



February 26, 2015

The Honorable Lamar Alexander  
Chairman  
Committee on Health, Education, Labor, and Pensions  
United States Senate  
428 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Patty Murray  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate  
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**RE: Elementary and Secondary Education Act reauthorization**

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the American Civil Liberties Union (ACLU), we thank you for the opportunity to submit comments on the staff discussion draft of the Elementary and Secondary Education Act (“ESEA”) reauthorization.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

We welcome the opportunity to comment on the Chairman’s draft and offer recommendations for ways to improve the ESEA for students, parents, and teachers. Our recommendations are rooted in the belief that all students should have the equal opportunity to a high-quality, safe, and supportive learning environment.

***I. Changes to the Title I Funding Formula***

We oppose the provision in Section 1007 of the discussion draft that would dismantle the Title I funding formula by providing states the option of making Title I funding “portable” to allow the money to follow a child to a public school.

First, this proposal would undermine Title I’s fundamental purpose of assisting public schools with high concentrations of poverty and high-need students. Congress adopted Title I in 1965 to ensure that districts and schools serving large concentrations of students in poverty would receive a greater portion of federal funds to address the compounded impact of poverty on student learning. High-poverty school districts and schools benefit from increased federal investment by taking advantage of “economies of scale” to combine resources for school-wide services and whole school reforms targeted at economically and academically needy groups of students. The portability provision, however, would dilute the funds and their ability to address the needs of the very students Title I funding is intended to assist.

A state would be able to fully disregard—and deny local school districts the ability to address—the unique needs of schools and communities with a concentration of students in poverty when distributing Title I funds throughout the state. Under the Title I portability option in this discussion draft, every eligible child within a state would receive the same amount of Title I funds regardless of the district or school he or she attends. This ignores the unique challenges schools with high concentrations of poverty face, stretches the dollars thinner, diminishes the effectiveness of the funding, and undermines congressional intent.

Second, portability is just one step removed from private school vouchers. Even though the discussion draft limits portability to public schools, we remain concerned that passage of this provision will be a stepping-stone for an expansion of vouchers for private and religious schools using either federal or state funds.

We oppose vouchers because they harm religious liberty. Religious schools, which receive the overwhelming majority of taxpayer-funded vouchers, not only require all students to receive religious instruction and attend religious services, but also integrate their religious beliefs in much of what they teach students. Beyond harming religious liberty, vouchers lead to taxpayer-funded discrimination. For instance, a voucher program in Milwaukee systematically excludes students with disabilities from participating and segregates them in public schools in disproportionate numbers.<sup>1</sup> Furthermore, many religious schools that receive taxpayer-funded vouchers discriminate in hiring and admissions,<sup>2</sup> which would result in the government funding that supports discrimination.

## ***II. Supporting a Healthy School Climate***

### **A. Accountability for “Push-Outs”**

The discussion draft does not adequately address accountability for school “push-outs,” a trend in which our country’s most vulnerable students—most often low-income students, students with disabilities, 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

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<sup>1</sup> See Letter to Tony Evers, State Superintendent, Wisc. Dep’t of Pub. Instruction, from U.S. Dep’t of Justice, Civil Rights Div., Educ. Opportunities Section, Apr. 9, 2013, *available at* [https://www.aclu.org/files/assets/04\\_09\\_13\\_letter\\_to\\_wisconsin\\_dpi\\_0.pdf](https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf).

<sup>2</sup> See, e.g., Rebecca S. Green, “Jury Sides with Fired Teacher,” *Fort Wayne Journal Gazette*, Dec. 20, 2014 (the school received taxpayer-funded vouchers for 51 students in 2012-2013 and 158 students in 2013-2014. <http://indianapublicmedia.org/stateimpact/sortable-table-voucher-distribution-private-school/>); Kim Severson, “Backed by State Money, Georgia Scholarships Go to Schools Barring Gays,” *N.Y. Times*, Jan. 20, 2013;

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 disabilities, 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.<sup>3</sup>

In the discussion draft, states are left to address push-outs on their own without federal accountability. We believe, however, that this is an important area requiring federal oversight and that states should be incentivized to take meaningful steps to prevent push-outs. 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 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 most recently authorized form of the ESEA requires consideration of schools’ graduation rates. Unfortunately, this accountability measure has not been adequately enforced. Similarly, Option 2 of Section 1111 of the Chairman’s discussion draft requires states to identify secondary school graduation rates, but it does not identify federal accountability mechanisms that would move states to then focus on those schools with lower graduation rates. To address this lack of enforcement, the ACLU recommends:

- Requiring federal 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**

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<sup>3</sup> David N. Figlio “Testing, Crime and Punishment,” *Journal of Public Economics* (Vol. 90 Iss. 4-5, May 2006), available at <http://www.nber.org/papers/w11194.pdf>.

We appreciate that Section 2103 and Section 4105 of the discussion draft provide the option of using funds for developing and implementing inclusionary disciplinary practices, such as School-wide Positive Behavioral Interventions and Supports (SWPBIS). 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. Excessive disciplinary measures impact African American, Latino, and students with disabilities disproportionately and are particularly harmful for African American and Latino girls.<sup>4</sup> 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 SWPBIS, which have demonstrated effectiveness in combating discipline problems while supporting a safe and productive learning environment. The discussion draft recognizes the benefits of SWPBIS and offers schools the option of using Title II funds and Title IV funds for training teachers in practices like SWPBIS and implementing SWPBIS practices. While we support such provisions, dedicating funding for inclusionary discipline practices would strengthen the bill. More can be done to incentivize states to adopt PBWIS. To further provide teachers with safe and effective means to promote students' positive behavior, the ACLU recommends:

- Dedicating 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 SWPBIS practices;
- Requiring the Department of Education to institute an office responsible for developing and supporting the implementation of SWPBIS practices; and
- Incorporating into ESEA reauthorization, the *Positive Behavior for Safe and Effective Schools Act* (H.R. 3165 in the 112th Congress), 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**

The discussion draft misses an important opportunity to address 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;

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<sup>4</sup> Kimberle Williams Crenshaw, Priscilla Ocen and Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, African American Policy Forum and the Center for Intersectionality and Social Policy Studies at Columbia Law School (Feb. 4, 2015), available at [http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=613546](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=613546).

- Continuing the requirement that states and LEAs report the total number of incidents in which corporal punishment is imposed upon students, preK-12; 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 discussion draft also fails to address the use of unnecessary restraints and seclusion, which is extremely dangerous for the students who are subjected to them. Most children subject to restraint and seclusion are students with disabilities enrolled in special education. According to the 2012 U.S. Department of Education’s Civil Rights Data Collection, though students with disabilities represent 12 percent of the student population, they made up 75 percent of the cases in which physical restraint or seclusion was used.<sup>5</sup> The GAO has documented 20 deaths of children from restraints, and many more serious injuries. The GAO has also found that hundreds of allegations of abuses and deaths in schools are attributable to the improper use of restraint and seclusion against students. The total of deaths and injuries nationwide cannot be calculated, due to a lack of reporting requirements and poor data. The total of deaths and injuries nationwide cannot be calculated, due to a lack of reporting requirements and poor data.

Students should never be subject to restraint and seclusion unless there is an immediate threat of physical injury and less restrictive methods will not resolve the situation. To prevent the continuance of this ineffective and dangerous tactic, the ACLU recommends:

- Prohibiting the use of restraint and seclusion against students except where there is an imminent threat of physical injury and less restrictive methods will not resolve the situation;
- Requiring that restraint and seclusion may only be imposed by trained professionals;
- Enforcing compliance by LEAs in reporting to the CRDC the required data elements related to restraint and seclusion;<sup>6</sup>
- 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.

### ***III. Background Checks***

We appreciate that this discussion draft does not include a federally mandated criminal background check requirement. Such a federal mandate for school employees would create a burdensome and redundant layer of bureaucracy: All 50 states and the District of Columbia currently require extensive background checks for school teachers, and 43 states require background checks for non-teaching

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<sup>5</sup> U.S. Dept. of Education Civil Rights Data Collection, *Data Snapshot: School Discipline* (Mar. 21, 2014), available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

<sup>6</sup> Many large urban school districts – for example, the Los Angeles Unified School District (2011 enrollment of 595,849 students ) and the City of Chicago School District (2011 enrollment of 400,579 students) – report no incidents of restraint and seclusion to the CRDC, despite the reality on the ground of the practices being employed with frequency.

school employees. Background checks are essential to help ensure student safety, but the conduct of those checks should be left to state and local agencies.

However, Section 4103 of this draft does allow Title IV funds to be used for state or local background check practices that would categorically exclude from employment any individual with a felony or other criminal conviction, thereby incentivizing a practice that could inadvertently exclude an extremely broad group of qualified individuals from ever finding employment in one of our economy's largest sectors. Categorical exclusion would also have a disproportionate impact on African Americans and Latinos, who are arrested and incarcerated at substantially higher rates than whites, not only for lesser crimes but also for crimes committed at equal rates by white people.<sup>7</sup> Furthermore, criminal history databases and registries are often riddled with errors, and a full 50 percent of records in the FBI database – heavily relied on nationwide – do not include information on the final dispositions of cases.<sup>8</sup>

Therefore, any applicant for school employment who is subject to a background check that reveals a criminal history should receive an individualized assessment that considers all relevant facts and circumstances, consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) as well as the U.S. Equal Employment Opportunity Commission Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions. Such assessments will help ensure that legitimate and well-intentioned concern for our children's safety does not lead to overbroad exclusions that undermine due process and prevent the employment of qualified individuals in a wide range of teaching and non-teaching positions.

Finally, initial background checks, individualized assessments, and appeals should all be concluded in a timely manner – ideally in 45 days or less. Such timeliness will help ensure that job applicants are not left in limbo, and schools are able to staff essential positions promptly and responsibly.

#### ***IV. Promoting School Diversity and Providing Equal Access to High-Quality Schools***

##### **A. Preventing Racial Re-segregation in our Schools**

The discussion draft does not sufficiently address the need to prevent racial re-segregation in our schools. Due 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.

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<sup>7</sup> See, e.g., ACLU, *The War on Marijuana in Black and White* (2013), available at <https://www.aclu.org/criminal-law-reform/war-marijuana-black-and-white-report>.

<sup>8</sup> U.S. Dept. of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) at 3.

## **B. Strengthening the Right and Ability to Transfer Out of Failing Schools and Failing Districts**

Both Section 1114 of the discussion draft and the existing ESEA structure provide a student who attends a failing school the right to transfer to a non-failing school. Unfortunately, the provision currently in the ESEA has not succeeded in ensuring that students have access to a high quality education due to administrative hurdles and lack of transportation, and because the right provides only for transfers within a given school district 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 ESEA, 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 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 intra-district resource equity has been substantially eroded by later revisions to the statute, and there is currently no requirement for resource equity *between* districts. While Option 2 of Section 1111 of the discussion draft requires per pupil expenditure reporting, the draft does not require states to then remedy any disparities. To provide all children with an equal opportunity to receive a high-quality education, the ACLU recommends:

- Strengthening the Title I requirement that intra-district 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.

## ***V. Assistance for Schools and Districts in Need of Improvement***

The current ESEA structure punishes schools and districts that do not meet their AYP goals. This structure hampers schools which are frequently under-resourced to begin with, harming the very

students it is intended to help. We appreciate that the discussion draft moves away from ESEA's harmful punitive funding structure. To properly encourage schools to improve their performance and to ensure that struggling schools receive the support they need, 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; and
- Rewarding schools and districts that make progress toward meeting goals.

#### **VI. *Assessments***

We appreciate that Section 1111 and Section 1112 of the Chairman's draft attempts to provide flexibility to school districts in their efforts to assess academic performance. Aside from standardized tests, performance-based assessments can serve a valuable role in measuring student achievement. However, in order for alternative measures of academic achievement to be meaningful, districts should not be able to opt out of statewide assessments unless they can demonstrate that their tests will deliver comparable data. To ensure that states' assessment measures are best serving the interest of students, the ACLU recommends:

- Maintaining the Secretary of Education's federal oversight and accountability role and ensuring that the Secretary has the authority to set the floor for assessment standards;
- Permitting growth as a measurement in determining school ratings; and
- Permitting multiple measures of student achievement.

#### **VII. *Prohibiting Discrimination Based on Sexual Orientation or Gender Identity***

The discussion draft completely ignores the needs of lesbian, gay, bisexual, or transgender (LGBT) students. Reauthorization of ESEA presents the opportunity to provide critical protections to students who are, or are thought to be 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:

- Incorporating into the ESEA reauthorization the *Student Non-Discrimination Act* (S. 439), 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 on Title IX.

#### **VIII. *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, the Office for Civil Rights (OCR) has made significant improvements to its data collection efforts, including expanding requiring reporting data on school discipline practices, like corporal punishment and restraint and seclusion, as well as on the number of allegations of harassment and bullying based on sexual orientation. The discussion draft, however, contains no requirement for sufficient federal reporting on school discipline. As ESEA is reauthorized, there are many areas in which a more comprehensive



and detailed collection of data is needed. We urge Congress to require annual reporting on school discipline by every school district and that the data be disaggregated and made publically available.

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 excused and unexcused 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 expand required data collection on information on the rates of in-school suspension; out-of-school suspension; expulsion; excused and unexcused absences, voluntary transfers to disciplinary alternative schools or programs; and other forms of punishment, including the incidents of corporal punishment and restraint and seclusion;
- Requiring all public schools, disciplinary alternative schools, and charter schools to collect data on the rates of school-based arrests, the instances of use of force by security staff against students, the types of law enforcement in schools, and the reasons for referrals to law enforcement or the juvenile justice system;
- 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 subgroups 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;
- Requiring schools, in addition to LEAs, to report the existence of a civil rights coordinator who is responsible for coordinating efforts to comply with and carry out their responsibilities under federal law and to report whether those civil rights coordinators receive training on civil rights laws; and
- Collecting and disaggregating data 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.

### ***IX. Maintaining Federal Oversight***

Overall the Chairman's draft would significantly scale back both the scope and the extent of federal authority over States and school districts. However, a strong federal role has historically

been necessary to protect civil rights. Federal funding must be attached to robust, ambitious and unequivocal demands for higher achievement, increased high school graduation rates, closing the racialized achievement gap and incentivizing supportive, not punitive, measures to improve learning environments and ensure the academic achievement of all young people.

We hope you will consider these recommendations and integrate them into the current ESEA proposal. If you have any questions regarding these ESEA priorities, please contact Jennifer Bellamy, Legislative Counsel, at [jbellamy@aclu.org](mailto:jbellamy@aclu.org) or (202) 715-0828.

Sincerely,



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Acting Director



Jennifer Bellamy  
Legislative Counsel

cc: Members of the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP)