May 7, 2010

VIA EMAIL to: ESEAcomments@help.senate.gov

U.S. Senate
Committee on Health, Education, Labor, and Pensions
Washington, DC 20510

Re: ACLU Priorities for ESEA Reauthorization

Dear Chairman Harkin, Ranking Member Enzi, and Committee Members:

The ACLU, on behalf of its more than half a million members, fifty-three affiliates nationwide, and countless additional supporters and activists, is pleased to submit the following recommendations for ways to improve the Elementary and Secondary Education Act (ESEA) for students, parents, and teachers as the Committee undertakes its reauthorization process. These recommendations are rooted in the ACLU’s strong belief that all students should have the equal opportunity to a high-quality, safe, and supportive learning environment.

1. Supporting a Healthy School Climate

A. Accountability for “Push-Outs”

Our country’s most vulnerable students – most often low-income students, students with special needs, and students of color – are increasingly pushed out of schools through counterproductive and excessively harsh punishments, including suspensions, expulsions, mandatory transfers or referrals to disciplinary alternative programs, and referrals to law enforcement or the juvenile justice system. This trend can be attributed to a confluence of factors, including overcrowded classrooms, a failure to identify and provide adequate services for children with special needs, insufficient support for teachers on classroom management, tolerance of bullying, harassment and discrimination, a failure to engage students and parents in the educational environment, and an overall lack of educational resources. Indeed, a number of scholars have concluded that school officials sometimes respond to the pressures of meeting Adequate Yearly Progress (AYP) standards by pushing out low-performing students through the inappropriate use of such disciplinary measures.

These push-outs result in devastating consequences for students, drastically increasing the likelihood that the child will drop out of school altogether and...
impacting chances for success later in life. To address these concerns, the ACLU recommends:

- Stronger monitoring and oversight of all publicly funded educational institutions and programs, including charter schools, disciplinary alternative schools, and detention facilities;
- Having states examine and correct harmful zero tolerance policies, by evaluating the disciplinary data of local education agencies (LEAs) to determine if significant discrepancies are occurring in the disciplinary rates of the identified subgroups - or in aggregate rates between schools or LEAs. If necessary, the state should assist in the revision of policies and practices in the LEAs where such discrepancies are occurring and provide technical assistance in evidence-based approaches to improve school discipline; and
- Mandatory reporting on the number of disciplinary “push-outs” in each school and each district, including the use of suspensions, expulsions, transfers or referrals to disciplinary alternative programs or schools, and referrals to law enforcement, disaggregated by subgroups.

B. Improved Accountability for Graduation Rates

To counteract school’s incentives to push-out low performing students, the NCLB requires consideration of schools’ graduation-rates. Unfortunately, this accountability measure has not been adequately enforced. To address this lack of enforcement, the ACLU recommends:

- Requiring accountability for improvements in graduation rates, including subgroup graduation rates; and
- Providing additional safeguards to ensure that the Secretary of Education may not approve any state plan that is inconsistent with the graduation rate requirements.

C. Positive Behavioral Supports, Rather than Harmful Disciplinary Practices.

Each year, over three million children are suspended and over 100,000 are expelled from school. Other students are arrested or sent to alternative schools for minor offenses. These excessive disciplinary measures impact African American, Latino, and disabled students disproportionately. Harsh punishments are an ineffective means to reduce disciplinary problems and they often lead to an unwelcoming—and in some cases, unsafe—learning environment. Instead, schools and school districts should provide Positive Behavioral Supports (PBS), which have demonstrated effectiveness in combating discipline problems while supporting a safe and productive learning environment. To provide teachers with safe and effective means to promote students’ positive behavior, the ACLU recommends:

- Utilizing Title I and other ESEA funds to support the development and training necessary to increase the use of supportive and flexible methods which do not impair students’ access to instruction and to fully realize the potential of PBS practices;
- Requiring the Department of Education to institute an office responsible for developing and supporting the implementation of PBS practices; and
- Incorporating into ESEA reauthorization, the Positive Behavior for Safe and Effective
Schools Act (H.R. 2597), a bill which would amend ESEA to provide funding and technical assistance for schools to implement safe and effective behavioral support methods to encourage educational and behavioral growth.

D. Prohibiting All Forms of Corporal Punishment

Each year, hundreds of thousands of students are subjected to physical inflictions of pain as a form of punishment for disciplinary infractions. Students of color and students with disabilities are disproportionately subjected to corporal punishment, further hampering their access to a supportive and encouraging learning environment. In fact, in many states, students receive greater protections against the use of corporal punishment in detention facilities than they do in their schools. In order to prevent the continued use of violence against children in our schools, the ACLU recommends:

- Addressing the disparate standards among states and localities by enacting a federal prohibition on the use of corporal punishment in schools;
- Defining corporal punishment as any punishment by which physical force is used with the intention of causing some degree of pain or discomfort, however light;
- Requiring that states and LEAs report the total number of incidents in which corporal punishment is imposed upon students; and
- Providing students and their families with a right of action to enforce their rights not to be subjected to corporal punishment.

E. Prohibiting the Use of Restraint and Seclusion

The use of restraints and seclusion as a punishment for disciplinary violations presents an unnecessary danger to students’ well-being. Many students are subjected to mechanical, chemical, or physical restraints in cases where less restrictive means may be available to address disciplinary violations. While national data on the use of these measures is not yet available, the General Accounting Office (GAO) has found that hundreds of allegations of abuses and deaths in schools are attributable to the improper use of restraint and seclusion against students. To prevent the continuance of this ineffective and dangerous tactic, the ACLU recommends:

- Reducing the use of restraint and seclusion against students and requiring that such measures may only be used, by trained professionals, when a student’s behavior poses an imminent danger of physical injury to the student or to others, where there are no less restrictive measures;
- Helping states and LEAs to keep students safe by promoting the development of PBS standards to encourage positive behavior in schools;
- Helping states establish and implement policies and collect data related to the use of physical restraint and seclusion of students in elementary and secondary schools; and
- Providing students and their families with a private right of action to enforce their rights not to be physically restrained or secluded.

2. Promoting School Diversity and Providing Equal Access to High-Quality Schools

A. Preventing Racial Re-segregation in our Schools
Due, in part, to a troubling series of recent Supreme Court decisions, public schools are at risk of becoming re-segregated along racial and class lines. Many students are forced to attend failing schools simply because they live in poor areas with underfinanced schools and school districts, disproportionately impacting the educational opportunities of students of color. To prevent the re-segregation of our nation’s schools and school districts, the ACLU recommends:

- Strengthening the Title I requirement of resource equity between and within school districts;
- Discouraging states and school districts from further increasing the re-segregation and concentration of poverty in certain schools or districts by creating enforceable financial consequences; and
- Requiring charter schools and other educational institutions which receive federal funding to promote racial and economic diversity among students in their programs.

B. Providing the Right and Ability to Transfer Out of Failing Schools and Failing Districts

Currently, NCLB provides a student who attends a failing school the right to transfer to a non-failing school. Unfortunately, this provision has not succeeded in ensuring that students have access to a high quality education because of administrative hurdles, lack of transportation, and because the right provides only for transfers within a given school district, and only if space permits. To provide students with the ability to obtain a high-quality education, regardless of the students’ neighborhood or economic background, the ACLU recommends:

- Maintaining and strengthening the right to inter-district transfers provided by the NCLB, and requiring states to ensure that students from low-income families have the right and the ability to transfer into high-performing schools;
- Providing support, counseling and transportation assistance for families who wish to transfer their children out of failing schools;
- Providing students and their families with a private right of action to enforce their rights to transfer to high-quality schools; and
- Requiring cooperative agreements for transfers between districts in instances where every school in a district is failing, or where non-failing schools within in a particular district do not have the capacity to accept additional students.

C. Promoting an Equitable Distribution of Resources Among Districts and Among Schools

Although early education is a significant predictor of later academic performance, many schools and school districts are severely under-resourced while others receive an unequally large share of funding. The Title I requirement of intradistrict resource equity has been substantially eroded by later revisions to the statute, and there is currently no requirement for resource equity between districts. To provide all children with an equal opportunity to receive a high-quality education, the ACLU recommends:

- Strengthening the Title I requirement that intradistrict resources and funding be allocated equitably;
• Providing children and taxpayers with a right to judicial and administrative enforcement actions for violations of Title I;
• Requiring states to address resource gaps between school districts;
• Collecting annual data from each district regarding key educational resource indicators, such as access to high-quality teachers, access to high-quality preschool, and the distribution of funds among districts and among schools; and
• Providing competitive funding grants to states with high levels of resource variations among their districts or schools so that they may develop and implement plans to ameliorate these inequities in and among their schools.

3. Assistance, Rather than Funding Cuts, for Schools and Districts “In Need of Improvement”

The current NCLB structure punishes schools and districts that do not meet their AYP goals. This structure further hampers schools which are frequently under-resourced to begin with, harming the very students it is intended to help. To properly encourage schools to improve their performance while avoiding the harmful effects of punitive funding cuts, the ACLU recommends:

• Increasing funding for schools which are in need of improvement so that they may obtain the necessary resources to initiate effective interventions;
• Permitting growth as a measurement in determining AYP standards;
• Permitting multiple academic assessment measures; and
• Rewarding schools and districts that make progress toward meeting goals.

4. Prohibiting Discrimination Based on Sexual Orientation or Gender Identity

Reauthorization of ESEA presents the opportunity to provide critical protections to students who are, or are thought to be, lesbian, gay, bisexual or transgender (LGBT). LGBT students are frequently denied equal educational opportunities on account of their sexual orientation or gender identity. Current federal law does not explicitly protect students in our nation’s public schools on the basis of actual or perceived sexual orientation or gender identity. To prevent discrimination against public school students based on sexual orientation or gender identity, the ACLU recommends:

• Including LGBT students as a protected group under federal civil rights statutes which prohibit discrimination, thereby adding to existing protections against discrimination based on race, color, sex, religion, disability or national origin;
• Clarifying that all exclusions or restrictions from participation in any public school program based on sexual orientation or gender identity constitutes discrimination;
• Prohibiting retaliation in any form against persons who challenge school, district, or state policies regarding discrimination against LGBT students;
• Providing a cause of action for LGBT students and their families to challenge discriminatory actions or practices, whether in the form of express discrimination or in the form of toleration of acts of discrimination committed by teachers, students or other persons; and
Incorporating into the ESEA reauthorization the Student Non-Discrimination Act (HR 4530), which would provide the first-ever comprehensive federal prohibition against discrimination in public schools based on a student’s actual or perceived sexual orientation or gender identity and provides victims with remedies modeled after Title IX.

5. Expanding Data Collection

The Department of Education’s Civil Rights Data Collection (CRDC) program compiles statistical information about the placement, treatment, and achievements of students in order to discover issues which have a discriminatory impact on particular groups. Recently, OCR has made significant improvements to its data collection efforts. However, as ESEA is reauthorized there are many areas in which a more comprehensive and detailed collection of data is needed. In order to ensure that information about access to high-quality education is readily available, the ACLU recommends:

- Expanding the collection of disaggregated data from every public school, disciplinary alternative school, and charter school in the country on an annual basis;
- Requiring disciplinary alternative schools to provide and report the same accountability data that other schools provide, as well as additional enrollment information, including average length of enrollment, peak enrollment, number of absences per year, and number of students who graduate, dropout, or re-enroll in their home school upon departing the disciplinary alternative school;
- Publishing separate data analyses for disciplinary alternative schools to allow for comparisons of the proportional assignment of students of color and students with disabilities into regular schools versus alternative schools;
- Requiring all public schools, disciplinary alternative schools, and charter schools to compile information on the rates of in-school suspension; out-of-school suspension; expulsion; transfers and referrals to disciplinary alternative schools or programs; school-based arrests; referrals to law enforcement or the juvenile justice system; and other forms of punishment, including corporal punishment and restraint and seclusion;
- Disaggregating collected data by race, ethnicity, gender, disability status, LEP status, socioeconomic status, and parental status;
- Cross-tabulating data according to multiple categories to accurately distinguish which sub-groups are affected in what ways (for example, by race or gender and also by disability status);
- Reviewing the number of disciplinary referrals in failing schools in order to replace harmful punitive measures by implementing positive behavior supports;
- Requiring accountability for improvements in graduation rates, including subgroup graduation rates;
- Collecting and providing information that distinguishes between incidents of discrimination based on gender identity and incidents of discrimination based on sexual orientation. In collecting such information, the Department of Education must protect students’ privacy and should only collect and publish voluntarily-submitted information about discrimination based on sexual orientation or gender identity; and
- Collecting and providing information about the placement of pregnant and parenting teens in alternative schools.
6. Military Recruitment in Schools

NCLB changed the landscape of military recruitment in public high schools across the nation. It granted military recruiters unprecedented access to schools and to students’ personal information. While students and parents do have the right to opt-out of their information being provided to the military, all too often families do not know of this right. In order to better protect the privacy rights of students and families, and to ensure that military recruiters do not receive preferential access to students, the ACLU recommends:

- Mandating that families opt-in to having student information released to recruiters. This will reduce the burden on already overwhelmed school districts while at the same time protect families from releasing information on their children without knowledge;
- Clarifying the law so that both parents and students may choose to release student information. While the U.S. Department of Education has clarified that students may themselves opt-out, the statute itself is still ambiguous and should be clarified;
- Prohibiting the use of classroom or instructional time for recruiting purposes. Educators agree that classroom time should be dedicated to student instruction and not to recruitment; and
- Clarifying the law that military recruiters must not be provided with preferential access to students, or special privileges not provided to college recruiters and employers.

If you have any questions regarding these ESEA priorities, please contact Deborah J. Vagins, ACLU Legislative Counsel, at dvagins@dcaclu.org or (202) 715-0816.

Sincerely,

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