup>12</sup> the Fair Housing Act (Title VIII of the Civil Rights Act of 1968),<sup>13</sup> Title IX of the Education Amendments of 1972,<sup>14</sup> and Section 504 of the Rehabilitation Act of 1973<sup>15</sup> represent unprecedented efforts to prohibit discrimination based on race, sex, and disability. In the process, these enactments marked a sea change in Americans' relationships to the government and to each other. It was in the midst of this paradigmatic shift in domestic policy that Congress enacted the ESEA.

In 1964, President Lyndon B. Johnson created a commission to study education funding and related issues of poverty. Led by future Secretary of Health, Education, and Welfare John Gardner, the Commission offered recommendations to target federal aid to address the educational needs of children living in

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*Empowering State and Local Leaders*, BACKGROUND (Heritage Found., D.C.), June 2, 2011, available at [http://thf\\_media.s3.amazonaws.com/2011/pdf/bg2565.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/bg2565.pdf).

10. 347 U.S. 483 (1954). See generally Robert L. Carter, *Brown's Legacy: Fulfilling the Promise of Equal Education*, 76 J. NEGRO EDUC. 240, 240-49 (2007) (offering an expansive view of *Brown's* mandate and suggesting that the ESEA advanced those ends).
11. Pub. L. No. 88-352, 78 Stat. 241.
12. Pub. L. No. 89-110, 79 Stat. 437 (banning discriminatory practices in voting).
13. Pub. L. No. 90-284, 82 Stat. 73 (prohibiting discrimination in housing-related transactions based on race, ethnicity, national origin, religion, sex, familial status, and disability).
14. Pub. L. No. 92-318, 86 Stat. 235 (prohibiting discrimination on the basis of sex in programs or activities that receive federal assistance).
15. Pub. L. No. 93-112, 87 Stat. 394 (prohibiting discrimination on the basis of disability in programs or activities that receive federal assistance).

poverty.<sup>16</sup> President Johnson adopted the Commission's recommendation and placed it at the heart of the ESEA.<sup>17</sup> The text of the statute indicated that it was designed to address the "special educational needs of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs."<sup>18</sup> When signing the legislation into law, President Johnson shared his hope that the ESEA would "bridge the gap between helplessness and hope for more than 5 million educationally deprived children."<sup>19</sup>

The ESEA expanded the administrative role played by the federal government in public education,<sup>20</sup> launching a comprehensive set of programs to serve concentrated populations of children living in poverty, including the Title I program of federal aid to disadvantaged children to address the educational challenges faced by children in poor urban and rural areas.<sup>21</sup> In its first year, the statute directed approximately one billion dollars to schools nationwide based on the number of students living in poverty within each school district.<sup>22</sup> Yet, ensuring that the law fulfilled its intended purposes has never been an easy task. Even in its infancy, various forces at the state and local level undermined the law's effectiveness.

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16. See John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 1, 3-4 (Geoffrey D. Borman, Samuel L. Stringfield & Robert E. Slavin eds., 2001); Janet Y. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 *REV. RES. EDUC.* 51 (2005).
  17. See Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (1965); Barbara R. Foorman, Sharon J. Kalinowski & Waynel L. Sexton, *Standards-Based Educational Reform Is One Important Step Toward Reducing the Achievement Gap*, in *STANDARDS-BASED REFORM AND THE POVERTY GAP: LESSONS FOR NO CHILD LEFT BEHIND* 18 (Adam Gamoran ed., 2007); Jennings, *supra* note 16, at 3.
  18. Pub. L. No. 89-10, § 201, 79 Stat. at 27.
  19. President Lyndon Johnson, Remarks in Johnson City, Texas, Upon Signing the Elementary and Secondary Education Bill (Apr. 11, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650411.asp>.
  20. See Elizabeth DeBray-Pelot & Patrick McGuinn, *The New Politics of Education: Analyzing the Federal Education Policy Landscape in the Post-NCLB Era*, 23 *EDUC. POL'Y* 15 (2009); Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, 52 *HARV. EDUC. REV.* 384 (1982).
  21. See Thomas & Brady, *supra* note 16, at 52; see also Carl F. Kaestle, *Equal Educational Opportunity and the Federal Government: A Response to Goodwin Liu*, 116 *YALE L.J. POCKET PART* 152 (2006), <http://www.yalelawjournal.org/images/pdfs/78.pdf> (placing Title I in context with broader federal initiatives for equal opportunity).
  22. See Thomas & Brady, *supra* note 16, at 52. In that same year, the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, authorized assistance for postsecondary education, including financial aid programs for needy college students.

In 1969, the NAACP Legal Defense and Educational Fund, Inc. (LDF) and the Washington Research Project (the predecessor of the Children's Defense Fund) published a report that was critical of early efforts to implement the ESEA.<sup>23</sup> Among the report's key findings were numerous instances of abuse and mismanagement in the distribution and oversight of ESEA Title I funds.<sup>24</sup> In response to these and other such critiques, Congress amended the ESEA in an effort to achieve the bill's original purpose of helping poor children. For example, Congress added the "comparability" and "supplement not supplant" requirements as a way to ensure that federal ESEA funds are not used in place of funds that should otherwise be provided at the state and local levels.<sup>25</sup> Through subsequent reauthorizations of the ESEA, the federal government continued its efforts to realize the promise of *Brown* and the law's original intent.<sup>26</sup>

## II. THE ADVENT, UNFULFILLED PROMISE, AND CONSEQUENCES OF NCLB

With the adoption of NCLB, the federal government took on an enhanced "watchdog" role. As it had done with civil rights compliance after Title VI of the Civil Rights Act of 1964,<sup>27</sup> the federal government demanded certain outcomes and processes in exchange for funding programs authorized under the law.<sup>28</sup>

NCLB took unprecedented steps to address several longstanding and profound issues of inequity within the nation's public schools. Strict accountability requirements called for each state, school district, and school to ensure that all major subgroup populations made aggressive and consistent progress toward the goal of every student reading and performing math proficiently by 2014.<sup>29</sup>

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23. WASH. RESEARCH PROJECT and NAACP LEGAL DEFENSE & EDUC. FUND, INC., *supra* note 4.

24. *Id.* at 9-15. The report also referenced a failure to meet the needs of educationally deprived children due to poor planning and execution, states' failure to carry out their legal responsibility to administer the program with fidelity to the law and Congress' intent, abdication of managerial oversight by the Office of Education (the Department of Education's predecessor), and an exclusion of poor people and community representatives from program planning and design efforts. *Id.* at 9-15, 29-42. Additionally, the report mentioned the misappropriation of more than fifteen percent of federal Title I funds by state grantees. *Id.* at 19-22; see Jerome T. Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform*, 41 HARV. EDUC. REV. 35 (1971).

25. Jennings, *supra* note 16, at 10.

26. See Goals 2000: Educate America Act, 20 U.S.C. § 5801 (2006); U.S. DEP'T OF EDUC., AMERICA 2000: AN EDUCATION STRATEGY (1991), available at <http://www.eric.ed.gov/PDFS/ED327985.pdf>.

27. 42 U.S.C. §§ 2000d to 2000d-7 (1970).

28. Sunderman & Orfield, *supra* note 4.

29. 34 C.F.R. § 200.15(a) (2008).

Furthermore, the law shined a bright light on “achievement gaps” between white students and students of color and increased accountability for schools’ failures to increase academic achievement of students in various racial and ethnic subgroups.<sup>30</sup>

NCLB’s strongest proponents claimed that the law, like the ESEA before it, was a major step forward in support of civil rights.<sup>31</sup> But the law has been nothing if not controversial—NCLB’s various mechanisms have been criticized as being alternately too far-reaching or woefully insufficient to ensure results.<sup>32</sup> For example, while some praise the law’s accountability provisions designed to close the achievement gap, others criticize what they characterize as unfair punishments for schools that were, in fact, making progress.<sup>33</sup> Still others point to unintended consequences. For example, the law’s focus on test scores as a measure of student achievement, without reference to student growth and other indicia, led many states to lower their standards and narrow their curricula to meet the specific demands of testing regimes—the “teaching to the test” phenomenon.<sup>34</sup>

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30. 20 U.S.C. § 6311(b)(2)(B) (2006) (stating that “[e]ach State plan shall demonstrate . . . what constitutes adequate yearly progress of the State, and of all . . . schools . . . in the State, toward enabling all . . . students to meet the State’s student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State”).
  31. See, e.g., *Department of Education Budget Priorities for Fiscal Year 2005: Hearing Before the H. Comm. on the Budget*, 108th Cong. 4 (2004) (statement of Roderick R. Paige, U.S. Sec’y of Educ.) (arguing that NCLB’s mission of closing achievement gaps furthers the interests of civil rights and social justice).
  32. Compare Burke, *supra* note 9 (contending that NCLB is an example of federal overreaching by imposing mandates on states), with GARY ORFIELD & JIMMY KIM, *INSPIRING VISION, DISAPPOINTING RESULTS: FOUR STUDIES ON IMPLEMENTING THE NO CHILD LEFT BEHIND ACT* (2004), available at <http://www.eric.ed.gov/PDFS/ED489174.pdf> (describing some of NCLB’s provisions as contradictory and some of its remedies as ineffective). Some states that took on NCLB’s new obligations in exchange for receiving federal education funds also decried the law. The State of Connecticut unsuccessfully sued the federal government in 2005, charging that NCLB was an unlawful, unfunded mandate. *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006), *appeal dismissed on other grounds sub nom. Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010).
  33. See, e.g., *COMM’N ON NO CHILD LEFT BEHIND, ASPEN INST., IMPROVING ACHIEVEMENT FOR ALL STUDENTS: IS NCLB ACCOUNTABILITY PRODUCING RESULTS?* 1 (2006), available at <http://www.aspeninstitute.org/sites/default/files/content/docs/commission%20on%20no%20child%20left%20behind/AtlantaReporto60606.pdf>.
  34. See JOHN CRONIN ET AL., *FORDHAM INST., THE ACCOUNTABILITY ILLUSION* (2009), available at [http://www.edexcellencemedia.net/publications/2009/200902\\_accountabilityillusion/2009\\_AccountabilityIllusion\\_WholeReport.pdf](http://www.edexcellencemedia.net/publications/2009/200902_accountabilityillusion/2009_AccountabilityIllusion_WholeReport.pdf); RAVITCH, *supra* note 6, at 149-67 (2010); Lance D. Fusarelli, *The Potential Impact of the No Child Left Behind Act on Equity and Diversity in American Education*, 18 *EDUC.*

In addition, many states sullied any meaningful hopes of compliance by consciously deciding to “back-load” efforts to achieve NCLB’s mandate of one hundred percent proficiency for all students by the year 2014. In other words, their NCLB plans required only small achievement gains in the early years of NCLB implementation, requiring gains on a much steeper trajectory in subsequent years.<sup>35</sup> In this way, the states delayed the inevitable need to demonstrate significant improvement. This approach, adopted in nearly half of all states,<sup>36</sup> has resulted in increasing numbers of schools failing to make Adequate Yearly Progress (AYP) in recent years. This triggers sanctions under NCLB, and, therefore, schools are forced to endure NCLB’s strict accountability measures or seek waivers from NCLB’s accountability provisions.<sup>37</sup>

Education leaders have lamented what they perceive to be NCLB’s “one-size-fits-all” approach to accountability.<sup>38</sup> Requirements designed to encourage improved academic achievement instead caused schools to be punished, labeled as failures, and in many cases closed, due to an inability to

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- POL’Y 71 (2004). The practice of “teaching to the test,” largely identified as a by-product of NCLB, has been roundly criticized as undermining critical thinking skills and meaningful classroom learning. *See, e.g.,* DEBORAH MEIER & GEORGE WOOD, *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* 113 (2004); Jaime O’Neill, *Leaving Creativity Behind: Drilling for Tests Kills Curiosity and Imagination*, S.F. CHRON., Mar. 12, 2006, at E5.
35. *See* NAOMI CHUDOWSKY & VICTOR CHUDOWSKY, *CTR. ON EDUC. POL’Y, MANY STATES HAVE TAKEN “BACKLOADED” APPROACH TO NO CHILD LEFT BEHIND GOAL OF ALL STUDENTS SCORING “PROFICIENT”* (2008), available at [http://www.cepd.org/cfcontent\\_file.cfm?Attachment=Chudowsky2%5FNCLBStatesBackloaded%5F051908%2Epdf](http://www.cepd.org/cfcontent_file.cfm?Attachment=Chudowsky2%5FNCLBStatesBackloaded%5F051908%2Epdf).
36. Twenty-three states took the back-loading approach. *Id.* at 6.
37. *See* Ben Wieder, *States Seek Waivers from No Child Left Behind Law*, STATELINE (Aug. 5, 2011), <http://www.stateline.org/live/printable/story?contentId=592180>. U.S. Secretary of Education Arne Duncan declared that 80% of schools would not make adequate yearly progress in the year 2011 and announced a plan to offer flexibility to states in exchange for a prescribed set of education reforms favored by the Obama administration. *The Budget and Policy Proposals of the U.S. Department of Education: Hearing Before the H. Comm. on Educ. & the Workforce*, 112th Cong. 9 (2011) (statement of Arne Duncan, Sec’y of Educ.); *see* Alyson Klein & Michele McNeil, *Waiver Plan Generates Relief, Fret*, EDUC. WK., Aug. 24, 2011, at 1; U.S. Dep’t of Educ., *ESEA Flexibility*, ED.GOV, <http://www.ed.gov/esea/flexibility> (last visited Dec. 20, 2011). A majority of states intend to apply for waivers of NCLB’s accountability provisions. Michele McNeil, *NCLB-Waiver Hopefuls Notify Education Dept. of Interest in Flexibility*, EDUC. WK., Oct. 19, 2011, at 18.
38. *Confirmation of Arne Duncan: Hearing Before the Comm. on Health, Educ., Labor, & Pensions*, 111th Cong. 32 (2009) (statement of Arne Duncan, CEO, Chi. Pub. Schs.).

increase student test scores.<sup>39</sup> Fear of the dire implications of failure to make AYP has even led teachers and administrators to use unscrupulous tactics, such as conveniently suspending or expelling, just before the testing date, students that threatened to perform poorly on the annual assessments.<sup>40</sup> Some have argued that the number of students pushed out of schools skyrocketed after NCLB was adopted because of the pressure to excel on high-stakes tests.<sup>41</sup> In addition, other teachers resorted to cheating on statewide exams by erasing and replacing incorrect answers submitted by students in order to inflate school performance.<sup>42</sup>

Moreover, NCLB's school choice and Supplemental Educational Services (SES) provisions have been derided as hollow and ineffectual.<sup>43</sup> Typically, students attending schools in need of improvement or required to undergo restructuring have little to no access to better performing schools in the same school district.<sup>44</sup> And few SES providers have been shown to actually improve student performance.<sup>45</sup>

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39. Christine Armario & Terence Chea, *Offered Chance, Few Failing Schools Close Doors*, HUFFINGTON POST (July 14, 2011), [http://www.huffingtonpost.com/2011/07/14/failing-and-lowperforming\\_n\\_898124.html](http://www.huffingtonpost.com/2011/07/14/failing-and-lowperforming_n_898124.html).
40. Davin Rosborough, Note, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework To Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663, 671 (2010).
41. See, e.g., *id.* at 670-72. Although it may not be possible to conclusively identify a causal relationship between NCLB and low graduation rates and high school discipline rates, it is clear that the law has not significantly improved the situation for these indicators, or for student test scores. See RAVITCH, *supra* note 6, at 109-10 (contending that scores on the National Assessment of Educational Progress have been modest at best and that achievement gaps actually narrowed more before the law's implementation than after).
42. Several cheating scandals have made the headlines recently, providing at least indirect evidence of the intense pressure on educators to improve test scores. See, e.g., Greg Toppo et al., *When Test Scores Seem Too Good To Believe*, USA TODAY, Mar. 17, 2011, at 1A; Heather Vogell, *Fulton, DeKalb, Douglas DAs Will Determine Whether To Prosecute*, ATLANTA J.-CONST., July 6, 2011, at 1A (describing extensive cheating in Atlanta public schools); Peggy Walsh-Sarnecki, *When Test Scores Don't Add Up*, DETROIT FREE PRESS, Mar. 6, 2011, at A1.
43. For a thorough explanation of Supplemental Educational Services and its shortcomings, see David Noah, *Putting the Research Back into "Research-Based": Revising the No Child Left Behind Act's Supplemental Educational Services Provision*, 15 VA. J. SOC. POL'Y & L. 190 (2007).
44. *Id.* at 191 n.8.
45. Carolyn J. Heinrich, Robert H. Meyer & Greg Whitten, *Supplemental Education Services Under No Child Left Behind: Who Signs Up, and What Do They Gain?*, 32 EDUC. EVALUATION & POL'Y ANALYSIS 273 (2010).



These effects caused NCLB to be ridiculed and reviled by many teachers, civil rights advocates, elected officials, parents, and the media.<sup>46</sup> Compounding problems with implementation are the data that illustrate a continuing crisis in public schools.<sup>47</sup> Little improvement in academic achievement or gap-closing came after NCLB. An analysis of post-NCLB student test scores on the National Assessment of Educational Progress, administered to all public school students in the fourth and eighth grades, has shown either slowing improvement or stagnation, compared with the pre-NCLB era.<sup>48</sup> Large, persistent achievement gaps are apparent between and among African-American, Latino, and low-income students and their white, Asian, and wealthier counterparts in reading and mathematics.<sup>49</sup>

Other statistics such as high school graduation rates, college enrollment, and college graduation rates (from two- and four-year institutions) mimic the disparate levels of achievement on standardized tests.<sup>50</sup> For example, an April 2010 analysis by the Alliance for Excellent Education showed that in 20 states

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46. See, e.g., AM. FED'N OF TEACHERS, EIGHT MISCONCEPTIONS ABOUT THE NO CHILD LEFT BEHIND ACT'S (NCLB) ADEQUATE YEARLY PROGRESS (AYP) PROVISIONS, <http://www.aft.org/pdfs/teachers/8misconceptions0704.pdf> (last visited Nov. 15, 2011); Frederick M. Hess, *Accountability Without Angst?: Public Opinion and No Child Left Behind*, 76 HARV. EDUC. REV. 587 (2006); Press Release, Leadership Conference on Civil Rights, Civil Rights Coalition Gives "No Child Left Behind" an "I" for Incomplete (Jan. 8, 2003), available at <http://www.civilrights.org/press/2003/civil-rights-coalition-gives-no-child-left-behind-an-i-for-incomplete.html>.
47. See, e.g., ROBERT BALFANZ & NETTIE LEGTERS, LOCATING THE DROPOUT CRISIS: WHICH HIGH SCHOOLS PRODUCE THE NATION'S DROPOUTS? WHERE ARE THEY LOCATED? WHO ATTENDS THEM?, at v-vi (2004), available at <http://www.csos.jhu.edu/crespar/techReports/Report70.pdf> (showing high dropout rates for poor and minority students and low promotion rates for majority-minority schools); GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), available at [http://www.urban.org/UploadedPDF/410936\\_LosingOurFuture.pdf](http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf).
48. See MONTY NEILL, FAIRTEST, NAEP EXAMS SHOW SLOWING OR STAGNANT RESULTS FOR MOST DEMOGRAPHIC GROUPS, IN READING AND MATH, AT ALL GRADES/AGES, SINCE THE START OF NCLB (2011), available at [http://fairtest.org/sites/default/files/NAEP\\_results\\_main\\_and\\_long\\_term.pdf](http://fairtest.org/sites/default/files/NAEP_results_main_and_long_term.pdf).
49. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: GRADE 12 READING AND MATHEMATICS 2009 NATIONAL AND PILOT STATE RESULTS (2009), available at <http://nces.ed.gov/nationsreportcard/pdf/main2009/2011455.pdf>.
50. See CHRIS CHAPMAN, JENNIFER LAIRD & ANGELINA KEWALRAMANI, U.S. DEP'T OF EDUC., TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 1972-2008 (2010), available at <http://nces.ed.gov/pubs2011/2011012.pdf>; NAT'L CTR. FOR PUB. POL'Y & HIGHER EDUC., MEASURING UP 2008: THE NATIONAL REPORT CARD ON HIGHER EDUCATION (2008), available at <http://measuringup2008.highereducation.org/print/NCPPHEMUNationalRpt.pdf>.

and the District of Columbia at least 10% of high schools were considered “dropout factories”—high schools in which 40% or more of the incoming freshman class failed to graduate with their incoming cohort.<sup>51</sup> In 8 states, more than 20% of high schools are considered dropout factories,<sup>52</sup> and 34% of the nation’s black students and 28% of students of color overall attended dropout factories, compared with 6% of all white students.<sup>53</sup>

These data, coupled with the substantial body of literature that illustrates the poor outcomes of those who do not complete high school or enroll in and graduate from college, have coincided with a sustained loss of faith in public education as an institution.<sup>54</sup> A June 2011 Gallup poll indicated that Americans have a near record-low level of confidence in public schools.<sup>55</sup> The decline in public trust in education from its historical averages casts doubt on NCLB’s effectiveness at improving the public school system.<sup>56</sup>

### III. MOVING FORWARD WHILE REACHING BACK: TOWARD AN NCLB REAUTHORIZATION THAT FULFILLS THE ESEA’S ORIGINAL PURPOSES

The lessons learned from NCLB’s nearly ten-year track record, the urgent need for improving student achievement, and the moral imperative of accelerating the achievement of those worst served by public schools must guide considerations of NCLB’s reauthorization. In many ways, the current law focuses too much on labeling schools based upon test scores, rather than addressing the root causes of poor student achievement and inequitable educational outcomes. Any serious NCLB reauthorization proposal must be measured not by how innovative or iconoclastic the strategy may be, nor by whether it falls into the “traditional” versus so-called “reform” realm.<sup>57</sup> Instead, the reauthorization’s

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51. ALLIANCE FOR EXCELLENT EDUC., PRIORITIZING THE NATION’S LOWEST-PERFORMING HIGH SCHOOLS: THE NEED FOR TARGETED FEDERAL POLICY 7-8 (2010), available at <http://www.all4ed.org/files/PrioritizingLowestPerformingSchools.pdf>.

52. *Id.*

53. *Id.* at 5.

54. See Lymari Morales, *Near Record-Low Confidence in U.S. Public Schools*, GALLUP (July 29, 2011), <http://www.gallup.com/poll/148724/near-record-low-confidence-public-schools.aspx>.

55. *Id.*

56. *Id.*; see also Jeffrey M. Jones, *Americans Most Confident in Military, Least in Congress*, GALLUP (June 23, 2011), <http://www.gallup.com/poll/148163/Americans-Confident-Military-Least-Congress.aspx> (comparing trust in public schools with other institutions).

57. See, e.g., Mike Rose, *Threats to School Reform . . . Are Within School Reform*, ANSWER SHEET, WASH. POST (Oct. 20, 2010, 12:30 PM), <http://voices.washingtonpost.com/answer-sheet/guest-bloggers/threats-to-school-reform-are-w.html> (detailing conflicts within the school reform movement).

main barometer should be whether it takes significant, active steps toward fulfilling the goal of *Brown v. Board of Education*: true equal opportunity in education.<sup>58</sup>

#### A. *The Mechanics of Education Accountability*

The remainder of this Essay focuses primarily on substantive recommendations for NCLB reauthorization. But three thoughts on the mechanics of accountability are worth noting here. First, in order to be maximally effective in its next attempt to realize the ESEA's goal of equitable education options for all children, policy makers must resist calls for a downgraded federal role in public education.<sup>59</sup> Instead, they should articulate a strong but clearer role for the federal government, while also offering more effective pathways for success at the state and local level. To clearly articulate the federal role, policy makers must start by requiring that the revised statute reach all students and hold all schools, public and charter, accountable for their achievement and progress—not just an arbitrary percentage of what some consider the lowest-performing schools. Second, the districts and states in which the schools are situated should also be held accountable as a step toward building a shared sense of obligation, urgency, and accomplishment.

Finally, interventions required under federal law should be both *graduated*, in response to the various levels of need and success among schools, and *differentiated*, in recognition of the different types of needs that schools face. For example, a school that has low graduation rates overall may require a different type of intervention than a school that has reasonably high overall graduation rates, but persistently low rates for its African-American students. Likewise, schools with extreme racial disparities in suspensions and expulsions may require a different type of intervention than schools with low graduation rates for English Language Learners.<sup>60</sup> Each of these problems warrants immediate

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58. See *supra* note 10 and accompanying text.

59. For an example of this type of call, see Press Release, Sen. Marco Rubio, Senator Rubio to Secretary Duncan: Cajoling States To Adopt Obama Education Reforms Unconstitutional (Sept. 14, 2011), available at <http://rubio.senate.gov/public/index.cfm/press-releases?ID=8aab326e-4051-4545-9ae2-76ca29434eb8>.

60. See, e.g., Russell W. Rumberger, *Why Students Drop Out of School*, in *DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS* 131, 131-37 (Gary Orfield ed., 2004); Christopher B. Swanson, *Sketching a Portrait of Public High School Graduation: Who Graduates, Who Doesn't?*, in *DROPOUTS IN AMERICA, supra*, at 13, 27; see also TASK FORCE ON EVIDENCE-BASED INTERVENTIONS IN SCH. PSYCHOLOGY, PROCEDURAL AND CODING MANUAL FOR REVIEW OF EVIDENCE-BASED INTERVENTIONS 10 (2003), available at [http://mail.tellcity.k12.in.us/oldwebsite/elem/resources\\_files/rti/evidencebased%20interventions/EBI%20Manual.pdf](http://mail.tellcity.k12.in.us/oldwebsite/elem/resources_files/rti/evidencebased%20interventions/EBI%20Manual.pdf) (detailing various types of possible interventions). Cf. GARY ORFIELD & CHUNGMEI LEE, *WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* (2005), available at [http://bsdweb.bsdt.org/district/EquityExcellence/Research/Why\\_Segreg](http://bsdweb.bsdt.org/district/EquityExcellence/Research/Why_Segreg)

attention, but perhaps not the same type of remedy. Instead, each of these issues requires a different set of interventions.<sup>61</sup> With this in mind, the reauthorized ESEA must embrace a spectrum of intervention significantly broader than the much-discussed “school turnaround” models advanced in recent years by the U.S. Department of Education, which focus primarily on radical restructuring, closure, or conversion of public schools into charter schools.<sup>62</sup>

The Department of Education should provide support and guidance to states and school districts in their efforts to craft solutions to each school’s unique needs.

## B. Substantive Proposals for NCLB Reauthorization

### 1. Redefining Accountability

Many proposals for NCLB reauthorization replicate a fundamental mistake in the current law—they place an inordinate focus on standardized test scores and insufficient emphasis on other important factors and barriers to learning that help to define student achievement.<sup>63</sup> The revised statute should ensure accountability across a broader range of indicators, with meaningful targets for student, school, and district performance for each indicator.

### 2. Standardized and Comprehensive Graduation Rates

America is in the midst of a continuing graduation rate and dropout crisis, particularly for students of color.<sup>64</sup> But, under NCLB, the states are permitted to calculate their graduation and dropout rates in wildly different ways. For example, some school leaders mask academic failures by marking dropouts with “unknown” status or directly falsifying data.<sup>65</sup> Thus, those who fail to matricu-

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\_Matters.pdf (detailing continued links between racial segregation and educational achievement).

61. See, e.g., Russell W. Rumberger, *What Can Be Done To Reduce Dropouts?*, in *DROPOUTS IN AMERICA*, *supra* note 60, at 243, 243-54 (outlining a variety of different options for reducing dropout rates).

62. David Terry, *What’s Possible: Turning Around America’s Lowest-Achieving Schools*, ED.GOV BLOG (Mar. 5, 2010), <http://www.ed.gov/blog/2010/03/whats-possible-turning-around-americas-lowest-achieving-schools/>.

63. See, e.g., COMM’N ON NO CHILD LEFT BEHIND, ASPEN INST., *BEYOND NCLB: FULFILLING THE PROMISE TO OUR NATION’S CHILDREN* (2007), available at <http://www.aspeninstitute.org/policy-work/no-child-left-behind/reports/beyond-nclb-commission-no-child-left-behind-report> (focusing on test scores as the most important measure of success).

64. See Swanson, *supra* note 60, at 13, 13-40.

65. See Michael Winerip, *The ‘Zero Dropout’ Miracle: Alas! Alack! A Texas Tall Tale*, N.Y. TIMES, Aug. 13, 2003, at B7.

late from ninth and tenth grade do not count against the bottom line. Entire cohorts of students simply do not count under this type of metric.

Congress missed an opportunity in NCLB to provide a uniform method to calculate graduation rates, instead allowing each state to determine what it means to graduate from high school.<sup>66</sup> As a result, NCLB does not do an effective job of holding schools accountable for failing to graduate students, particularly when the failure is concentrated in particular student subgroups. A reauthorized ESEA can address this problem by providing for not only a standard definition and calculation method, but also identification and disaggregation of substandard diplomas (e.g., certificates of attendance or completion and special education diplomas), issued by some states as poor substitutes for standard diplomas.<sup>67</sup>

One possible source for a uniform definition can be found in the Every Student Counts Act, a bill sponsored in the 112th Congress by Senator Tom Harkin of Iowa (chair of the Senate Health, Education, Labor and Pensions Committee) in the Senate and Representative Bobby Scott of Virginia in the U.S. House of Representatives.<sup>68</sup> This bill would account for students who are pushed out or drop out of school, including those who leave through involuntary transfers.<sup>69</sup>

### 3. Eliminating Harsh School Discipline Policy as a Barrier to Learning

Students cannot learn unless they are safe, but they also cannot learn if they are not in the classroom due to a suspension, expulsion, or assignment to an alternative education placement. The steps that many schools have taken in the name of school safety have backfired. Through the adoption of “zero-tolerance” approaches and an overreliance on overly punitive disciplinary policies, officials

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66. U.S. DEP’T OF EDUC., HIGH SCHOOL GRADUATION RATE NON-REGULATORY GUIDANCE (2008), *available at* <http://www.ed.gov/policy/elsec/guid/hsgrguidance.pdf> (providing only suggestions rather than firm requirements for graduation rate calculation); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-879, NO CHILD LEFT BEHIND ACT: EDUCATION COULD DO MORE TO HELP STATES BETTER DEFINE GRADUATION RATES AND IMPROVE KNOWLEDGE ABOUT INTERVENTION STRATEGIES (2005) (detailing consistency problems in graduation rate calculation without stricter federal guidance).

67. *See, e.g.*, FLA. DEP’T OF EDUC., HIGH SCHOOL DIPLOMA OPTIONS FOR STUDENTS WITH DISABILITIES 4 (2010), *available at* [http://www.fldoe.org/ese/pdf/hs\\_options\\_ese.pdf](http://www.fldoe.org/ese/pdf/hs_options_ese.pdf) (“A certificate of completion is not a diploma. It certifies that the student attended high school. . . . After graduation with a certificate of completion . . . students may be required to take the college placement test or a test of basic skills and complete remedial coursework.”).

68. S. 767, 112th Cong. (2011); H.R. 1419, 112th Cong. (2011).

69. S. 767, 112th Cong. § 4 (2011); H.R. 1419, 112th Cong. § 4 (2011).

have not only failed to make our schools safer, but have also pushed students out of school at an alarming rate, often for nonviolent infractions.<sup>70</sup> According to data from the U.S. Department of Education, over three million students are suspended each year and over one hundred thousand are expelled from school.<sup>71</sup> Research has shown that exclusionary discipline policies lead to racial disparities, undermine students' academic achievement, and make it more likely that they will end up behind bars.<sup>72</sup>

NCLB did little to address these problems. Title IV of the current ESEA authorizes grant programs under the Federal Safe and Drug-Free Schools program.<sup>73</sup> But many of these grant funds are used in ways that exacerbate problems—such as paying for metal detectors and security equipment that can make a school feel like a prison.<sup>74</sup> The “persistently dangerous school” provision,

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70. DANIEL J. LOSEN, NAT'L EDUC. POL'Y CTR., DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 8 (2011), available at <http://nepc.colorado.edu/files/NEPC-SchoolDiscipline.pdf> (“Contrary to popular belief, most suspensions are not for guns, drugs or violence. . . . Accordingly, the high rates of disciplinary removal from school currently seen in American schools cannot reasonably be attributed to the necessary responses to unlawful or dangerous misbehavior.”); DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 9, available at [http://www.splcenter.org/sites/default/files/downloads/publication/Suspended\\_Education.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf); Thalia Gonzalez, *Restoring Justice: Community Organizing To Transform School Discipline Policies*, 15 U. CAL. DAVIS J. JUV. L. & POL'Y 1, 9-10 (2011).
71. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2006 CIVIL RIGHTS DATA COLLECTION: PROJECTED VALUES FOR THE NATION, available at <http://ocrdata.ed.gov/downloads/projections/2006/2006-nation-projection.xls>.
72. TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR. and PUB. POL'Y RESEARCH INST. AT TEX. A&M UNIV., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 35-72 (2011), available at [http://justicecenter.csg.org/files/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](http://justicecenter.csg.org/files/Breaking_Schools_Rules_Report_Final.pdf). Suspension rates have at least doubled for all students of color since the early 1970s, with the sharpest increases experienced by African-American students. LOSEN & SKIBA, *supra* note 70, at 2-3. In fact, African-American students are nearly three times as likely to be suspended and three-and-a-half times as likely to be expelled as their white peers. See Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, POVERTY & RACE, Jan.-Feb. 2011, at 5, 5, available at <http://www.prrac.org/newsletters/janfeb2011.pdf>.
73. See Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §§ 7101-7103 (2006).
74. See U.S. DEP'T OF EDUC., SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT STATE GRANTS: GUIDANCE FOR STATE AND LOCAL IMPLEMENTATION OF PROGRAMS DRAFT 5 (2004), available at <http://www.ed.gov/programs/dvpformula/guidance.doc>.

which ostensibly allows students to transfer to safer schools under NCLB's accountability mechanism, amounts to little more than a misleading label.<sup>75</sup>

A revised ESEA can help to refocus school discipline policy in a way that supports academic achievement. For example, some advocates have called for the revised ESEA to replace the current "persistently dangerous school" label with a "safe and supportive schools" metric, which would include indicia of positive school conditions that support learning.<sup>76</sup> Examples might include the reduced use of exclusionary discipline measures (such as suspension, expulsion, assignment to alternative educational placements, and school-based arrest), high pupil and teacher attendance rates, low arrest rates, and survey results from teachers, students, and parents.<sup>77</sup>

Pending legislation that could be incorporated into the revised ESEA also shows promise. The Positive Behavior for Safe and Effective Schools Act would increase federal funding and technical assistance for schools seeking to improve overall "school climate."<sup>78</sup> This bill emphasizes the implementation of school-wide Positive Behavioral Supports, a data-driven approach to improving school discipline that has been linked to greater academic achievement, significantly fewer disciplinary referrals, increased instructional time, and safer learn-

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75. David J. Hoff, *A Flaw in NCLB Is Acknowledged by Spellings*, EDUC. WK., Feb. 27, 2008, at 19, available at <http://www.edweek.org/ew/articles/2008/02/27/25fedfil.h27.html> (noting Secretary Spellings's acknowledgement of problems with the "persistently dangerous" label).
76. See LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., *FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 10-11* (2010), available at [http://naacpldf.org/files/case\\_issue/Framework%20for%20Providing%20All%20Students%20an%20Opportunity%20to%20Learn%202.pdf](http://naacpldf.org/files/case_issue/Framework%20for%20Providing%20All%20Students%20an%20Opportunity%20to%20Learn%202.pdf); see also Letter from Dignity in Schools Campaign to Chairman Tom Harkin and Ranking Member Richard Enzi, U.S. Senate Comm. on Health, Educ., Labor & Pensions (Apr. 22, 2010), available at [http://www.dignityinschools.org/files/DSC\\_Senate\\_ESEA\\_Letter.pdf](http://www.dignityinschools.org/files/DSC_Senate_ESEA_Letter.pdf) (calling for, inter alia, increased support for best practices in improving school discipline and climate as a means to turn around the lowest-achieving schools).
77. For a wide array of possible metrics and relevant factors, see ADVANCEMENT PROJECT, *TEST, PUNISH, AND PUSHOUT: HOW "ZERO-TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE* 37-40 (2010), available at [http://www.advancementproject.org/sites/default/files/publications/rev\\_fin.pdf](http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf); Robert H. Horner et al., *A Randomized, Wait-List Controlled Effectiveness Trial Assessing School-Wide Positive Behavior Support in Elementary Schools*, 11 J. POSITIVE BEHAV. INTERVENTIONS 133 (2009); and see also M. Lynn Sherrod, Brian Huff & Steven Teske, *Childish Behavior; Criminal Behavior*, HUNTSVILLE TIMES, June 1, 2008, at 23A, for a promotion of collaborative solutions for school discipline instead of criminalization.
78. H.R. 3165, 112th Cong. (2011).

ing environments.<sup>79</sup> With respect to Safe and Drug-Free Schools funding, the Successful, Safe, and Healthy Students Act of 2011 would allow schools and school districts to document school climate indicators and receive funding for research-based interventions that have proven effective in improving school climate through school-wide approaches such as Positive Behavioral Supports and restorative practices.<sup>80</sup>

As several examples have shown, school discipline policies that support students, rather than exclude them from the classroom, will lead to improved school climate and better educational outcomes.<sup>81</sup>

#### 4. Closing the “Opportunity Gap”

Achievement gaps do not occur in a vacuum. Resources play an integral role in a school’s ability to improve student achievement. Schools that have fewer resources than others are unable to compete for, retain, or fully develop high-performing or qualified teachers, the most important in-school factor in student achievement.<sup>82</sup> In recognition of the important role that resources play in helping schools achieve their mission of encouraging the academic growth of students, Title I of the current iteration of the ESEA requires that school districts equitably fund all public schools on an intradistrict basis.<sup>83</sup> School districts that are able to demonstrate funding comparability between schools are then eligible to receive federal funds that supplement the educational needs of students that attend schools with concentrations of students living in poverty.<sup>84</sup>

A loophole in this part of the law, however, allows school districts to maintain funding disparities, undermining the intent of the comparability provision.<sup>85</sup> In some of the worst examples of this “comparability loophole,” some

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79. *Id.* For one study on the effectiveness of Positive Behavioral Supports, see YVONNE WASILEWSKI, BETH GIFFORD & KARA BONNEAU, CTR. FOR CHILD & FAMILY POL’Y, DUKE UNIV., EVALUATION OF THE SCHOOL-WIDE POSITIVE BEHAVIORAL SUPPORT PROGRAM IN EIGHT NORTH CAROLINA ELEMENTARY SCHOOLS (2008).

80. S. 919, 112th Cong. (2011).

81. *See, e.g.*, Cregor & Hewitt, *supra* note 72, at 6 (noting efforts in Denver, Los Angeles, and Clayton County, Georgia, to limit school exclusion while improving academic achievement).

82. *See* FRANK ADAMSON & LINDA DARLING-HAMMOND, CTR. FOR AM. PROGRESS, SPEAKING OF SALARIES: WHAT IT WILL TAKE TO GET QUALIFIED, EFFECTIVE TEACHERS IN ALL COMMUNITIES 4-5, 13-24 (2011) (showing the substantial costs associated with attracting high-quality teachers to high-poverty districts), *available at* [http://www.americanprogress.org/issues/2011/05/pdf/teacher\\_salary.pdf](http://www.americanprogress.org/issues/2011/05/pdf/teacher_salary.pdf).

83. *See* No Child Left Behind Act of 2001 sec. 101, § 1120A(c)(1)(A), 20 U.S.C. § 6321(c)(1)(A) (2006).

84. No Child Left Behind Act of 2001 § 1120A(c)(1)(B).

85. Marguerite Roza, *What If We Closed the Title I Comparability Loophole?*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION 59, 68 (Ctr. for Am. Progress



high-poverty schools actually received *less* funding from state and local sources than low-poverty schools in the same district—exactly what is *not* permitted by current law.<sup>86</sup> These disparities are often hidden because districts are required to report only *average* salaries paid to personnel in the school district, regardless of how those salaries differ between schools.<sup>87</sup> Resource inequities are not the result of selfish school leaders or conniving school district administrators. Rather, the disparities result from systems that permit veteran teachers, who command higher salaries, to move to low-poverty schools, leaving novice teachers, who earn significantly less, to predominate in high-poverty schools. At the district level, these patterns add up to differences of hundreds of thousands of dollars.<sup>88</sup>

Predictably, schools that have fewer resources are hobbled in their attempts to help children learn.<sup>89</sup> Without the ability to attract, retain, or fully develop the best teachers, they are forced to rely on large numbers of young and well-intentioned, but underprepared and undersupported educators, to teach critical subjects such as mathematics.<sup>90</sup> Although a strong argument can be made for the benefits of hiring young educators who are passionate about working with underserved populations, research indicates that the turnover in this population of educators is extremely high.<sup>91</sup> Data suggest that teachers

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ed., 2008), *available at* <http://www.americanprogress.org/issues/2008/06/pdf/comparability.pdf>.

86. See, e.g., U.S. DEP'T OF EDUC., *COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOLS WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES 3* (2011), *available at* <http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf>; Matt Hill, *Funding Schools Equitably: Results-Based Budgeting in the Oakland Unified School District*, in *ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION*, *supra* note 85, at 79, 86-87.
87. Roza, *supra* note 85, at 69-70.
88. See SABA BIREDA, CTR. FOR AM. PROGRESS, *FUNDING EDUCATION EQUITABLY: THE "COMPARABILITY PROVISION" AND THE MOVE TO FAIR AND TRANSPARENT SCHOOL BUDGETING SYSTEMS* (2011), *available at* [http://www.americanprogress.org/issues/2011/03/pdf/school\\_budget.pdf](http://www.americanprogress.org/issues/2011/03/pdf/school_budget.pdf); DARIA HALL & NATASHA USHOMIRSKY, EDUC. TRUST, *CLOSE THE HIDDEN FUNDING GAPS IN OUR SCHOOLS* (2010), *available at* [http://www.edtrust.org/sites/edtrust.org/files/publications/files/Hidden%20Funding%20Gaps\\_0.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/Hidden%20Funding%20Gaps_0.pdf).
89. See, e.g., Rob Greenwald, Larry V. Hedges & Richard D. Laine, *The Effect of School Resources on Student Achievement*, 66 REV. OF EDUC. RES. 361 (1996).
90. HEATHER G. PESKE & KATI HAYCOCK, EDUC. TRUST, *TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY* (2006), *available at* <http://www.edtrust.org/sites/edtrust.org/files/publications/files/TQReportJune2006.pdf>.
91. See JULIAN VASQUEZ HEILIG & SU JIN JEZ, GREAT LAKES CTR. FOR EDUC. RES. & PRACTICE, *TEACH FOR AMERICA: A REVIEW OF THE EVIDENCE* (2010), *available at*

improve their craft the fastest during the first few years in the classroom, and become most effective after this initial learning period.<sup>92</sup> Thus, many teachers that leave the classroom after their first or second year have not yet reached their professional potential. This is a disservice to students and the novice educators alike. In addition to the obvious deleterious effect on school culture and student achievement, the constant turnover of teachers in these schools is also costly in terms of teacher recruitment and professional development expenses—some estimates range as high as over \$70,000 per person.<sup>93</sup>

The equitable distribution of teachers and principals must be a key provision of any reauthorized ESEA. This part of the law should call for states to create realistic plans to ensure that students of color, low-income students, English Language Learners, and students with disabilities are not taught by inexperienced, uncertified, or out-of-field teachers at rates greater than other students. This protection, a slight extension of present law,<sup>94</sup> should apply on an inter- and intradistrict basis.

Because effective teachers play an integral role in promoting student achievement, and because schools that have fewer resources are unable to attract or retain these teachers, the ESEA must require school districts to address disparities in resources by closing the comparability loophole. School districts should be required to report the individual salaries of staff members, rather than the present practice of reporting average salaries. Such is the standard

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[http://www.greatlakescenter.org/docs/Policy\\_Briefs/Heilig\\_TeachForAmerica.pdf](http://www.greatlakescenter.org/docs/Policy_Briefs/Heilig_TeachForAmerica.pdf); see also Matthew M. Chingos & Paul E. Peterson, *It's Easier To Pick a Good Teacher than To Train One: Familiar and New Results on the Correlates of Teacher Effectiveness*, 30 *ECON. EDUC. REV.* 449, 451 (2011).

92. See Steven G. Rivkin, Eric A. Hanushek & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 449 (2005); see also Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Teacher-Student Matching and the Assessment of Teacher Effectiveness*, 41 *J. HUM. RESOURCES* 778, 807 (2006) (indicating that the benefit from having a highly experienced teacher is rather small; however, the most significant impact occurs for the first one or two years of teaching); Christopher Jepsen & Steven Rivkin, *What Is the Tradeoff Between Smaller Classes and Teacher Quality?* 9 (Nat'l Bureau of Econ. Research, Working Paper No. 9205, 2002) (noting that “[a]lthough average experience is not closely linked with achievement gains, recent work suggests that first and second year teachers perform markedly worse than more experienced colleagues”).
93. HEILIG & JEZ, *supra* note 91, at 11 (estimating costs per capita for Teach For America recruits).
94. Under the current Title I requirement, students with disabilities or those learning English are not specified in the provision that prohibits disproportionate instruction for low-income and minority students from inexperienced, uncertified, or out-of-field teachers. See No Child Left Behind Act of 2001 sec. 101, § 1112 (c)(1)(L), 20 U.S.C. § 6312(c)(1)(L) (2006).

for funds distributed through the American Recovery and Reinvestment Act;<sup>95</sup> no less should be demanded in exchange for the receipt of federal education funds through the ESEA.

In addition to actual dollars, school resources may also be defined as curricula aligned with college- and career-ready standards, such as college-preparatory courses in middle and high schools; college-credit-eligible classes such as Advanced Placement, International Baccalaureate, and dual enrollment programs; and high-quality career and technical education programs. Curricular options such as these are infrequently offered in low-income schools, and there is substantial literature, including the Department of Education's latest Civil Rights Data Collection, regarding the dearth of college preparatory offerings available to students of color.<sup>96</sup> To ensure that all students are college- and career-ready when they graduate from high school, states must provide evidence in their state plans that indicates realistic steps to equally avail all students of curricula, coursework, and other supports that are aligned with college- and career-ready standards. A focus on preparing students for postsecondary school options should not replace a well-rounded education. Indeed, art, music instruction, physical education, and other subjects must remain part of all students' coursework.

State resource equity plans should identify, report, and describe how states will measure and remedy inequitable distribution of core instructional resources within and among school districts. This requirement would call for school districts to report actual expenditures on teaching, instructional, and non-instructional staff salaries, as well as related expenditures such as technolo-

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95. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 181 (2009) (requiring "local educational agenc[ies] receiving [Title I, Part A] funds . . . to file with the State educational agency . . . a school-by-school listing of per-pupil educational expenditures from State and local sources"). The Department of Education has specified that such reporting should include teacher salaries. See U.S. DEP'T OF EDUC., FORM A: DATA REPORTING INSTRUCTIONS FOR SCHOOL-LEVEL EXPENDITURE DATA FOR STATE EDUCATIONAL AGENCIES AND LOCAL EDUCATIONAL AGENCIES 3 (2009), available at [http://www.sde.ct.gov/sde/lib/sde/pdf/arra/sl\\_arra\\_reporting\\_instructions.pdf](http://www.sde.ct.gov/sde/lib/sde/pdf/arra/sl_arra_reporting_instructions.pdf) (requiring districts to report "[p]ersonnel salaries at the school level for all school-level instructional and support staff"). This data has already proven useful, and at least some states have successfully complied with these requirements. See U.S. DEP'T OF EDUC., *supra* note 86, at 3 (2011), available at <http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf> ("All states submitted school-by-school expenditure data in response to the [American Recovery and Reinvestment Act of 2009] requirement.").

96. See Sean Kelly, *The Black-White Gap in Mathematics Course Taking*, 82 Soc. EDUC. 47 (2009); Press Release, U.S. Dep't of Educ., New Data from the U.S. Department of Education 2009-2010 Civil Rights Data Collection Show Continuing Disparities in Educational Opportunities and Resources (June 30, 2011), available at <http://www.ed.gov/news/press-releases/new-data-us-department-education-2009-10-civil-rights-data-collection-show-conti>.

gy and staff support costs. States would also have to allocate sufficient additional resources to school districts and schools that serve concentrations of the neediest students. Additionally, state and local resources would have to be provided to ensure that interventions such as basic health screening and nutritional programs are available to all children. High-quality early childhood education, full-day prekindergarten, and full-day kindergarten—perhaps the most fundamental set of programs—must also be provided so that children enter school ready to learn.<sup>97</sup>

##### 5. Ensuring Equitable Access to Highly Qualified and Effective Teachers

Research indicates that teachers are the most important in-school factor when it comes to student academic performance, accounting for as much as 13% of the variance in student achievement, making it the most impactful of school-level variables.<sup>98</sup> The most-effective teachers can help students learn as much in one year as they would in multiple years with a less-effective teacher.<sup>99</sup> Thus, providing the lowest-performing students with access to these most-effective teachers would be an important step toward improving student achievement. Yet, some provisions of current law all but ensure the persistence of inequities in access to high-quality teachers.

One of the more promising provisions of NCLB was its requirement that states provide information regarding the quality of their teaching corps.<sup>100</sup> Known as the “highly qualified teacher” provision, it was not without contro-

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97. See, e.g., JANET CURRIE, *EARLY CHILDHOOD INTERVENTION PROGRAMS: WHAT DO WE KNOW?* (2002), available at <http://www.eric.ed.gov/PDFS/ED451906.pdf>; SHARON L. RAMEY ET AL., *HEAD START CHILDREN'S ENTRY INTO PUBLIC SCHOOL: A REPORT ON THE NATIONAL HEAD START/PUBLIC EARLY CHILDHOOD TRANSITION DEMONSTRATION STUDY* (2000), available at [http://www.acf.hhs.gov/programs/opre/hs/ch\\_trans/reports/transition\\_study/transition\\_study.pdf](http://www.acf.hhs.gov/programs/opre/hs/ch_trans/reports/transition_study/transition_study.pdf); Arthur J. Reynolds et al., *Age 21 Cost-Benefit Analysis of the Title I Chicago Child-Parent Centers* (Inst. for Research on Poverty, Discussion Paper No. 1245-02, 2002), available at <http://www.irlp.wisc.edu/publications/dps/pdfs/dp124502.pdf>.

98. See ROBERT MARZANO, *MID-CONTINENT RESEARCH FOR EDUC. AND LEARNING, A NEW ERA OF SCHOOL REFORM: GOING WHERE THE RESEARCH TAKES US 66* (2000), available at [http://www.mcrcel.org/PDF/SchoolImprovementReform/5002RR\\_NewEraSchoolReform.pdf](http://www.mcrcel.org/PDF/SchoolImprovementReform/5002RR_NewEraSchoolReform.pdf).

99. KATI HAYCOCK, *EDUC. TRUST, GOOD TEACHING MATTERS: HOW WELL-QUALIFIED TEACHERS CAN CLOSE THE GAP 3-10* (1998), available at [http://www.pearsonassessments.com/hai/images/NES\\_Publications/1999\\_04Haycok\\_397\\_1.pdf](http://www.pearsonassessments.com/hai/images/NES_Publications/1999_04Haycok_397_1.pdf) (outlining case studies in which students with high-quality teachers exhibited multiple times the growth of students with low-quality teachers); Rivkin, Hanushek & Kain, *supra* note 92, at 417, 449 (1996).

100. No Child Left Behind Act of 2001 sec. 101, § 1111(h)(1)(c)(viii), (h)(4)(g), 20 U.S.C. § 6311(h)(1)(C)(viii), (h)(4)(G) (2006).

versy: Some teacher advocates balked at the label, which many criticized for assessing the wrong criteria.<sup>101</sup> But this provision provided at least a basic way to assess the qualifications of teachers nationwide.

With the discretion permitted under the law, the U.S. Department of Education allowed the State of California to adopt a novel definition of who could be considered a highly qualified teacher. Under California's definition, even uncertified teachers who are just beginning or are still in training through alternative certification programs could be considered "highly qualified." This move became the subject of a lawsuit, *Renee v. Duncan*.<sup>102</sup> The U.S. Court of Appeals for the Ninth Circuit eventually struck down this regulation as a violation of the true spirit of NCLB. But in December 2010, after intense lobbying efforts by groups such as Teach For America, Congress changed the law to broaden the definition of highly qualified, and did so under the cloak of a continuing resolution on the federal budget designed to avoid a government shutdown.<sup>103</sup> This measure, which will disproportionately impact students of color, low-income students, and those who are learning English or have disabilities, was implemented with no opportunity for input from communities that stand to be affected.<sup>104</sup> As the late Senator Edward M. Kennedy noted, "It does our children a disservice to call a teacher who does not even have state certification—and may never get it—"highly qualified."<sup>105</sup> And if this new measure continues to be implemented through 2013 as specified in the continuing resolution's language, it will enable school districts to place the most poorly prepared, untrained, and least experienced teachers in the schools whose students have the greatest need.<sup>106</sup> Immediate repeal of this provision and a more permanent safeguard through the NCLB reauthorization are imperative.

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101. Leslie S. Kaplan & William A. Owings, *No Child Left Behind: The Politics of Teacher Quality*, 84 PHI DELTA KAPPAN 687 (2003).
  102. 623 F.3d 787 (9th Cir. 2010).
  103. Continuing Appropriations and Surface Transportation Extensions Act of 2011, Pub. L. No. 111-322, sec. 1(a)(2), § 163, 124 Stat. 3518, 3521 (to be codified at 20 U.S.C. § 7801) (2010); TEACH FOR AMERICA, LOBBYING REPORT FOR U.S. SENATE (2010), available at <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4A0C6D2-94B1-40DF-99A5-A6FA8FD9D033>; Lauren Smith, *Pell Grant Increase Survives in CR; Teacher Standards Ruffle Some Groups*, CQ TODAY, Dec. 20, 2010, available at 2010 WLNR 25412367 (noting that Teach For America requested a provision that would allow teachers still in training to be considered "highly qualified").
  104. Julian Vasquez Heilig, Heather A. Cole & Marilyn A. Spiegel, *Alternative Certification and Teach For America: The Search for High Quality Teachers*, 20 KAN. J.L. & PUB. POL'Y 388, 409-10 (2011).
  105. Letter from Sen. Edward M. Kennedy and Rep. George Miller to Roderick Paige, Sec'y of Educ., at 2 (Jan. 8, 2003) (on file with author).
  106. PESKE & HAYCOCK, *supra* note 90, at 1-3; see Letter from Sen. Edward M. Kennedy and Rep. George Miller to Roderick Paige, *supra* note 105, at 2 ("These regulations

Some have attempted to draw a false distinction between teacher qualifications and teacher quality, suggesting that teachers do not need training in order to be effective in the classroom.<sup>107</sup> But uncontested research shows that first- and second-year teachers tend to perform much more poorly than more experienced teachers, particularly when the novice teachers lack training and are placed in the most challenging classroom environments, which is where many private teacher placement and recruitment organizations place them as a matter of course.<sup>108</sup> For this reason, a balanced reauthorization proposal should focus equally on quality (in terms of degree of preparation and certification) and demonstrated effectiveness, which can only be demonstrated once inside of the classroom.

A system that facilitates equal access to effective teachers must also rely on a robust evaluation rubric. Teachers should be annually appraised based on multiple indicators. These indicators should illustrate their ability to distinguish themselves from their peers based on the degree to which they can positively influence student achievement and school climate. Therefore, important measures to be included in such an evaluation rubric are student achievement data, peer and supervisor evaluations, and student surveys. Evaluations that rely solely on test scores have led to the cheating scandals recently reported in cities around the nation.<sup>109</sup> Although these tests may convey important diagnostic information regarding student performance, President Obama's recent critique of high-stakes testing rings true in light of these scandals.<sup>110</sup>

## 6. Promoting Enhanced Diversity

Racial isolation and concentrated poverty continue to undermine educational opportunity. Attending a high-poverty, racially isolated school is a leading predictor of academic failure. As President Obama has noted, "[S]egregated schools were and are inferior schools . . . [fifty] years after *Brown v. Board of*

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will perpetuate current practices under which teachers with no experience and no training are assigned to teach our most disadvantaged children." (emphasis omitted)).

107. Marilyn Cochran-Smith, *Reporting on Teacher Quality: The Politics of Politics*, 53 J. TCHR. EDUC. 379 (2002).
108. STEPHEN CARROLL, ROBERT REICHARDT & CASSANDRA GUARINO, RAND EDUC., *THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS* 1-2 (2000), available at [http://www.rand.org/pubs/monograph\\_reports/2007/MR1298.0.pdf](http://www.rand.org/pubs/monograph_reports/2007/MR1298.0.pdf); Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1050-51 (2003).
109. See *supra* note 42.
110. See Erica Werner, *Obama Urges Fewer Tests To Gauge Student Progress*, BOS. GLOBE, Mar. 29, 2011, at 8 ("Too often what we have been doing is using these tests to punish students." (internal quotation marks omitted)).

*Education.* And the inferior education they provided, then and now, helps explain the pervasive achievement gap between today's black and white students."<sup>111</sup> Moreover, the academic benefits of diverse educational settings have been well documented.<sup>112</sup> Yet, nearly sixty years after the U.S. Supreme Court struck a blow to America's racial caste system in *Brown*, public schools are more segregated than ever, albeit on a de facto and not a de jure basis.<sup>113</sup> Too many students are not experiencing the documented societal and academic benefits of learning in integrated, diverse classroom and school environments.<sup>114</sup>

In order to fully realize the twin goals of promoting diversity and delivering quality education, and to redeem *Brown's* promise of high-quality, inclusive schools for all students, federal law must actively promote diversity alongside improved academic achievement. NCLB's school choice provision was billed as a means to permit parents whose children were trapped in "failing" schools to explore other educational options at schools where students performed at a higher level.<sup>115</sup> But, in practice, the notion of meaningful choice among public schools has been illusory. For the most part, transfers have only been available on an intradistrict basis, permitting students to transfer only to schools within the same school district.<sup>116</sup> This provides little benefit in school districts where achievement levels for most or many schools is consistently low. And NCLB contains no general mandate for school districts to offer interdistrict choice options.<sup>117</sup>

To the extent that the reauthorized NCLB retains transfer provisions, they should be strengthened to require that states offer all low-income children attending poorly performing schools the option of attending a high-performing school, whether it be within the same school district, or in a neighboring school district. Furthermore, the receiving districts must be required to accept these students if space is available. In this way, federal law could offer *true* choice, not

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111. Senator Barack Obama, *A More Perfect Union*, Remarks at the Constitution Center (Mar. 18, 2008).

112. Jaekyung Lee, *Can Reducing Segregation Close the Achievement Gap?*, in *LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS* 74, 74-91 (Erica Frankenberg & Gary Orfield eds., 2007).

113. James E. Ryan, *The Real Lessons of School Desegregation*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION* 73 (Joshua M. Dunn & Martin R. West eds., 2009).

114. Lee, *supra* note 112, at 85-87.

115. Richard Lee Colvin, *Public School Choice: An Overview*, in *LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS* 10, 13 (Frederick M. Hess & Chester E. Finn, Jr., eds., 2004).

116. Maurice R. Dyson, *De Facto Segregation & Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in PICS v. Seattle School District*, 77 *UMKC L. REV.* 697, 729-31 (2009).

117. *See id.* at 731-32.

confined to the limited options of available intradistrict transfers or charter schools of often-dubious quality.<sup>118</sup> It was the lack of this type of meaningful choice that led, in part, to the arrest of Ohio mother Kelley Williams-Bolar, who was prosecuted for enrolling her child in a neighboring school district.<sup>119</sup>

The revised NCLB should also provide resources and support to families who exercise their right to transfer, including counseling on parental and student rights, transportation, and monitoring to ensure a smooth transition. Such a program should include both financial incentives for districts that take concrete steps to promote diversity, as well as financial penalties for those that enact policies, including school turnaround strategies, that exacerbate racial isolation and concentrated poverty. One positive step worthy of financial incentives is the creation of magnet schools for diversity purposes—an approach with an extensive track record of success, including through the federal Magnet School Assistance Program.<sup>120</sup> Though magnet schools have a more than thirty-year track record of success in deepening student learning and promoting diversity,<sup>121</sup> they have not received in recent years the financial support they are due.<sup>122</sup> Congress should use the reauthorization to spur the creation of diverse and academically excellent magnet schools as a means to turn around struggling schools and should also provide additional funding for the creation and development of magnet schools.

## 7. Safeguarding Educational Equity

As LDF and the Washington Research Project noted in 1969, the federal government must remain ever vigilant to ensure that federal education dollars

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118. See JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 181-214 (2010).
  119. See Timothy Williams, *Jailed for Switching Her Daughters' School District*, N.Y. TIMES (Sept. 26, 2011), <http://www.nytimes.com/2011/09/27/us/jailed-for-switching-her-daughters-school-district.html>.
  120. No Child Left Behind Act of 2001 sec. 501, 20 U.S.C. §§ 7231-7231j (2006).
  121. See, e.g., GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, NAT'L COAL. ON SCH. DIVERSITY, RESEARCH BRIEF: MAGNET SCHOOL STUDENT OUTCOMES: WHAT THE RESEARCH SAYS, available at [http://www.magnet.edu/modules/info/files/files\\_4de6547910edd.pdf](http://www.magnet.edu/modules/info/files/files_4de6547910edd.pdf) (summarizing the results of six major studies of magnet school student outcomes and noting one study finding that students attending magnet schools in the Los Angeles Unified School District were 30% more likely to graduate from high school); U.S. DEP'T OF EDUC., INNOVATIONS IN EDUCATION: CREATING SUCCESSFUL MAGNET SCHOOLS PROGRAMS, at v, 1-3 (2004) (noting the success of various magnet programs over time).
  122. See U.S. Dep't of Educ., *Magnet Schools Assistance: Funding Status*, ED.GOV, <http://www.ed.gov/programs/magnet/funding.html> (last updated June 15, 2011) (showing flat or decreasing spending levels).



reach their intended beneficiaries and have their desired impact.<sup>123</sup> This function may be advanced, in part, through explicit requirements for user-friendly, public reporting of data that is disaggregated by race, ethnicity, and student exceptionality, and cross-tabulated by gender. The data should cover expanded categories of information consistent with the proposals set forth above: various indicia of student achievement, such as uniformly and appropriately calculated graduation rates; barriers to learning, such as the use of exclusionary school discipline; and allocation of resources through comparability calculations and per-pupil expenditures at the individual school level.

But access to data alone is insufficient to ensure compliance. Parents and students also need a means to be heard and to seek relief when problems arise. Unlike most civil rights bills of its day, the ESEA did not include a mechanism for private parties to sue in order to vindicate their rights; NCLB was no different.<sup>124</sup> Without the ability to seek redress and secure specific performance of the law's mandates, NCLB's language may continue to ring hollow, regardless of the provisions that are included in the pending reauthorization. Thus, the reauthorized law should offer parents and students the opportunity to enforce their rights to key provisions through administrative and/or judicial proceedings, particularly in federal court. This private right of action will complement enforcement actions that the U.S. Secretary of Education may take at his discretion, such as withholding federal funds. Parallel public enforcement by the federal government and private enforcement by third-party beneficiaries, in this case parents and students, has been proven to enhance compliance by state and local government officials in other realms.<sup>125</sup> In many ways, this enforcement would mirror the efforts following *Brown v. Board of Education*. In the face of massive resistance from both the public and private spheres, coordinated litigation was necessary to complement the efforts of federal officials to enforce the law.<sup>126</sup>

## CONCLUSION

For generations, achievement gaps and low student performance have persisted in our nation's schools, in some cases worsening in recent years. The No Child Left Behind Act was heralded as an attempt to finally reverse these trends.

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123. See *supra* notes 4 and 23.

124. Elementary and Secondary Education Act of 1965 §§ 1111, 1116(b)(6), 1116(e), 20 U.S.C. §§ 6311(h)(6), 6316(b)(6), 6316(e) (2006); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (noting that there is no private right of action or remedy available under 42 U.S.C. § 1983 for parents or students regarding NCLB's provisions on notice and supplemental educational services).

125. See Amy M. Reichbach, *The Power Behind the Promise: Enforcing No Child Left Behind To Improve Education*, 45 B.C. L. REV. 667, 702-04 (2004).

126. See NAACP LEGAL DEFENSE & EDUC. FUND, INC., STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 5-6 (2008).

As the latest iteration of the ESEA, NCLB's stated goals were reminiscent of the original law—improved educational opportunities for poor students and students of color. But NCLB's accountability and enforcement mechanisms and its implementation were either ineffective or ill conceived.

Some have either tried to evade NCLB's mandates or used them to advance their own, narrow visions of education reform—often grounded more in philosophical ideology than in any notions of equity. The simple truth is that educators and policy makers know what works. Civil rights and education advocates are not seeking more than their fair share—they simply want poor students and students of color to have the same opportunities that have long been afforded to children who grow up in other neighborhoods and wealthier households. Equalizing opportunities for all students is not a novel idea; it is the essence of *Brown*. As policy makers now move toward NCLB reauthorization, they would be well served to restructure the law's accountability and enforcement mechanisms to achieve the ESEA's stated equity goals and to close loopholes to ensure implementation with fidelity to those goals.

By employing multiple indicators such as graduation rates, disciplinary indicators, and human and fiscal resource inequities, the ESEA's accountability mechanism can better address the root causes of inequitable educational outcomes. By strengthening teacher quality and distribution requirements, the ESEA can bring the best teachers to the places where the neediest students are concentrated. And by promoting diversity and offering mechanisms for enforcement, the ESEA can begin to break down the artificial barriers that have long meant that a child's educational opportunities are dependent upon his or her zip code, family income, and social status. In these ways, the ESEA can resume its historic work of leveling the playing field—both inside and outside of the classroom.