



**KEY REFORMS UNDER THE NO CHILD LEFT BEHIND ACT—  
THE CIVIL RIGHTS PERSPECTIVE:  
RESEARCH-BASED RECOMMENDATIONS TO IMPROVE NCLB**

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Whatever else might be said about the No Child Left Behind Act, it has the potential to be one of the most important pieces of education civil rights legislation in a generation. Its goals are an indispensable component of a renewed commitment to promoting racial and ethnic justice. The emphasis on accountability gives essential urgency and attention to the shameful achievement gaps of poor and minority students and students with limited English proficiency and disabilities. For NCLB to achieve its ultimate promise, serious, thoughtful changes are needed that:

- maintain NCLB's focus on the most disadvantaged students, and especially the narrowing of achievement and attainment disparities;
- capitalize on the momentum NCLB has generated at all levels around systemic reform and effective interventions; and
- carefully and constructively improve the law by building on its strengths, reducing its weaknesses, and trying to address several problems created as a result of its implementation rather than the law itself.

**AMENDMENTS TO ADEQUATE YEARLY PROGRESS:**

The net effect of any changes to NCLB should be to ensure that states, districts and schools make more thoughtful — *viz.*, less ideological, fashionable and unscientific — decisions about student improvement. These decisions should be rooted in education research and should promote substantive, enduring academic gains, not mere disruption of unsustainable blips engineered for short term political purposes. Achieving thoughtful, systemic responses to school failure in some cases will require more rigidity or muscular regulation than is currently contemplated under NCLB (such as with test quality, graduation rates and equitable distribution of the best teachers). In other cases, it will require more flexibility and professional judgment than current law allows (such as the definition of AYP).

From the civil rights perspective, the latter is more controversial. Many civil rights advocates supported NCLB, in part, because it removed professional judgment from the school evaluation process. It offered the opportunity, through raw measures of student achievement, to shine a “bright light” on the way that public education has continually failed minority students, arguably in part because of its traditional emphases on poorly policed localism and professionalism. In the new regime, there would be no more excuses or denials from people trying to hide school failure.

However, according to the research presented here and elsewhere, it has become clear that NCLB *as implemented* does not always lead to accurate assessments of student learning and has not always led to the kind of rich and enduring learning gains that parents expect for their children. Civil rights and education advocates now confront a difficult challenge: how to amend NCLB to allow the flexibility and support necessary to foster creativity and excellence, without returning so far back to the past that minority student underachievement is once again ignored or hidden.

Drawing on extensive research on NCLB, the following recommendations reflect an attempt to achieve this kind of constructive change. They do not encompass all desirable amendments, but are limited to research-based recommendations flowing from the Warren Institute’s recent work.

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**I. Assessments should be high-quality and should include multiple, performance-based measures of student achievement.**

1. Define the requirement that assessments “involve multiple up-to-date measures of student academic achievement including measures that assess higher order thinking skills and understanding” to mean that assessments must include performance-based measures. Performance-based measures can either be extended response items within a test or classroom based assessment outside of the test. These measures may extend beyond written answers to projects where appropriate, provided the assessment tools are scientifically rigorous and appropriate for accountability purposes.
2. Require that performance-based items be used for all subjects and all grade levels assessed.
3. Clarify that the term “assessment” under the Act allows the use of classroom-based assessments that are aligned both to states’ high content and performance standards.
4. Specifically name *Standards for Educational and Psychological Testing* under the requirement that assessments “be used for purposes for which such assessments are valid and reliable, and be consistent with relevant nationally recognized professional and technical standards” (Sec. 1111(b)(3)(C)(iii)).

5. To ensure quality and fairness, states shall demonstrate how they will ensure transparency in development of performance-based items and in the scoring of those items.
6. The Secretary shall appoint an independent, non-partisan expert panel to certify that the assessments used for accountability purposes conform to the requirements of the Act and the *Standards for Educational and Psychological Testing*. This safeguard is critical: An assessment may not be used for high-stakes purposes unless it is certified for use for each purpose for which it is used.
7. Amend Section 1503, Assessment Evaluation, to require an immediate National Research Council study of the quality of each state's assessments including a review of state compliance with each assessment quality provision under the Act and a review of the substantive quality of assessment items. Require that the Secretary:
  - a. report the findings of the study to Congress, and
  - b. develop and report to Congress on a plan that describes how the Secretary will enforce the law, support the creation of interstate test development consortia, provide technical assistance, and disseminate effective assessment models to ensure that all states come into compliance with the requirements of the Act.
8. States that are implementing higher quality assessments should be eligible for a waiver to have more time to develop the full scale of required annual assessments under NCLB. Or, consistent with any growth model used by the state, a state should be eligible for a waiver to reduce the number of grades in which students are tested under the Act. Waivers shall be considered only if a state can show that it has implemented an alternative way to track student progress in the grades for which it seeks a waiver from testing, such as through benchmark tests, classroom-based assessment, sampling, or the use of the state test for diagnostic purposes only.
9. Under Grants for Enhanced Assessments, give priority to consortia of states developing shared assessments. Focus existing assessment funds on meeting new test quality requirements, supporting state testing consortia, providing professional development on the use of assessment for diagnostic purposes and developing accommodations for students with limited English proficiency and disabilities.

Need for Amendments:

NCLB offers the opportunity for the kind of high quality assessment needed for effective school reform. In fact, the law requires higher quality assessments than are currently used and does not prohibit state use of performance-based assessment as part of overall state assessments. However, implementation is clearly flawed. The result is the low quality, standardized, overwhelmingly multiple-choice assessments that are most commonly used by states. A lack of resources for assessment, a lack of technical expertise at the state level, and insufficient federal enforcement of the law has created a disincentive for states to use higher

quality multiple, open-ended measures in assessment (Toch, 2006). Currently, despite the law's requirements, 15 states have been permitted to use only multiple choice assessments except for a separate writing assessment (Olson, 2005). At the same time, federal funding for assessments has remained insufficient for the development of more advanced assessments. The GAO reports that using the minimum appropriation allowed in law, the federal government will have provided \$2.34 billion for state assessments over the first 6 years of NCLB (See Sec. 1111(b)(3)(D)). This falls almost \$3 billion short of how much it would cost states to use higher quality assessments that employ both multiple choice and hand-scored constructed response items (\$5.3 billion) (GAO-03-389, 2003). Linda Darling Hammond cites Maine and Maryland as examples of two states that moved away from more sophisticated assessment systems as a result of NCLB (Darling Hammond, 2006).<sup>1</sup>

The result is that state tests continue to measure low level skills, do not accurately measure what students know and can do and are insufficiently aligned with state standards, leading to degraded classroom instruction that narrows curriculum and emphasizes low level skills. This trend undermines efforts to raise expectations and standards and to expand the range and depth of curriculum (eg Hawley, 2006, Mintrop, 2006). According to a recent Education Sector report, "statewide testing, envisioned under NCLB as a key part of the solution to what ails public schools, is fast becoming part of the problem in education," (Toch, 2006).

At the same time, it is important to acknowledge that standardized testing emerged as a tool to support civil rights—allowing traditionally underserved groups to overcome bias in college admissions (Lemann, 1999). Any policy change that moves toward less standardization must also carefully guard against the bias or lowered expectations that can result from human discretion in test development and scoring.

Finally, the expanding emphasis on test-based accountability for school and school system performance under NCLB has too often triggered state and district policies of high-stakes testing for student accountability. These policies are highly problematic as a scientific matter, as they commonly suffer from problems of validity, instructional alignment, failure to incorporate "multiple measures", or a combination of such failings. As a civil rights matter, retention and diploma-denial sanctions re-victimize the very students NCLB seeks most to help. Claims that such high-stakes regimes create powerful incentives for students, educators and administrators are generally unsubstantiated, certainly in the assertion that no less punitive incentive structure could be effective.

## **II. Evaluate schools based on multiple indicators of student and systemic achievement, avoiding over reliance on a single test.**

1. States may apply to establish an academic performance index upon which they will determine schools' adequate yearly progress.
2. The index shall be *partially* compensatory—success on multiple indicators can compensate for poor performance on others—subject to certain conditions described below, intended to ensure undiluted focus on accountability for improving subgroup performance.
3. The state assessment will be the primary means by which AYP is determined, and no single indicator shall carry equal or more weight than the aggregate weight of the state academic assessments.

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<sup>1</sup> In July 2006, the Department rejected Maine's state plan to use the SAT as its high school test because the state did not show that the SAT was aligned with state standards. Maryland's assessment system, on the other hand, gained full approval from the Department (Olson, 2006).

4. The state will include in its application a description of how it will ensure that continuous failure of any sub-group or in any single subject will result in failure to make adequate yearly progress.
5. The index shall include a mix of required and optional variables. At a minimum, (a) performance on state assessments including growth and percent proficient score interpretations and (b) graduation rates must be included.
6. All indicators shall be disaggregated by sub-group, consistent with the statistical requirements of NCLB.
7. All states must establish a reasonable floor and rate of progress for each indicator where measuring progress is feasible.
8. To ensure quality and fairness, states shall demonstrate how they will ensure transparency in the development of performance based items and in the scoring of those items.
9. States shall conduct an independent, extensive audit of both successful schools and schools that fail to make AYP to help ensure the validity of all measures used in the index.
10. Substantial federal matching funds shall be provided to states to implement this index process.
11. After one year, the Secretary shall promulgate two or more academic performance index models. States that have not yet applied and received approval to implement their own system will have one year to:
  - a. show how they will implement one of the models promulgated by the Secretary, or
  - b. work with the Department to apply and receive approval for the use of their own or another state's or consortium-of-states model.
12. Because the partially compensatory model for AYP may result in fewer schools being labeled as in need of improvement or, colloquially, "failing", eligibility for school improvement resources under the Act should at the discretion of the State remain available for schools that would have been designated eligible for assistance under the pure conjunctive model for AYP.

Need for Amendments:

Colleges, universities, and employers recognize that a single test cannot measure everything we need to know about what students know and can do and what they should be able to know and do to be successful in college, the workplace and as citizens in our democracy (Balfanz and Legters, 2006, Achieve, 2006).<sup>2</sup>

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<sup>2</sup> Achieve, Inc. notes that in developing their own high school accountability systems, only three states, Indiana, New York and North Carolina, report holding high schools accountable for their students' completing college and work ready curricula. One state, Oklahoma, holds high schools accountable for the percentage of graduates requiring postsecondary remediation and one state, Georgia, holds high schools accountable for both (Achieve, Inc., 2006).

Research commissioned by the Warren Institute this conclusion (Balfanz and Legters, 2006, Darling Hammond, 2006, Kornhaber, 2006, Linn, 2006, Hawley, 2006).

Further, the overreliance on a single measure can lead to negative outcomes for students. As the *Standards for Educational and Psychological Testing* state: “Concerns have been raised, for instance, about narrowing the curriculum to focus only on the objectives tested, restricting the range of instructional approaches to correspond to the testing format, increasing the number of dropouts among students who do not pass the test, and encouraging other instructional or administrative practices that may raise test scores without affecting the quality of education” (1999).

Using more than a single measure to evaluate schools could hold substantial affirmative benefits for poor and minority students. The achievement gap in American education extends well beyond test scores. There are racial disparities in multiple aspects of schooling that leave too many poor and minority children significantly less prepared for success in high school, college and the work place and significantly more likely to drop out of school. For example:

- Black and Latino students are half as likely as Whites are to be placed in Gifted and Talented classes (National Research Council, 2002).
- While 45.1 percent of White and 55 percent of Asian/Pacific Islander high school graduates studied precalculus, calculus, trigonometry and other advanced math courses, only 30.4 percent of Black, 26.2 percent of Latino and 26.9 percent of Native American high school students graduate having taken these courses (NCES, 2003).
- Twice as many Black students as White students have been retained in grade at least once (NCES, 1999). Data on Black and Hispanic students ages 10 and 16 show that they are more likely than their White and Asian peers to be two or more grades behind (Children’s Defense Fund, 2005).

An incentive system that encourages closing the achievement gap on a broader range of educational indicators is needed if all children are to have the same opportunity to be successful as adults. Yet, the law provides little incentive for schools, districts and states to do so because schools are not rewarded within the NCLB framework for success on these measures they are only penalized for failure.<sup>3</sup>

Finally, moving to an approved partially compensatory model for AYP will help focus the adverse “labeling” on those schools that are in at least some sense neediest because they have few offsetting positive developments to report. But there are other schools that remain in need of supportive interventions and additional resources, and the recommendation would continue their eligibility for NCLB resources by decoupling the test for labeling from the test for help.

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<sup>3</sup> Current law very specifically addresses and limits the use of multiple indicators of student achievement to determine Adequate Yearly Progress. Sec. 1111(b)(2)(C)(vi) requires high schools to show improvement on their graduation rate in addition to state assessments in order to make adequate yearly progress. (Elementary Schools must show progress on at least one other academic indicator as well. States have largely chosen attendance rate). However, while these and other indicators may be used to deny AYP status to a school, they explicitly may not be used to help a school make AYP if that school is not already making AYP on state assessments. (See Sec. 1112(b)(2)(D)(ii), Sec. 1111(b)(4) and Sec. 1116(a)(1)(B).)

There is one exception known as the Safe Harbor provision. Sec. 1111(b)(2)(I)(i) allows schools to be considered to have made Adequate Yearly Progress if the percentage of students in the sub-groups that did not meet proficiency on state tests decreased by at least 10 percent in a year and that group made progress on one or more alternate academic indicators including graduation rates, additional state or local tests, growth measures, decreases in grade to grade retention rates, attendance rates and percentages of students completing gifted and talented, advanced placement and college preparatory courses. (Sec. 1111(b)(2)(C)(vi) and (vii).)

These indicators must be valid and reliable and be consistent with relevant, nationally recognized professional standards, if applicable (Sec. 1112(b)(2)(D)(i)).

**III. A “Best Practices Safe-Harbor”: Expanded opportunity to review and present evidence to defer accountability designations under limited circumstances.**

1. For schools that have failed to make AYP on the above indices, a more viable appeals option should be permitted for a small number of schools. Schools that can show:
  - a. they have recently instigated significant, comprehensive, research based reforms that show new promise for substantial academic improvement over the long term;
  - b. they are addressing the unique needs of all subgroups in need of improvement sanctions; and,
  - c. the district mandated designation or sanction would undermine the school’s ability to implement their ongoing reform,should be permitted to appeal to the State under Sec. 1116(b)(2) to either be exempted from designation as in need of improvement, to suspend NCLB’s timeline for interventions under Sec. 1116, or to be exempted from mandated sanctions.
2. The state shall appoint an independent appeals panel that includes experts in education reform and civil rights, representatives of parents as well as highly regarded educators, to hear such appeals.
3. Appeals hearings must be open to the public and take place outside of the school and in the community in which the school is located.
4. Parents must be notified in writing in advance of the hearing as well as be notified in writing of the panel’s decision and the basis upon which the decision was made.

Need for amendments:

School reform that results in continuous, substantive improvement is complex, varying in pace and requires a minimum of 3-5 years to take root and generate truly meaningful outcome gains. (Balfanz and Legters, 2006, Hawley, 2006). NCLB’s timeline, which initiates interventions and sanctions after two years of school failure and escalates sanctions each year after that may not accommodate, and could undermine, the innovation and long term planning necessary for successful and sustainable reform. While NCLB can successfully trigger important “first order” changes, such as aligning curriculum and dealing with disorder, there is substantial concern that it will not foster long term “second order changes” such as fundamental structural and relationship changes needed for sustainable success (Hawley, 2006, Mintrop, 2006). The result may be schools’ inability to implement needed long term reforms or schools that have engaged in effective reform being labeled as failing because of an aberration or other problem common to the reform processes.

Significant concerns have also been raised that mandating supplemental services and public school choice at the predetermined times established by law may also be disruptive to the reform process. Researchers

and advocates have concluded that school reform requires a long term, comprehensive and coordinated approach (Balfanz and Legters, 2006, National High School Alliance, 2005). While clearly not all schools engage in this type of constructive reform, for those that do, federally mandating specific remedies (that cost up to 20 percent of a school or district's Title I allocation) may pose unintended obstacles. It may reduce financial and personnel resources and inhibit the complete or creative implementation of potentially successful reforms (Hawley, 2006, Sunderman, Kim and Orfield, 2005).

In fact, Balfanz and Legters show that for the lowest performing high schools, NCLB's timeline and interventions may not be having their intended effect. They find that among the highest need high schools that receive Title I funding, one of the two most significant factors associated with failing to make AYP is the length of time the school has been in improvement status (Balfanz and Legters, 2006). Given this and the above stated concerns, NCLB's timeline and scheduled sanctions should be revisited in certain circumstances. *But not all.*

#### **IV. Implement growth models.**

1. All states must adopt a longitudinal data system and include growth in the definition of Adequate Yearly Progress.
2. Proficiency levels must also be tracked and achieved.
3. The Department should, through a peer review process, consider alternative growth models in addition to the one it currently employs (sufficient growth defined as on a three-year trajectory to proficiency). Other such models could include growth compared to state or national norms and measures of growth that reflect the performance of all students in a grade, not just those within a limited range of proficiency.

#### Need for Amendments:

In many low performing schools, educational challenges greatly exceed those in high performing schools and more intensive interventions are needed. For example, in high schools where the majority or near majority of students do not graduate, the typical student enters ninth grade 2-4 years below grade level and will be absent for a month or more of the ninth grade year. 30-40 percent of ninth graders will be retained in ninth grade (Balfanz and Legters, 2006). The exclusive use of a proficiency model in the context of such schools and students can be counterproductive. Research has shown that when a proficiency model is used:

- low performing schools can focus instruction on the small group of students most likely to rise from below to above proficient each year, ignoring the needs of the lowest performing and highest performing students (Balfanz and Legters, 2006, Center for Education Policy, 2006); and,
- low performing students have been pushed out of school or inappropriately retained in grade as a way to not count their low test scores against a school's overall grade (Losen, 2005, Haney, 2004).

Restructuring NCLB's incentives to encourage schools to focus on the needs of and engage the lowest performing students even if they may not achieve proficiency in the same time as their peers is essential if low performing schools are to ensure that the hardest to serve students receive the attention they need to succeed.<sup>4</sup>

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<sup>4</sup> It is important to note that in both North Carolina and Tennessee, the states projected (based on the prior year's test scores) that there would be only a small increase in the number of schools that would make AYP under the growth model. However, with a more reasonable end date for overall proficiency, this may change. Reducing the number of schools in need of improvement is not the reason for this recommendation, however. Rather it is to provide a disincentive to engage in negative educational



**V. Assessments of English proficiency must measure high levels of academic language, and should not be used for a variety of purposes for which they are not designed or validated.**

1. Create a federal instrument *and* cut-score for determining LEP classification, and design the instrument and cut-score to assess “academic” English.
2. For sub-group AYP calculation, a student’s LEP designation will extend at least three years beyond determination of English competence. The number of years of continued designation as LEP will be based on a Department analysis of the relationship between the level of English competence necessary for the redesignation by the state and the level of competence necessary to meet the federal LEP classification.

Need for Amendments:

“Students with limited English proficiency” is one of the subgroups whose improvement must be measured under the No Child Left Behind Act. Section 6311 (b). NCLB also provides that assessments shall provide for the inclusion of limited English proficient students, requires assessments to be valid and reliable and with reasonable accommodations, and requires states to require LEA’s to provide for an annual assessment of English proficiency measuring students’ oral language, reading, and writing skills in English. Under NCLB, once a student is redesignated as proficient in English, the student is no longer counted as a student with limited English proficiency (English Language Learner) for NCLB accountability purposes. Students classified as ELLs must be included in the state accountability assessments after one year in U.S. schools, and must be tested entirely in English after three years. In 2004, the U.S. Department of Education changed the system to allow states to count redesignated students within the ELL subgroup for up to two years.

If all students who obtain English Language Proficiency are no longer counted in the English Language Learner category, the ELL group of students, almost by definition, will not be able to show progress toward state proficiency goals. And data on how redesignated students are in fact progressing in school is not collected. This problem is compounded by the low level proficiency tests that are used in most states to determine proficiency, with an astounding variety of levels of proficiency on state tests of English proficiency. Most experts agree it takes an average of 5 years for a non English speaker to gain the appropriate level of proficiency in English to learn academic subjects in English. The Department of Education amendments will help states, districts and schools meet AYP goals, but will still not allow for a fair assessment of whether ELL students are learning enough English at a high enough level of comprehension to be able to learn higher level skills in English. Often, an English proficiency test is used for a variety of purposes, e.g. accountability for a school, assessment of a population, student-level placement and diagnosis and other purposes, in violation of the professional standards of appropriate test use.

**VI. Capacity-building: Expand research, expertise, and funding.**

1. Congress will create a major national research laboratory and regional laboratories, funded at the level of national science research laboratories,

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practices such as focusing on a narrow band of near proficient students and to push schools to do their best for all students, regardless of where they are with respect to proficiency levels.

to research and disseminate effective intervention strategies for high need schools.

Although there will be increasing numbers of schools and districts identified as not achieving Adequate Yearly Progress, there is a dearth of research on the most effective methods of intervening in these schools and districts to improve the quality and suitability of instruction. Effective strategies have not been implemented because of lack of resources and implementation systems and strategies.

## 2. Improve state capacity to implement NCLB and support effective school reform.

If we are going to implement a more responsive, constructive approach to school improvement on a systemic basis, there needs to be substantial improvements in state capacity. Capacity obviously includes much more than money. High quality personnel with expertise in effective measurement, accountability and school reform, and in how to implement those things well are at the core. On all fronts, current capacity is insufficient:

- Given the large demands placed on State Education Agencies (SEA) by NCLB, departments triage. They devote time to compliance with NCLB's requirements (i.e. developing assessments and data collection) and do very little to support school improvement (Sunderman and Orfield, 2006). School improvement plans required under NCLB are rarely even read because of lack of personnel at the State level (Mintrop, 2006, Sunderman and Orfield, 2006).
- At current capacity, States realistically can be expected to intervene effectively in no more than 10% percent of schools (Mintrop, 2006).
- The federal funds SEAs receive for school improvement are, in the best case, enough to hire one additional employee (Sunderman and Orfield, 2006).

The result has profound implications for NCLB. According to Mintrop's analysis of first generation accountability systems, States set standards based on their existing capacity to achieve them. Therefore, in most states, standards are low. This leads to "horizon 1" changes that grab low hanging fruit and focus on basic skills but that can undermine efforts to achieve "horizon 2" changes—advanced reasoning and problem solving. When States did pursue high standards, such as in Maryland, they saw little improvement because they did not provide sufficient support to schools to achieve them (Mintrop, 2006).

There needs to be a far more constructive state response to failure. Schools need significantly more support and technical assistance to effectively reform. This requires, at the state level, a far better understanding of what constitutes effective school reform, how to recognize when schools are effectively reforming and how to actually integrate effective reform into day to day practice. Achieving, disseminating and providing technical assistance around this knowledge base requires significant increases in staff and professional development. This warrants, in addition to greater state effort, significant federal aid for both research and State education agencies themselves.

## 3. Increase federal support for high schools.

High school reform often requires a comprehensive overhaul of school curriculum, instruction, student support and even school structure (Balfanz and Legters, 2006). This cannot be done without significant increases in resources. Yet, in general, high schools have been neglected under the Title I program. According to the authors, only 47% percent of the nations' worst performing high schools receive any Title I funding. Significant increases in funding for dropout prevention targeted toward at risk youth and schools are also needed (Rumberger, 2006).

## 4. Develop a "Marshall Plan" for effective teachers.

According to Linda Darling-Hammond, NCLB's teacher quality requirements have been a good step forward, but that they have to be followed up with a massive federal investment, akin to the Marshall Plan, to improve the quality of the teaching force in America's schools. Schools with the highest percentage of

minority and low income students are more likely to employ beginning teachers, teachers with less education and teachers who did not major in the field in which they are teaching. The federal government, she argues, must take the lead to recruit new teachers, reduce barriers to interstate mobility for teachers, strengthen teacher preparation and improve teacher retention and effectiveness (Darling Hammond, 2006).

Further, despite NCLB's 2005-2006 deadline to ensure that all classes are taught by highly qualified teachers and the requirement that poor and minority students are not taught at higher rates by inexperienced, unqualified or out of field teachers, the Administration has only recently started to focus on and enforce these provisions. As a result, states were free to ignore and sometimes mislead in their reporting on this key issue and little progress has been made (McClure, Piche and Taylor, 2006). The federal government, states and districts must immediately work to come into compliance with these provisions of the law (Darling Hammond, 2006).

5. Refocus on incentives and supports to address students' non-cognitive needs as they impact students' school experience.

Significant research has shown that a substantial portion of the achievement gap is attributable to non-academic factors. Coleman, for example, found that "Family background differences account for much more variation (in student achievement) than do school differences," (Coleman, 1966, reprint, 1990 p. 124). While Coleman's work and this broad conclusion are heavily debated, it is clear that non-academic factors, such as transience, hunger and poor health, present major obstacles to learning. There can be little debate that closing the achievement gap would be quicker and easier if schools and society at large were able to reduce non-academic barriers. Therefore, if we want to see the types of gains demanded by NCLB, addressing non-academic factors should be part of the reform equation. Federal support for efforts that range from school based outreach and collaborations with social and health services agencies, to provision of mental health services to overall systemic improvement from the federal level down is essential.

6. Increase federal funding and improve funding equity across states, districts, and schools to target resources to the neediest children.

Title I aid flows from the federal government to states, then to districts, then to schools. This paper examines Title I funding equity at each level: across states, across districts, and across schools. This multi-tiered inquiry reveals the complex ways in which equitable allocations are nested within inequitable allocations, and vice versa. In brief, the data show that Title I funds are inequitably allocated across states. By allocating aid to states in proportion to state per-pupil expenditures, Title I reinforces vast spending inequalities between states to the detriment of poor children in high-poverty jurisdictions. Across districts, aid per poor child generally increases with poverty concentration, but there are significant inequities among districts with comparable poverty. The two Title I formulas expressly designed to target high-poverty districts work not only to the advantage of districts with higher poverty but significantly to the advantage of districts with bigger enrollments. As a result, small or mid-sized districts that serve half or more of all poor children in areas of high poverty receive less aid than larger districts with comparable poverty. Finally, Title I disproportionately benefits schools with higher poverty, although equitable allocations across schools are nested within varied allocations across districts and inequitable allocations across states. (Liu, 2006)

Need for Amendments:

The success of these amendments and NCLB in general hinge on expanding state, local and school capacity to implement effective reforms. While there are clearly some cases where education professionals have permitted school failure because of neglect, in general, this explanation is insufficient to explain school failure. NCLB's theory of action, that educators largely will change their behavior solely based on incentives or pressure, is therefore incomplete and does not fully address the realities of American education (Hawley, 2006, Rumberger, 2006). Rumberger argues that there are three critical elements needed to initiate and sustain reform efforts: incentives, resources and support. NCLB has not provided sufficient resources or support to better guarantee its success (Rumberger, 2006). When resources and support (both financial and technical) are lacking, the highest need schools, which are more likely to

educate poor and minority students, are particularly harmed. Not only are their existing resources, personnel quality and access to outside enrichment and learning opportunities insufficient, but also, as a result, they are more likely to resort to counter-productive tactics to show success (e.g. Center for Education Policy, 2006).

**VII. Aggrieved persons should have the right to appeal failure to appropriately enforce, follow, or interpret NCLB requirements.**

1. An individual or group may file a lawsuit against a local or state educational agency in federal court to seek a remedy for failure to properly enforce or follow the NCLB, including its implementing regulations. Access to court would be available after exhausting any administrative process created by the State specifically to handle NCLB-related complaints. In court, only injunctive relief against arbitrary and capricious action or inaction would be allowed. Damages would not be available.
2. NCLB would be amended to provide for review of “arbitrary and capricious” United States agency (usually the U.S. Department of Education) action taken under NCLB under normal litigation procedures allowed under the Administrative Procedure Act. Federal district courts would be given jurisdiction to hear the cases.

Need for Amendments:

The NCLB statute does not provide any party the right to appeal an action the United States, a state or local decision taken under the No Child Left Behind Act. Efforts to use federal and state courts to enforce the Act or to challenge actions taken under the statute have been dismissed. Courts are very reluctant to find “implied” causes of action in statutes like the NCLB, and it is very unlikely that courts will entertain actions to require governments to enforce NCLB in a different way or to challenge federal state or local government actions taken under the statute. There are however, significant and educationally relevant issues about the interpretation and enforcement of the statute that, at present, can not be tested in a neutral forum under well developed legal standards for review of agency action or inaction. A review would help to enforce the standards of the statute and allow a challenge to government actions that are outside the intent, language and ambit of the NCLB statute. Most fundamentally, the NCLB statute is an effort, through law, to make federal financial support for education improvement contingent on certain policies and actions. In adopting this framework of conditional funding, Congress is also saying that the program should be conducted within the Rule of Law, rather than the realm of political largesse and unbridled administrative discretion. Access to judicial or quasi-judicial review of administrative action is a hallmark of the Rule of Law.

**VIII. Clarify that equal educational opportunity is a fundamental right of all children in the United States.**

1. Amend the Purposes and Findings at the beginning of the Act to write into law an explicit recognition of the fundamental right of equal educational opportunity, pursuant to Congress’s constitutional authority to enforce the guarantees of the Fourteenth Amendment.

Need for Amendment:

Though the NCLB requires states to set high standards for achievement for all students and high levels of performance by all schools, the Act does not explicitly articulate the obvious profound importance of equal educational opportunity in the United States. The United States Supreme Court has held that education is not a fundamental right guaranteed by the U.S. Constitution (*San Antonio ISD v. Rodriguez*), yet the Court has also held that the fundamental importance of education to the child distinguishes education from other forms of social welfare legislation (*Plyler v. Doe*). Yet, certainly Congress can express its basic position on the importance of education by explicitly noting the relation of education to fundamental Constitutional rights such as speech, assembly and political participation. In addition, if courts or administrative officers interpret the NCLB, it will be important for Congress to give general guidance of the importance of fundamental rights underlying the framework of the Act.

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