

**AMERICAN BAR ASSOCIATION****COMMISSION ON YOUTH AT RISK  
COMMISSION ON HOMELESSNESS AND POVERTY****RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges federal and state legislatures to pass  
2 laws, and national, state, and local education agencies to implement policies:

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- 4 1. To help secure the right of every child to a high quality education, including, specifying the  
5 elements of that right and fostering its consistent provision to all by schools and local, state,  
6 and federal agencies;
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  - 8 2. To improve implementation and enforcement of existing provisions of law and policy  
9 designed to enable students to obtain elements of a high quality education;
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  - 11 3. To enable and assist students and their parents and their representatives in participating in  
12 decisions affecting their right to quality education and in understanding and utilizing existing  
13 provisions of law and policy and remedying deficiencies in their implementation and  
14 enforcement through administrative and judicial relief; and
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16 FURTHER RESOLVED, That the American Bar Association urges state and local bar  
17 associations, and attorneys to:

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- 19 1. Seek improvements in state and federal law to protect and advance the right to high quality  
20 education, including the enactment of remedies to secure that right administratively and  
21 judicially;
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  - 23 2. Make legal representation available to parents, students, and organizations seeking to enforce  
24 provisions of state and federal law related to the right to high quality education, in  
25 administrative and judicial proceedings; and
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  - 27 3. Provide community legal education and other assistance to parents, students, community  
28 organizations, schools, and school systems to aid in understanding and obtaining improved  
29 implementation of laws that protect and advance the right to high quality education.

## REPORT

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

“Today” was 1954 when a unanimous Supreme Court wrote these words in *Brown v. Board of Education*.<sup>1</sup> Few statements about education are more frequently quoted than this paragraph. In 2009, after fifty-five years of social and economic change, recognition of education’s importance for our well-being has only grown.<sup>2</sup> That these words continue to resonate reflects both (a) the widespread popular agreement that every child has a basic right to a high-quality education – one that will properly prepare him or her to graduate from high school well-qualified for productive and meaningful work at a living income, higher education, and active participation in family, community, and civic life and that this must be equally available to all children, not just to the most advantaged – and (b) the widespread recognition that we are still far from securing that basic right on a consistent basis for all children, and particularly for children from low-income families, children of color, children with disabilities, children whose primary language is not English, children in foster care, and children from families that are homeless.<sup>3</sup>

Securing this basic right to a quality education, particularly for those most at risk of its denial, requires several, *coordinated actions, by legislative bodies and education agencies*, that form the

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<sup>1</sup> 347 U.S. 483, 493 (1954). The underlying recognition in this quote that education is not only among the basic human rights, but is fundamental to the advancement and exercise of other rights, is also evident in the 1948 Universal Declaration of Human Rights, wherein the General Assembly of the United Nations called upon all member countries “to cause it to be disseminated, displayed, read and expounded *principally in the schools and other educational institutions.*” (Emphasis added.)

<sup>2</sup> See for example, pronouncements of Barack Obama, such as this: “At this -- at this defining moment in our history, America faces few more urgent challenges than preparing our children to compete in a global economy. The decisions our leaders make about education in the coming years will shape our future for generations to come. . . .” Transcript of Obama, A PLAN FOR EDUCATION: REMARKS IN OHIO, September 9, 2008 (from Chicago Sun Times), [http://blogs.suntimes.com/sweet/2008/09/obama\\_education\\_speech\\_in\\_ohio.html](http://blogs.suntimes.com/sweet/2008/09/obama_education_speech_in_ohio.html). Similarly, George W. Bush’s last policy speech as President noted that it was on the same subject as his first -- education. Alyson Klein, *Bush calls for resolve on NCLB renewal*, EDUCATION WEEK, January 8, 2009, [www.edweek.org/ew/articles/2009/01/08/18nclb.h28.html?r=1133167622](http://www.edweek.org/ew/articles/2009/01/08/18nclb.h28.html?r=1133167622)

<sup>3</sup> A 2003 survey of Colorado voters conducted by Ciruli Associates for the Piton Foundation and described at [www.ciruli.com/polls/childhooded303.htm](http://www.ciruli.com/polls/childhooded303.htm), for example, found that 96% believe children have a right to a high quality. See also Lake Research Partners and The Tarrance Group, RE: RECENT POLL FINDINGS ON NATIONAL SURVEY (10/11/06), [www.publiceducation.org/pdf/Publications/National\\_Poll/2006\\_PEN\\_Public\\_Poll.pdf](http://www.publiceducation.org/pdf/Publications/National_Poll/2006_PEN_Public_Poll.pdf). Similarly, there is near consensus nationally that closing the achievement gap between white students and black and Hispanic students is of great importance and that it can be done while maintaining high standards for all children. See also Lowell C. Rose and Alec M. Gallup, *The 38th Annual Phi Delta Kappa/Gallup Poll Of the Public’s Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, September 2006, p. 41 at 46-47; available at [www.pdkmembers.org/members\\_online/publications/e-GALLUP/kpoll\\_pdfs/pdkpoll38\\_2006.pdf](http://www.pdkmembers.org/members_online/publications/e-GALLUP/kpoll_pdfs/pdkpoll38_2006.pdf).

# 118A

contents of this recommendation: (1) clear articulation of the core elements of that right in terms of the quality education that children and their families should be able to count on; (2) an expectation that schools will provide those elements of the right to each child and will have the resources to do so; (3) consistent focus, in the various functions of district-, state-, and federal-level education agencies on ensuring that schools are providing those elements of a quality education; (4) better implementation and enforcement of those provisions of existing law that advance those elements of quality education; and (5) a stronger voice for youth and their parents at the front end in shaping the nature and quality of the educational programs they get.

The recommendation also identifies the kinds of *actions that attorneys and bar associations can and should appropriately take* to further these ends. The role of attorneys in securing high-quality education on an equal basis for all was of course evident in *Brown* and has continued, in the drafting of education laws and policies seeking to effectuate it, in both systemic and individual challenges to its denial, and in community legal education to help parents, students, community, organizations, and schools and school systems to understand their rights and obligations under laws related to quality education.<sup>4</sup>

NOTE: This recommendation and its companion on the right to remain in school are strongly related. The goals of that recommendation in seeking to reduce school dropouts and truancy and increase high-school graduation rates will be advanced by ensuring that we provide every child with the kind of high-quality, meaningful education that will make him/her want to be there. A very high proportion of students who ultimately drop out go first go through a growing sense of academic failure, boredom, and disconnection, evident in failing courses and grade retentions that further their isolation from their peers.<sup>5</sup> At the same time, the primary purpose of ensuring a high-quality educational program is not to prevent dropouts. Rather, the primary purpose of staying in school should be to get a good education.

## 1. Securing and advancing that right for every child

The recommendation urges federal, state, territorial, and tribal legislatures to pass laws, and national, state, and local education agencies to implement policies, that advance and secure the right to a high-quality education for every child, articulate the elements of that right, and align school, district, and state and federal agency practices with providing the elements of that right consistently.

**a. Articulating the elements of that right.** For the right to a high-quality education to be meaningful, its contours and meaning must be understood. Turning the unexceptionable belief in

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<sup>4</sup> Portions of this report have been adapted from Paul Weckstein and Stephen J. Wermiel, *The Need for Equal Opportunity and a Right to Quality Education*, 35:3 HUMAN RIGHTS 21 (ABA, Summer 2008); and Paul Weckstein, Center for Law and Education, CLOSING THE CIRCLE ON THE RIGHT TO QUALITY EDUCATION (forthcoming).

<sup>5</sup> Melissa Roderick, CLOSING THE ASPIRATIONS-ACHIEVEMENT GAP IMPLICATIONS FOR HIGH SCHOOL REFORM: A COMMENTARY FROM CHICAGO (New York, NY: MDRC 2006); Office Of Multiple Pathways To Graduation, The New York City Department Of Education, MULTIPLE PATHWAYS RESEARCH AND DEVELOPMENT, SUMMARY FINDINGS AND STRATEGIC SOLUTIONS FOR OVERAGE, UNDER-CREDITED YOUTH (2006). See also Russell W. Rumberger, *Why Students Dropout of School*, in Gary Orfield (Ed.), DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS, 131-155 (Cambridge, MA: Harvard Education Press, 2004).  
[http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger--Why%20Students%20Drop%20Out%20of%20School%20\(2004\).pdf](http://education.ucsb.edu/rumberger/internet%20pages/Papers/Rumberger--Why%20Students%20Drop%20Out%20of%20School%20(2004).pdf)

every child's right to a high quality education into a living reality that can be secured depends upon making clear to families what they can expect their school to provide their children and upon school systems understanding what they are expected to provide, so that no child is left behind.

Rather than specify the elements of this right in the recommendation itself, the recommendation calls on appropriate legislative bodies and education agencies to do so through deliberative and democratic processes (see also 5. below). These elements should be the things that every family should be able to count on when it sends its child off to school. And in the context of every state already having adopted, under law, a set of academic standards for what it expects *all* students to know and be able to do,<sup>6</sup> these should include the elements of a quality education program that students need in order to attain those proficiencies. In other words, the standards for what students should achieve are a touchstone, but not a substitute, for then defining the quality elements of what a school should provide to enable students to get there.

It is expected that these legislative and administrative bodies, in specifying what a high-quality academic program entails, would address the issue of quality in the *central components* that constitute an educational program, including curriculum (what students are taught), instruction (how they are taught it), and individual assistance (attending to each child in the learning process), for which the report here provides further background. While the recommendation does not attempt to identify all the areas that a core set of program elements would address, let alone to delineate any of the specific core characteristics, indicators, or elements of quality that these bodies would articulate within each such area, these three broad areas are clearly at the crux of what students actually get in school. If we expect all students to learn certain knowledge and skills, then those things must be taught, and they must be taught well and with attention to the learning needs of the individuals being taught. The development of challenging standards for what all students should know and be able to do is incompatible with those traditional forms of curriculum tracking in which intellectually challenging courses are reserved for only some students while others get much more limited academic content.<sup>7</sup> Indeed, much work is going into assuring that curriculum is “aligned” with state and local standards for what students should learn.<sup>8</sup> At the same time ensuring a high-quality curriculum is more than a matter of seeing that everything in the state standards is “covered” somewhere, or of mechanically developing curriculum units that have a one-to-one correspondence with each standard.<sup>9</sup> It requires an

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<sup>6</sup>Every state, as a condition of receiving federal education funds (and often a matter of state law as well), now identifies challenging knowledge and skills that all students in the state should master – though these state standards vary both in their rigor and in the extent to which they emerged from a widely democratic and deeply deliberative process. See Ivor Pritchard, *JUDGING STANDARDS IN STANDARDS-BASED REFORM* (Council for Basic Education 2000); American Federation of Teachers, *SIZING UP STATE STANDARDS 2008* (2008), available at [www.aft.org/pubs-reports/downloads/teachers/standards2008.pdf](http://www.aft.org/pubs-reports/downloads/teachers/standards2008.pdf). That qualification is even more applicable to the way in which states made decisions as to what level of mastery of these standards constitutes “proficiency” or “advanced” mastery.

<sup>7</sup>See Jeannie Oakes, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (1985); Linda Darling-Hammond, *THE RIGHT TO LEARN* (San Francisco: Jossey-Bass, 1997).

<sup>8</sup>See, for example, Center on Education Policy, *FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT* (March 2006); Council of Chief State School Officers, *WHAT ARE THE SURVEYS OF ENACTED CURRICULUM (SEC)?*, at [www.ccsso.org/projects/surveys\\_of\\_enacted\\_curriculum/](http://www.ccsso.org/projects/surveys_of_enacted_curriculum/); Mid-continent Research for Education and Learning (McREL), *Resources for Key Question #4: How can we align our district's curriculum with our standards?*, KEYS TO LEARNING, at [www.mcrel.org/keystolearning/Default.aspx?tabid=2191](http://www.mcrel.org/keystolearning/Default.aspx?tabid=2191).

<sup>9</sup> *Id.*

# 118A

overall curriculum that systematically addresses the standards in ways that are sufficiently rigorous, engaging, well sequenced (in terms of building on existing knowledge) and developmentally appropriate for all students to make sense of and master.

If the first imperative of expecting all students to learn something is to teach it (curriculum), the second is to teach it well (instruction). There are many paths to effective teaching. But research, both into teaching and into how people learn, offers insight. For example, consistent with the growing body of research on how the mind acquires new knowledge and skills,<sup>10</sup> and based on analysis of what accomplished adults do in their work, researchers have developed a set of characteristics of “authentic” learning – namely using disciplined inquiry to create new knowledge about real-world matters – and then found that teachers who systematically engage their students in learning activities with those characteristics produce dramatic gains in achievement and close achievement gaps between student groups.<sup>11</sup>

Well-qualified teachers and effective, sustained professional development for those teachers are both corollaries of ensuring effective teaching; in both cases an emphasis on both content knowledge and effective instructional methods is important.<sup>12</sup> Research has shown that certain types of professional development can positively impact student achievement -- for example, professional development in working with different student populations, in higher-order thinking skills, and in laboratory skills.<sup>13</sup> Too often, both the qualifications used for selecting teachers and the professional development programs used to support them are not sufficiently attuned to the qualities of effective teaching. Adequate instructional materials, supplies, and equipment to teach the curriculum effectively are another corollary.

A third area to which a set of core quality elements needs to be addressed is individual attention - consonant with the recognition of rights as belonging to the individual, with principles of good teaching, and with the reality of students’ learning needs. First, effective individual attention is needed both in terms of teachers quickly identifying in the course of the school day when a

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<sup>10</sup>See National Research Council (John D. Bransford, Ann L. Brown, and Rodney R. Cocking, editors), *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL*, National Academy Press (1999).

<sup>11</sup>Fred M. Newmann and Gary G. Wehlage, *SUCCESSFUL SCHOOL RESTRUCTURING: A REPORT TO THE PUBLIC AND EDUCATORS* (Wisconsin Center for Education Research, University of Wisconsin-Madison, 1995), jointly distributed by American Federation of Teachers, Association for Supervision and Curriculum Development, National Association of Elementary School Principals, and National Association of Secondary School Principals. “For example, an average student who attended a ‘high authentic instruction’ school would learn about 78 percent more mathematics between grades 8 and 10 than a comparable student in a ‘low authentic instruction’ school.” *Successful Id.*, at 25. Moreover, authentic pedagogy was found equally effective for students regardless of gender, SES, race, and ethnicity, and it reduced the impact of SES on achievement gain. Further, students in such schools achieved high marks not only on performance assessments designed to measure these higher-level skills but on traditional tests as well. For example, “Regardless of social background, an average student would increase from about the 30th percentile to about the 60th percentile as a result of experiencing high versus low authentic pedagogy.” *Id.* at 22. See also Fred Newmann and Associates, *AUTHENTIC ACHIEVEMENT: RESTRUCTURING SCHOOLS FOR INTELLECTUAL QUALITY* (1996). See also Harold Wenglinsky, Educ. Testing Serv., *HOW TEACHING MATTERS: BRINGING THE CLASSROOM BACK INTO DISCUSSIONS OF TEACHER QUALITY* (2000), available at [www.ets.org/Media/Research/pdf/PICTEAMAT.pdf](http://www.ets.org/Media/Research/pdf/PICTEAMAT.pdf); Harold Wenglinsky, *How Schools Matter: The link between teacher classroom practices and student academic performance*, EDUCATION POLICY ANALYSIS ARCHIVES (EPAA), 10(12) (2002), available at <http://epaa.asu.edu/epaa/v10n12/>.

<sup>12</sup>See Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUCATION POLICY ANALYSIS ARCHIVES 8(1) (January 1, 2000); National Commission on Teaching & America’s Future, *WHAT MATTERS MOST: TEACHING FOR AMERICA’S FUTURE* (1996).

<sup>13</sup>Harold Wenglinsky, *supra*.

student is experiencing difficulty mastering a particularly learning goal or standard and knowing how to address that student's need so that s/he does not fall behind, and in terms of the school's more systematically having in place methods for providing more intensive, effective assistance for students who have fallen behind so that they can catch up. Schools receiving Title I funds are obligated to provide both kinds of assistance.<sup>14</sup> Second, there are students who come to school with particular kinds of challenges and barriers to learning which, if not effectively attended to, will prevent them from mastering the skills and knowledge all children are expected to learn. This includes students with disabilities and students with limited English proficiency (including immigrant students).<sup>15</sup> It also includes students whose life circumstances can pose difficulties for ensuring consistent, high-quality education unless the school is effectively paying attention – in particular, mobile students, including students from homeless families and migrant families, and children in foster care. Finally, *all* students need and deserve individual attention in school, even those who are meeting minimum standards for proficiency. Title I requires a focus on enabling all students to reach “proficient and advanced levels” of mastery of the state standards, but little attention has been paid to implementing the law in regard to the latter. A school program that stops paying attention to a student's ongoing learning needs once s/he has achieved minimal proficiency is not, at that point, a quality education (particularly when state law compels the student to attend).

While articulating core program elements that every child and family should expect from their school, along with the expectation that gaps will be remedied, is central to securing the right to quality education and ensuring that the promise of reform is real, those expectations need not be established in a vacuum of law. As identified in section 2 and 3 below, there are a variety of existing legal requirements that can help support the need to provide such elements of quality.

**b. Schools consistently provide those elements to all.** The recommendation urges legislatures and education agencies to pass laws and implement policies that ensure that schools consistently provide elements of a high-quality education program to all children. This requires both establishing their responsibility for providing those elements and ensuring their capacity to do effectively.

Articulating on paper the elements of a high-quality education to which students are entitled is obviously not enough. The school's obligation to provide those elements to every student must be put at the front and center of its attention and activity. Indeed doing so will speak to a deeply experienced need in the context of current reform efforts (including No Child Left Behind) – the perception that schools are being asked to dramatically boost student achievement, as measured on state tests, and are being motivated to do so by fear of identification as falling short, but without adequate identification of and attention to what schools need to *do* to foster that achievement in ways that are real and sustained, in terms of improvements in the quality of educational practice within the school. So the articulation of those elements of program quality and the required focus on schools' providing them are a key vehicle for translating school reform into reality for students and for schools (and for halting counter-productive efforts to look good in the absence of knowing how to bring about real change – for example, through teaching to the specifics of the tests rather than the skills and knowledge that the tests are supposed to sample, through increasing pass rates through lowering the definition of proficiency, or through excluding some of the students who would lower the proficiency rates).

<sup>14</sup> See section 4 below for existing legal support for this and other aspects of individual attention discussed here.

<sup>15</sup> *Id.*

The nation's school systems are undertaking, with varying degrees of success, a variety of educational reforms aimed at raising overall achievement and closing achievement gaps for particular groups of students. These reforms employ both top-down strategies for holding schools accountable for their students' achievement and bottom-up strategies for building the capacity of schools and their staffs. A rights-based approach focusing on every student's right to a high-quality education is a critical lens for making school reform work. Otherwise, both top-down accountability strategies and bottom-up capacity building strategies for school reform fail to be rigorous in answering, with sufficient immediacy and reality, the question that is most important -- how will the reforms actually result in providing the children now in school with a high-quality education? Strategies work to the extent that they can answer that question, for each child and his or her family, in ways that are both clear and realistic. Since it is ultimately children, not schools, who achieve, and at the individual level no child is "entitled" to a certain level of achievement, this right must therefore be understood in terms of the elements of a high-quality education to which the child is entitled in order to enable that child to achieve.

This portion of the recommendation also speaks to school capacity. On the one hand, the child's right to a high-quality education must not be conditioned on waiting for better funding. Indeed, establishing that right and its elements as requirements should help ensure adequate funding.<sup>16</sup> At the same time, it is also obvious that commitment, at local, state, and national levels, to that right entails commitment to ensuring that schools have the capacity to implement it. Thus the recommendation encompasses the need for concentrated efforts to assure that schools have the capacity – the resources, information, and assistance – needed to fulfill that obligation. Funding in itself is no guarantee of high-quality practices, but resources do matter in affecting whether the school has the capacity to organize itself around consistent, high-quality teaching and learning, including assuring the necessary teacher skills and intensive staff development,<sup>17</sup> along with sufficient time within the school day for staff to attend to students' learning needs.

**c. Federal, state, and district agency practices fostering schools' implementation of those core elements of the right to quality education.** The recommendation urges passage of laws and implementation of policies that focus federal, state, and school district agency practices on fostering schools' implementation of core program elements of the right to a high quality education for all students.

Schools operate within a structure of oversight and assistance provided by school districts, state departments of education, and the U.S. Department of Education. Those local, state, and federal agencies carry out a variety of functions – such as developing subject-matter standards, issuing

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<sup>16</sup>For example, one of the most common approaches in efforts to implement the state constitutional obligation to provide a thorough and efficient education involves a costing-out study based on determinations of what components are needed in the school to meet that mandate. Without an understanding of what it takes to fulfill the mandate, decisions about how much to increase school funding (or how much it can be cut) become arbitrary in relation to the need and more vulnerable to other political considerations. For a sample description of a costing out study, see Chambers, et al. A PROPOSAL FOR DETERMINING ADEQUATE RESOURCES FOR NEW YORK PUBLIC SCHOOLS" (American Institutes For Research and Management Analysis and Planning, Inc. 11/27/02), [www.cfequity.org/costingoutsummary.pdf](http://www.cfequity.org/costingoutsummary.pdf).

<sup>17</sup>See, for example, Johnson, S. M., Kardos, S. M., Kauffman, D., Liu, E. & Donaldson, M. L., *The Support Gap: New Teachers' Early Experiences in High-Income and Low-Income Schools*, EDUCATION POLICY ANALYSIS ARCHIVES, 12(61) (October 29, 2004), finding weaker systems of support for new teachers and less evidence of complete, aligned, flexible curricula in low-income schools.

regulations and policy guidance, compliance monitoring and enforcement, program quality evaluation and improvement assistance, student assessment, pre-service preparation of teachers and administrators, in-service professional development, curriculum resources, and the approval and oversight of program grants. Full and consistent implementation of every child's right to a high-quality education very much depends upon whether each of these agency functions fosters or hinders the delivery at the school level of the elements of a high-quality education to all children. This is largely a matter of focus, in structuring each agency function so that it is sufficiently attuned to the elements of quality and to assuring them for all students on an equitable basis -- in terms of its intensity of focus, clarity, forcefulness, helpfulness, attention to relevant research, accurate attention to legal requirements for that area of school practice, attention to the nature of common implementation issues relevant to that area, etc. It is also a matter of resources, in terms of having sufficient agency personnel to carry out each of those functions in that way across the entire district, state, or nation for which it is responsible. The extent of mismatch can be evident just by looking at the numbers of full-time equivalent staff devoted to a particular function, and then further revealed by looking more deeply on how those limited resources are used.<sup>18</sup>

These questions about agency focus and capacity have become more pointed as a result of No Child Left Behind and related state reforms, under which schools not making adequate yearly progress toward all students becoming proficient must put in place improvement plans, with required district and state assistance and oversight of increasing intensity and intervention as the lack of adequate progress persists. While there are examples of state and district success in promoting major gains in these schools, the overall picture is far from rosy, and it is widely acknowledged that district and state agencies often lack both the know-how and the personnel resources to provide the high level of quality assistance on reform that is needed.<sup>19</sup> This problem is exacerbated by the common misunderstanding of No Child Left Behind as promoting improvement through setting high standards and then using the fear of punishment for not meeting them as the main motivator of change, rather than focusing on understanding and implementing the kinds of core school-level practices that result in high achievement – i.e. the core elements of a high-quality education. Indeed, it is the inadequate focus on and capacity for instituting those elements in the first place, so that students do not get a high-quality education that results in high-achievement at the front end, that results in the unfortunate need for greater levels of intervention on the back end. The focus on every child's right to a high-quality education should help draw attention back to schools' delivery of the elements of that right, rather than assuming that success will come from relying on the achievement outcomes alone to drive or shame schools to do the right thing. As with the school-level elements of program

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<sup>18</sup>See, for example, Cross City Campaign for Urban School Reform, *A DELICATE BALANCE: DISTRICT POLICIES AND CLASSROOM PRACTICE* (2005). See Richard F. Elmore, *The Role of Local School Districts in Instructional Improvement*, in Susan H. Fuhrman (Ed.), *DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM*. (San Francisco: Jossey-Bass 1993); James P. Spillane, *STANDARDS DEVIATION: HOW SCHOOLS MISUNDERSTAND EDUCATION POLICY* (Cambridge: Harvard University Press, 2004); Chris Unger et al., *HOW CAN STATE EDUCATION AGENCIES SUPPORT DISTRICT IMPROVEMENT?: A CONVERSATION AMONGST EDUCATIONAL LEADERS, RESEARCHERS AND POLICY ACTORS*, The Education Alliance at Brown University (2008), and references therein, [www.alliance.brown.edu/pubs/csrqi/Symposium.pdf](http://www.alliance.brown.edu/pubs/csrqi/Symposium.pdf). For U.S. Department of Education issues, see section 4 *infra*.

<sup>19</sup>Angela Minnici and Deanna D. Hill, Center on Education Policy, *EDUCATIONAL ARCHITECTS: DO STATE EDUCATION AGENCIES HAVE THE TOOLS NECESSARY TO IMPLEMENT NCLB?* (2007). See also William J. Mathis, Great Lakes Center for Education Research and Practice, *NCLB'S ULTIMATE RESTRUCTURING ALTERNATIVES: DO THEY IMPROVE THE QUALITY OF EDUCATION?* (April 2009), available at [www.greatlakescenter.org/docs/Policy\\_Briefs/Mathis\\_Restructuring.pdf](http://www.greatlakescenter.org/docs/Policy_Briefs/Mathis_Restructuring.pdf).

# 118A

quality, the aligning of these agency-level functions to foster the realization of the right to a high-quality education can build upon existing provisions of law, addressed below.

## **2. Improving Implementation and Enforcement of Existing Provisions of Law Enabling Students to Obtain High-Quality Education; and**

## **3. Enabling Students And Parents To Participate In Decisions Affecting Their Right To Quality Education And In Understanding And Utilizing Existing Provisions Of Law And Policy And Remedying Deficiencies In Their Implementation And Enforcement Through Administrative And Judicial Relief**

The recommendation urges legislatures and education agencies to take action to improve implementation and enforcement of existing provisions of law and policy designed to enable students to obtain high-quality education – both by strengthening federal, state, and school district agency monitoring, implementation, and enforcement practices (#2), and by enabling and assisting students and their parents and representatives to participate in decisions affecting their right to quality understand such provisions and to pursue remedies for deficiencies in their implementation through administrative complaints and in the courts (#3). They are discussed together because they are interrelated.

**Existing Laws.** Various federal and state laws do require schools to provide some key elements of a high-quality education to certain students. But aside from gaps in their scope and coverage, implementation and enforcement is hampered by limited understanding of them at the school level; limited implementation and enforcement activity devoted to those provisions at the district, state, and federal agency levels; limited awareness by families of these requirements and of their rights to seek correction of violations through administrative complaints and lack of resources to do so effectively; and lack of authority or ability to seek enforcement in the courts.

The obligation to provide children with core elements of a high-quality education, including in the areas identified in #1 above, can be found in various laws,<sup>20</sup> covering at least some students:

- Schools receiving federal funds under Title I [the largest federal education program, first enacted in 1965 as part of the War on Poverty and most recently reauthorized as part of the No Child Left Behind Act of 2001 (NCLB)]<sup>21</sup> are required to provide their students with key elements of a high-quality education that will enable them to master those high standards. In particular, students must get an accelerated and enriched curriculum aligned with challenging state standards for all students, not a slower, watered down one.<sup>22</sup> Teachers must be "highly qualified," use effective instructional strategies, and regularly get intensive training on how to provide this kind of enrichment.<sup>23</sup> They must also recognize when individual students are having difficulty mastering any of the standards and intervene with timely, effective extra help.<sup>24</sup> How

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<sup>20</sup>While many of these laws were originally enacted before the widespread development of state standards for what all students should know and be able to do, their content or their interpretation by agencies has been updated in light of that development. [This summary is taken from Center for Law and Education, FACT SHEET: RIGHTS TO OBTAIN HIGH-QUALITY EDUCATION (2008).]

<sup>21</sup> The funds are distributed based on the numbers of low-income students in a school and are generally limited to those schools whose poverty rate is above the district average.

<sup>22</sup> 20 U.S.C. §§6314(b)(1)(B)(ii)(II) and 6315(c)(1)(C)(ii).

<sup>23</sup> 20 U.S.C. §§6314(b)(1)(B)(ii), (C), and (D) and 6315(c)(1)(C), (E), and (F).

<sup>24</sup> 20 U.S.C. §§6314(b)(1)(I) and 6315.

the school will do these things must be spelled out in a program plan that is jointly developed with the parents and based on an assessment of the school's current implementation of each of these requirements.<sup>25</sup> How the plan will be jointly developed must in turn be spelled out in a parent involvement policy, developed jointly with and agreed upon by the parents.<sup>26</sup> That policy must also spell out how various forms of required assistance to enable parent involvement will be provided, including effective training and information about the program (including reasonable access to the classroom), about their rights, and about how their own child is doing.<sup>27</sup>

- Under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1974, children with disabilities have the right to a program designed to help them meet the same high standards expected for all children. The written individualized education plan (IEP) required by these laws should spell out how the child's special needs will be addressed so that they do not pose a barrier to reaching those standards. For all students with disabilities except those with the most severe cognitive impairment, an IEP that sets lower goals and does not focus on these standards is usually illegal. Nor is it generally legal to assign a student with disabilities to a low-track regular program that does not teach to these standards. Parents must be fully involved in the evaluation of the child and in developing and approving the IEP.

- Under Title VI of the 1964 Civil Rights Act, prohibiting discrimination on the basis of race or national origin, children should not be placed in low-track classes disproportionately composed of students of one race if those classes have lower academic content and do not fully address the challenging subject matter the state in its standards has determined all students should learn.

- Under both Title VI and the Equal Educational Opportunities Act of 1974, children from a different language background with limited ability to write, read, or speak English must get a program effectively designed to overcome these language barriers so that they can meet the standards expected for all children.

- In schools that get federal aid under the Carl D. Perkins Career and Technical Education Act, students must have a program that integrates high-level academic and career/technical skills and that prepares them for four-year college as well as for work. The program must provide strong understanding and experience in "all aspects of the industry" students are studying – such as planning, finance, management, principles of technology, and labor issues – not just the skills to do a single job that may not be there when they graduate.<sup>28</sup> Students with special needs – because of low income, a disability, or limited English proficiency, or because they are trying to enter a field that is not traditional for their sex – have a right to the extra help necessary to

<sup>25</sup> 20 U.S.C. §§6314(b)(2) and 6318(b)(1) and (c)(3); 34 C.F.R. § 200.26(a)(ii).

<sup>26</sup> 20 U.S.C. § 6318(b)(1) and (c)(3)

<sup>27</sup> 20 U.S.C. § 6318(b)(1) and (c).

<sup>28</sup> These requirements are consistent with many of the principles for overall high-school reform that have subsequently emerged, such as integration of theoretical and experiential learning, breaking large schools into smaller schools or sub-schools with theme-based curriculum organized around a broad area of human endeavor or industry, such as health care or law and government, etc. Compare National Center for Research in Vocational Education, Erika Nielson Andrew (ed.), *AS TEACHERS TELL IT: IMPLEMENTING ALL ASPECTS OF THE INDUSTRY* (1996); Susan Imel, *Career and Technical Education in Urban Schools*, IN BRIEF, No. 9 National Dissemination Center for Career and Technical Education (2000); Paul Weckstein, *A Lever for Reform: Does NCLB Leave Any Place for Vocational Education?*, LEADERSHIP INSIDER, National School Boards Association (July 2004); with National Association of Secondary School Principals, *BREAKING RANKS II: STRATEGIES FOR LEADING HIGH SCHOOL REFORM* (2004); National High School Alliance, *A Call to Action: Transforming High School for All Youth* (2005), [www.hsalliance.org/CalltoAction.asp](http://www.hsalliance.org/CalltoAction.asp).

# 118A

succeed in the program as well as protection against discrimination.

- In many states, students are guaranteed rights to high-quality education which allows them to reach high standards -- under the state constitution<sup>29</sup> and state school-reform laws, as well as under the plans states and school districts adopt to get federal funds under NCLB.<sup>30</sup>

**Implementation Problems.** While these various provisions, when taken together, cover significant numbers of students, and particularly many of those most at risk of denial of quality education, they could and should be more clearly articulated in the law as establishing elements of a quality education that must be provided to all. The larger problem, however, is that these provisions are not well understood, supported, implemented, and enforced. More clearly articulating elements of a basic right to high-quality education in the law would help with that larger problem, but must be combined with other steps to make it a reality.

Just as there are important but largely unrecognized and unimplemented provisions of law regarding schools' obligations to provide key elements of a high-quality education, so too are there important provisions of law regarding local and state agency responsibilities both to enforce those obligations and to assist schools in meeting them. For example, regarding enforcement, local and state agencies must sign assurances that Title I and other Elementary and Secondary Education Act programs will be operated in conformity with all applicable laws, regulations, program plans, and applications.<sup>31</sup> Title I also requires each State, in its state plan, to describe how it will assist each local district and Title I school to develop the capacity to comply with the sections of the law that contain the key quality elements cited above, as well as how it will help each district and school provide additional educational assistance to individual student needing such help to achieve the State's standards, specific steps to ensure highly qualified instructional staff in Title I schools, and assurance that it will assist local districts in developing or identifying high-quality effective curricula aligned with State standards.<sup>32</sup> Other provisions throughout the Act impose state and district responsibilities for technical assistance in program improvement and for instructional staff development.<sup>33</sup>

Just looking at Title I alone, if the requirements of that law for providing enriched and accelerated curriculum aligned with state standards, effective instructional methods, and timely and effective individual assistance whenever students experience difficulty learning were being implemented, the rights of more than 17 million students in Title I schools,<sup>34</sup> particularly those in low-income neighborhoods, to a high quality education would be largely fulfilled. Similarly, under the civil rights requirements, all schools and education agencies would be constantly identifying and remedying every practice that is unnecessarily resulting in lower success for minorities and students with disabilities. Thus, the effective implementation and enforcement of

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<sup>29</sup>Litigation based on the education clauses found in state constitutions has, not surprisingly, varied in its success both in establishing the parameters of a state right to quality education in the state courts, and, when successful in that regard, in obtaining the reforms and resources necessary to implement that right.

<sup>30</sup>See below regarding the legal status of those plans.

<sup>31</sup>20 U.S.C. §§7844(a)(1) and 7846(a)(1).

<sup>32</sup>20 U.S.C. §6311(b)(8)(A)-(D). The State plan must also describe how the State will support collection and dissemination to districts and schools of effective parent involvement practices that are geared to lowering barriers to greater parent participation in school planning, review, and improvement. 20 U.S.C. §6311(d).

<sup>33</sup>See, for example, §§6316 and 6319.

<sup>34</sup>U.S. Department of Education, for 2006-07 school year. IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES (TITLE I, PART A) at [www.ed.gov/programs/titleiparta/index.html](http://www.ed.gov/programs/titleiparta/index.html).

these provisions is essential for fulfilling the right to a high-quality education.

Yet it is difficult to find schools where staff and parents are even aware of these requirements and their meaning, let alone Title I schools in which, as the law requires, parents have jointly developed with the school and then approved a parent involvement policy that spells out how the parents and school will jointly develop the school's plan for providing each of those required program quality elements (along with spelling out how the parents of the school will be provided the required training, information, and other assistance needed to fulfill this and other mandated roles) and have then used that policy to assess the state of each of the required program elements and jointly developed the plan in a way that fully addresses each program element, which is then actually implemented.<sup>35</sup>

As part of improving implementation of those key provisions of law, there needs to be thorough, objective analysis of the extent of such implementation, together with a focus on strengthening both statutory mechanisms for such implementation and enforcement by federal, state, and district agencies and mechanisms for parents, students, and their representatives to understand and seek implementation and enforcement of those key provisions. As noted in a discussion of how lack of federal attention to such provisions translates down to the school level,

Part of the reason that most schools and families are unaware of the important quality provisions summarized on the list above is that there is so little expectation at the federal level of responsibility for implementation and enforcement, or for ensuring that parents, teachers, and others have enough information to work on implementation themselves. Indeed the problem is difficult to document . . . because it is so endemic: 1. The Department of Education maintains virtually no data by which it could gauge, and inform the rest of us about, the implementation of key provisions summarized above. 2. Funded research studies of implementation, even when looking at the impact of federal programs, rarely analyze the extent to which the programmatic provisions were understood and implemented as intended. . . . 3. Congressional oversight and reauthorization hearings look at evaluation data on program participation and impact, anecdotes that relate to the program's usefulness, and experts' recommendations for change, but Congress almost never inquires into the degree to which the provisions it wrote actually were implemented. Thus implementation and enforcement are defined as a nonissue. . . . Congress continually rewrites the law without knowing whether the problems it seeks to address have persisted because the strategies it adopted last time don't work or because they were never adequately tried.<sup>36</sup>

The extensive coverage of Title I/No Child Left Behind on the U.S. Department of Education's web site<sup>37</sup> displays little attention to implementation of the school-level provisions of law containing the key quality program elements discussed above. This both results from and further contributes to the overwhelming sense that Title I is simply about the state setting

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<sup>35</sup> The lack of compliance is revealed, at least to a limited degree, in Timothy Speth, Steffen Saifer, and Gregory Forehand, Northwest Regional Educational Laboratory, PARENT INVOLVEMENT ACTIVITIES IN SCHOOL IMPROVEMENT PLANS IN THE NORTHWEST REGION, REL 2008- NO. 064 (October 2008). Cf. *Spillane*, STANDARDS DEVIATION: HOW SCHOOLS MISUNDERSTAND EDUCATION POLICY, supra at note 18.

<sup>36</sup> Paul Weckstein, "School Reform and Enforceable Rights to Quality Education," in Jay Heubert (ed.), LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY, pp. 306-389, at 317 (Yale University Press, 1999) (footnotes and paragraph breaks omitted).

<sup>37</sup> [www.ed.gov](http://www.ed.gov).

# 118A

standards, testing to assess whether students are making adequate progress toward meeting them, and imposing sanctions on schools where students do not – as opposed to recognizing that Title I is a *program*, in which \$14 billion is sent to schools each year<sup>38</sup> to assist them in implementing a core set of educational quality program elements so that students will achieve.

**Denial of remedy.** Exacerbating these problems, there are no explicit provisions regarding a private cause of action for families to enforce the key quality-oriented provisions of Title I, along with many of the other programs, above. For much of its 45-year history, the ability of affected students and their families to pursue remedies was assumed, by courts and others, as either implied by the Act or (more commonly in later years) available through use of 42 U.S.C. §1983.<sup>39</sup> However, the Supreme Court ruled in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that obligations imposed on recipients of federal funds in the Family Educational Rights and Privacy Act, governing access to students' records maintained by educational institutions receiving federal funds, were not enforceable by families under §1983, but only by the Department of Education, and since then it has been widely assumed that Title I is likewise not judicially enforceable by affected students and parents.<sup>40</sup> And in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court determined that the private right of action to enforce Title VI of the 1964 Civil Rights Act extended only to intentional discrimination under the Act and that the regulations requiring recipients of federal funds to either justify or modify actions which produce racially disparate impact could be enforced only by federal agencies, not by affected parties. Evisceration of rights by failure to provide a remedy for those whose rights are violated should not be tolerated, particularly a right of such importance as the right to a quality education.

These avenues to improved implementation and enforcement of key program quality provisions of law, both through agency action and through the actions of students, parents, and their representatives, are interrelated. The Court's conclusions in *Gonzaga* and *Sandoval* that legal obligations – under FERPA and by implication Title I and other education laws in the former case and under Title VI in the latter -- accompanying federal funds are judicially enforceable not by the affected students and their parents but only by the agencies distributing the funds make it all the more incumbent for those agencies to do a thorough job of enforcement, yet there has been no stepping up of federal agency action in response to those decisions. At the same time, the recognition that agency enforcement action is not alone sufficient to assure implementation was, prior to those decisions, long part of the basis for the need for private causes of action. Similarly, it must be recognized that these decisions did not suddenly cut off a steady flow of litigation to enforce the Title I quality requirements or the civil rights disparate impact requirements as applied to elements of educational quality; few such cases had been filed – and not because these laws were being well implemented or because parents did not care about the quality of their children's education, but because there has been so little in place to ensure that the affected parents and students understand these provisions and have the capacity to seek resolution and enforcement. Likewise, while federal law requires States to have administrative

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<sup>38</sup> In addition, a one-time infusion of \$13 billion more for Title I has been added by the American Recovery and Reinvestment Act of 2009 (the stimulus package).

<sup>39</sup> See, for example, *Valdez v. Grover*, 563 F.Supp. 129 (W.D.Wis. 1983); *Nicholson v. Pittenger*, 364 F.Supp. 669 (E.D.Pa. 1973).

<sup>40</sup> See, for example, *Ass'n of Community Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp.2d 338 (S.D.N.Y. 2003); *Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp.2d 910 (N.D. Ohio 2005). It is also reasonable to assume a similar result if private parties sought to enforce the Perkins Act requirements above.

complaint procedures and districts to make parents aware of them, few complaints are filed concerning the core program quality requirements above because of parent lack of awareness not only of the program requirements but of the complaint procedures themselves.<sup>41</sup>

Thus the recommendation calls for legislative and agency action to: (a) have education agencies step up and take more responsibility for meeting their legal obligations to monitor and enforce these provisions; (b) ensure that parents and youth have the information and assistance needed to understand the requirements and effectively pursue administrative complaints for redressing non-compliance; and (c) restore access by parents and students to the courts to enforce these quality-related provisions of law.

**Role of Youth and their Families and Representatives.** The ABA has long recognized the importance of youth and family voice in decisions affecting their destiny. This is both a matter of right and a matter of making decisions affecting their other rights more effective. This is particularly critical in the area of quality education, which is not a mechanically provided good or service but rather a volitional activity whose success requires a committed partnership of teaching and learning. And given that key details both in clarifying the core elements of program quality and in planning and carrying out the methods for implementing them must inevitably be left to administrative agencies and schools, it is essential that those whose rights are at stake and are the intended beneficiaries of those rights have seats at the table as full and informed partners, which also helps to ensure that administrative convenience is not the determinative factor. This is a matter of both improving implementation and enforcement of existing but unaddressed requirements, such as the parent involvement requirements for Title I schools (see 4. above), and enacting new law and policy to strengthen and extend such voice beyond their current applicability.

Research on the benefits of parent involvement in schools is plentiful,<sup>42</sup> including support for involving parents in key educational program decisions.<sup>43</sup> Parents should be viewed as a key part of the learning community. Schools with strong joint decision-making frameworks based upon a school-parent consensus about mission have been shown to have a more positive impact on achievement than either adversarial or consolidated principal power models of governance.<sup>44</sup>

The parent involvement requirements found in Title I, as described above, provide a potentially powerful framework for involvement that is consistent with the research on learning communities – through a parent involvement policy that has been jointly developed with and approved by the parents of the schools and that spells out how parents will jointly develop with the school the specific plan for how the school will provide enriched and accelerated curriculum, effective teaching methods, timely and effective individual assistance, and other key elements of

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<sup>41</sup> 34 CFR §§299.10-299.12.

<sup>42</sup>See Anne T. Henderson and Nancy Berla, *A NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT* (Center for Law and Education, 1994); Anne T. Henderson and Karen L. Mapp, *A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT* (Southwest Educational Development Laboratory, National Center for Family and Community Connections with Schools, Austin Texas 2002), available at [www.sedl.org/pubs/catalog/items/fam33.html](http://www.sedl.org/pubs/catalog/items/fam33.html) (2002).

<sup>43</sup>*Id.*

<sup>44</sup>Anthony Bryk, et al., *A VIEW FROM THE ELEMENTARY SCHOOLS: THE STATE OF REFORM IN CHICAGO* (Consortium on Chicago School Research, University of Chicago, 1993). See also Newmann and Wehlage, *supra*, at note 11; Kavitha Mediratta & Norman Fruchter, *FROM GOVERNANCE TO ACCOUNTABILITY: BUILDING RELATIONSHIPS THAT MAKE SCHOOLS WORK*, NYU Institute for Education and Social Policy, (January 2003).

# 118A

a quality education, and that also spells out how the school will implement the various requirements for ensuring that parents have the information, training, and other assistance needed to be full and informed partners.<sup>45</sup> The task lies in implementing those requirements.

Rights of students to be involved in such decisions have received less attention in federal law.<sup>46</sup> Basic rights of self-determination complement parental rights regarding the upbringing of their children. Personalization in schools – being, and feeling, attended to – is increasingly recognized as an important central element of restructuring schools, and particularly high schools, for success.<sup>47</sup> Being listened to – having a voice that is taken seriously – is in turn an important element of being attended to. Attention to issues of student voice in school improvement, while still limited, is starting to grow.<sup>48</sup>

Many foster children, for example, do not receive a high-quality education, in part because they are not empowered to engage in the education process and do not have strong education advocates or education decision-makers. Typically, a child's parent has legal authority to make education decisions on the child's behalf and is also the person who advocates for the child's education needs. However, for foster children, it is often unclear who has the legal right to make these decisions,<sup>49</sup> and frequently no one is advocating for his or her right to an education. Lack of clarity about who can make education decisions can delay a child's enrollment, receipt of necessary placements or services, or creation or changes to an education plan. Thus, foster youth need to be more involved in all aspects of their education and educational planning so they can advocate for their needs and pursuits, when sometimes there is no one else that will.<sup>50</sup> Foster youth are frequently left out of discussions, meetings, or hearings addressing issues that concern them. Individuals around them make decisions without consulting them or asking for input. Because there are so many individuals involved with a foster youth's life, yet no clear advocate for education issues, it is especially important to hear the youth's opinion. To better engage foster youth in the process and ensure their voices are heard, schools can (a) routinely ask youth about their educational preferences and needs, including when their living situation changes; (b) give youth the opportunity to participate in school and child welfare meetings and planning about their education and their future; (c) give youth the opportunity to participate in court proceedings, supported with transportation and accommodations to decrease the impact on

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<sup>45</sup>20 U.S.C. §6318.

<sup>46</sup>But see 20 U.S.C. §6314(b)(2)(B)(ii), which provides for appropriate student involvement in development of the Title I program plan in secondary schools, though with none of the specificity applicable to parents. See also provisions of the Perkins Act requiring local plan description of how students, as well as parents and others, are involved in development, implementation, and evaluation of programs assisted under the Act and how they are effectively informed about, and assisted in understanding the requirements of the Act; and State requirements for involving students and others in development of the state plan and for developing effective activities and procedures, including access to information needed to use them, to allow students and others to participate in State and local decisions that relate to State plan development.

<sup>47</sup>Adria Steinberg and Lili Allen, FROM LARGE TO SMALL: STRATEGIES FOR PERSONALIZING THE HIGH SCHOOL, Jobs For the Future (2002), [www.alliance.brown.edu/pubs/largetosmall.pdf](http://www.alliance.brown.edu/pubs/largetosmall.pdf); The Principals' Partnership, RESEARCH BRIEF: PERSONALIZED LEARNING IN HIGH SCHOOL, [www.principalspartnership.com/personalizedlearning.pdf](http://www.principalspartnership.com/personalizedlearning.pdf). See also note 28, *supra*.

<sup>48</sup>See, for example, SoundOut, [www.soundout.org](http://www.soundout.org).

<sup>49</sup>Portions of this part of the report have been adapted with permission from: McNaught, K.M. (2007).

MYTHBUSTING: BREAKING DOWN CONFIDENTIALITY AND DECISION-MAKING BARRIERS TO MEET THE EDUCATION NEEDS OF CHILDREN IN FOSTER CARE, ABA Center on Children and the Law, Washington, DC.

<sup>50</sup>Portions of this part of the report have been adapted with permission from: BLUEPRINT FOR CHANGE: EDUCATION SUCCESS FOR CHILDREN IN FOSTER CARE (2007). Legal Center for Foster Care and Education, Washington, DC.

school attendance and schoolwork; and (d) ensure youth with disabilities actively participate in the special education process, especially transition planning for post-school education and employment, with the supports necessary to effectively participate.<sup>51</sup>

### **What State and Local Bar Associations Can Do**

The steps identified above to secure the right to a high quality education will not be effectively undertaken by legislatures and education agencies merely because this recommendation urges them to do so. Thus the recommendation also urges state and local bar associations, and attorneys generally, to engage in three types of related activities:

1. *Seeking improvements in state and federal law to protect and advance the right to high quality education, including the enactment of remedies to secure that right administratively and judicially.* These can and should be in any of the five broad areas above, including restoration of judicial remedies for failure to comply with provisions of law related to that right.
2. *Making legal representation available to parents, students, and organizations seeking to enforce provisions of state and federal law related to the right of high quality education, in administrative and judicial proceedings.* Lawyers and bar associations can seek improvements in laws to advance children's rights to a better education by taking on impact cases. Pro bono representation, adequate support for legal services representation of low-income students and parents, and development of and support for organizations with legal expertise on issues of educational quality are important components.
3. *Providing community legal education and other assistance to parents, students, community organizations, schools, and school systems to aid in understanding and obtaining improved implementation of state and federal laws that protect and advance the right to high quality education.* Lawyers and bar associations can help educate the public and the child-serving community about federal and state laws that advance the right to a good education. The Association has a long history of supporting efforts that educate children, youth and families about the law, particularly in the school system. By doing so, lawyers will empower community players to take action and better implement laws affecting children's educational rights.

**Laura Farber, Chair**  
**American Bar Association**  
**Commission on Youth at Risk – August 2009**

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<sup>51</sup> FACT SHEET: EDUCATION OUTCOMES FOR CHILDREN AND YOUTH IN FOSTER AND OUT-OF-HOME CARE (2007). National Working Group on Foster Care and Education, Casey Family Programs, Seattle, Washington.



**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON YOUTH AT RISK**  
**COMMISSION ON HOMELESSNESS AND POVERTY**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges federal and state legislatures to pass laws  
2 and national, state, and local education, child welfare, and juvenile justice agencies to implement  
3 and enforce policies that:

- 4
- 5 1. Help advance the right to remain in school, promote a safe and supportive school  
6 environment for all children, and enable them to complete school;  
7
  - 8 2. Limit exclusion from and disruption of students' regular educational programs as a response  
9 to disciplinary problems;  
10
  - 11 3. Provide full procedural protections, including the opportunity to have representation by  
12 counsel in proceedings to exclude students from their regular education program, appropriate  
13 provisions of due process in other school disciplinary processes, and implementing  
14 disciplinary procedures in a fair, non-discriminatory and culturally responsive manner;  
15
  - 16 4. Reduce criminalization of truancy, disability-related behavior, and other school-related  
17 conduct; and  
18
  - 19 5. Establish programs and procedures to assist parents, caregivers, guardians, students, and their  
20 legal representatives in understanding and exercising student rights to remain in school; and  
21

22 FURTHER RESOLVED, That the American Bar Association urges federal and state legislatures  
23 to legally define, and assure standardized on-going monitoring, reporting, and accountability for,  
24 measuring graduation rates, school dropout rates, school truancy, and disciplinary violations  
25 resulting in student suspensions and expulsions, with data disaggregated by race, disability and  
26 other disparately affected populations, and ensure that no group of students is disparately  
27 subjected to school discipline or exclusion.

## REPORT

Building on the longstanding commitment of the American Bar Association (ABA) to promote the rights of children and youth, including rights that pertain to education-related matters, this recommendation focuses on the right of students to remain in school. While varying statistics have been presented on high school graduation and dropout rates,<sup>1</sup> it is clear that large numbers of students leave school without a diploma and that the numbers are especially large for certain subgroups, including African American and Latino students<sup>2</sup> and students with disabilities, in particular those identified as having an emotional disturbance.<sup>3</sup> This recommendation addresses the need for targeted prevention and intervention programs for students at risk of leaving and for steps to reduce practices that result in students leaving school – whether they are being “pushed out” (through policies and practices that have the byproduct of increasing dropouts), “kicked out” (as a disciplinary measure), or “pulled out” (by criminalization of school-related behavior). This recommendation should be read in conjunction with the ABA recommendations concerning the right to a high-quality education and the right to resume education.<sup>4</sup>

### **1. Advancing the Right to Remain in School, Promoting a Safe and Supportive School Environment for All Children, and Enabling Them to Complete School**

#### **a. The Need for Effective Truancy and Dropout Prevention and Intervention**

Under the No Child Left Behind Act (NCLB) of 2001, states are required to report on graduation rates, disaggregated by subgroup populations (low-income status, race/ethnicity, disability, and limited English proficiency) as part of their “adequate yearly progress” (AYP) determinations.<sup>5</sup> Until recently, states and local districts were using various methods for calculating graduation rates, making it difficult to obtain an accurate assessment of the situation.<sup>6</sup> In the fall of 2008, the U.S. Department of Education finalized implementing regulations under NCLB, which now require all states to adopt the same method of calculating graduation rates.<sup>7</sup> At the same time, a

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<sup>1</sup> Compare CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CITIES IN CRISIS: A SPECIAL ANALYTIC REPORT ON HIGH SCHOOL GRADUATION 1 (Apr. 1, 2008) <[http://www.americaspromise.org/uploadedFiles/AmericasPromiseAlliance/Dropout\\_Crisis/SWANSONCitiesInCrisis040108.pdf](http://www.americaspromise.org/uploadedFiles/AmericasPromiseAlliance/Dropout_Crisis/SWANSONCitiesInCrisis040108.pdf)> (last visited Apr. 9, 2009), with Joydeep Roy & Lawrence Mishel, Econ. Pol’y Inst., *Using Administrative Data to Estimate Graduation Rates: Challenges, Proposed Solutions and Their Pitfalls*, 16 EDUC. POL’Y ANALYSIS ARCHIVES 24 (June 4, 2008) <<http://epaa.asu.edu/epaa/v16n11/v16n11.pdf>> (last visited Apr. 9, 2009).

<sup>2</sup> See EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., NATIONAL SUMMARY SCHOOL TO COLLEGE: CAN STATE P-16 COUNCILS EASE THE TRANSITION? (SPECIAL SUPPLEMENT TO EDUCATION WEEK’S DIPLOMAS COUNT 2008), at 2 (June 2008) <<http://www.edweek.org/media/ew/dc/2008/40sgb.us.h27.pdf>> (last visited Apr. 9, 2009); Roy & Mishel, *supra* note 2, at 24.

<sup>3</sup> CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., SPECIAL EDUCATION IN AMERICA: THE STATE OF STUDENTS WITH DISABILITIES IN THE NATION’S HIGH SCHOOLS 20 (Nov. 3, 2008) <[http://www.edweek.org/media/eperc\\_specialeducationinamerica.pdf](http://www.edweek.org/media/eperc_specialeducationinamerica.pdf)> (last visited Apr. 9, 2009).

<sup>4</sup> Portions of this report have been adapted from Joanne Karger, Jenny Chou, & Kathleen B. Boundy, Center for Law and Education, *Dropouts and Push-outs: How School Discipline Policies Are Failing Our Students* (forthcoming).

<sup>5</sup> 20 U.S.C. § 6311(b)(2)(C)(vi). Graduation rates are defined as “the percentage of students who graduate from secondary school with a regular diploma in the standard number of years.” *Id.*

<sup>6</sup> See Paul E. Barton, *The Dropout Problem: Losing Ground*, 63 EDUC. LEADERSHIP 14, 14 (Feb. 2006).

<sup>7</sup> 34 C.F.R. § 200.19(b).

# 118B

uniform method for calculating the dropout rate has not been determined.<sup>8</sup> Important questions relate to whether states should include certain youth in their dropout calculations – e.g., those who are incarcerated and those enrolled in high school equivalency programs.<sup>9</sup>

Despite the challenges associated with the calculation of dropout rates, there is widespread agreement that dropping out results in significant, negative consequences for both the individual and society. Youth who drop out have fewer prospects of obtaining work, and if they succeed in finding employment, they generally are in low-paying jobs that require only low-level skills with limited opportunity for advancement.<sup>10</sup> In 2005, the average annual income for a high school dropout was just two-thirds of that for a high school graduate and only one-third of the average income for an individual with a bachelor's degree.<sup>11</sup> Moreover, students who leave high school without a diploma are more likely to be unemployed<sup>12</sup> and are approximately three times as likely to be dependent on welfare.<sup>13</sup> In addition, students who drop out have higher rates of incarceration.<sup>14</sup> Students who drop out also tend to have a greater number of health problems<sup>15</sup> and are responsible for significant health costs to the states and the nation overall.<sup>16</sup>

Not surprisingly, high levels of truancy are a strong predictor of dropping out.<sup>17</sup> Truancy is broadly defined as an unexcused absence from school. The specific number of absences required for a student to be deemed truant varies by state and local school district.<sup>18</sup> Given these varying

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<sup>8</sup> Two common data collection methods are: (1) “event dropout rate,” which calculates the percentage who left school over the course of one school year and (2) “status dropout rate,” which calculates the percentage within a particular age range who left school without a diploma regardless of when they dropped out. See U.S. DEP'T. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2006, at 1-2 (Sept. 2008) <[http://www.dropoutprevention.org/stats/docs/Dropout\\_Rates-2006.pdf](http://www.dropoutprevention.org/stats/docs/Dropout_Rates-2006.pdf)> (last visited Apr. 9, 2009).

<sup>9</sup> Franklin P. Schargel, *School Dropouts: A National Issue*, in HELPING STUDENT'S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 11 (Jay Smink & Franklin P. Schargel, eds., 2004).

<sup>10</sup> Christine A. Christle, Kristine Jolivet, & C. Michael Nelson, *School Characteristics Related to High School Dropout Rates*, 28 REMEDIAL & SPECIAL EDUC. 325, 325 (2007).

<sup>11</sup> JASON AMOS, ALLIANCE FOR EXCELLENT EDUC., DROPOUTS, DIPLOMAS, AND DOLLARS: U.S. HIGH SCHOOLS AND THE NATION'S ECONOMY 11 (Aug. 2008) <<http://www.all4ed.org/files/Econ2008.pdf>> (last visited Apr. 9, 2009).

<sup>12</sup> CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIV., AN ASSESSMENT OF THE LABOR MARKET, INCOME, HEALTH, SOCIAL, AND FISCAL CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: FINDINGS FOR ILLINOIS ADULTS IN THE 21<sup>ST</sup> CENTURY 8 (Oct. 2007)

<[http://www.clms.neu.edu/publication/documents/An\\_Assessment\\_of\\_the\\_Consequences\\_of\\_Dropping\\_Out\\_of\\_High\\_School\\_in\\_Illinois.pdf](http://www.clms.neu.edu/publication/documents/An_Assessment_of_the_Consequences_of_Dropping_Out_of_High_School_in_Illinois.pdf)> (last visited Apr. 9, 2009).

<sup>13</sup> U.S. GEN. ACCOUNTING OFFICE, SCHOOL DROPOUTS: EDUCATION COULD PLAY A STRONGER ROLE IN IDENTIFYING AND DISSEMINATING PROMISING PREVENTION STRATEGIES (GAO-02-240), at 4 (2002).

<<http://www.gao.gov/new.items/d02240.pdf>> (last visited Apr. 9, 2009) [hereinafter GAO, SCHOOL DROPOUTS].

<sup>14</sup> CAROLINE WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 3, t.2 (Jan. 2003)

<[http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/20/5a.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/20/5a.pdf)> (last visited Apr. 9, 2009).

<sup>15</sup> U.S. DEP'T. OF EDUC., *supra* note 8, at 1.

<sup>16</sup> AMOS, *supra* note 11, at 15.

<sup>17</sup> See, e.g., Gary G. Wehlage & Robert A. Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?* 87 TCHRS. C. REC. 374, 380 (1986).

<sup>18</sup> Compare, e.g., CAL. EDUC. CODE § 48260(a) (defining truant as a student who is absent without a valid excuse for 3 days in one school year, or who is tardy or absent for more than 30 minutes without a valid excuse on three occasions in one school year (or some combination)), with WIS. STAT. § 118.16(1) (defining truancy as part or all of

definitions, it is difficult to develop a national picture of the problem or to conduct any meaningful cross-state analyses. As of the 2005-06 school year, NCLB has required state education agencies to report truancy rates to the U.S. Department of Education.<sup>19</sup> The statute, however, does not include a standard definition of truancy.

While the causes of truancy are complex, a number of school factors have been identified, including uninteresting curriculum, lack of engaging instruction, lack of attention to the specific learning needs of students, unwelcoming atmosphere,<sup>20</sup> negative attitudes of teachers and/or other students, and inflexibility toward meeting students' cultural needs.<sup>21</sup> Research has found that truancy is associated with negative outcomes for youth, including dropping out of school, substance abuse, delinquency, and teen pregnancy.<sup>22</sup> Truancy rates are highest in urban school districts with large percentages of low-income students and students from racial and ethnic minority backgrounds.<sup>23</sup>

In order to combat the large numbers of students leaving school each year and thereby implement the recommendation's call to advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school, enactment of laws and implementation of policies that promote effective truancy and dropout prevention and intervention programs is necessary. Such programs should include an array of school-based programs, wrap-around services, and targeted programs for at-risk youth that encourage them to remain in school and succeed, regardless of age or prior school performance. The "wrap-around" service delivery model involves the implementation of a range of supports and services, including mental health and counseling services, to address the individualized needs of the student and family through a community-based, collaborative process.<sup>24</sup> Supports to be considered may include behavioral and reading interventions, community mentors, or basic assistance for families in areas such as housing, childcare, or healthcare.<sup>25</sup> Research has shown that the use of an effective wrap-around process can result in improvements in student motivation, attendance, and grade point average as well as fewer disciplinary actions.<sup>26</sup>

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one or more days without notification of the legal cause for the absence, while a habitual truant is a student who is absent without an acceptable excuse for part or all of 5 or more days in a semester).

<sup>19</sup> 20 U.S.C. § 7112(c)(3).

<sup>20</sup> Nat'l Ctr. for Sch. Engagement, *Truancy: An Overview in Denver: Prevalence, Effects, and Intervention* (2006) <<http://www.ncjrs.gov/pdffiles1/ojdp/188947.pdf>> (last visited Apr. 9, 2009).

<sup>21</sup> MYRIAM L. BAKER, JANE NADY SIGMON, & M. ELAINE NUGENT, U.S. DEP'T. OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE JUSTICE BULLETIN, TRUANCY REDUCTION: KEEPING KIDS IN SCHOOL 2* (Sept. 2001) <<http://www.ncjrs.gov/pdffiles1/ojdp/188947.pdf>> (last visited Apr. 9, 2009).

<sup>22</sup> *Id.*

<sup>23</sup> See BAKER, SIGMON, & NUGENT, *supra* note 21, at 2-3.

<sup>24</sup> See Lucille Eber & C. Michael Nelson, *School-Based Wraparound Planning: Integrating Services for Students with Emotional and Behavioral Needs*, 67 AM. J. OF ORTHOPSYCHIATRY 385, 387-88 (1997).

<sup>25</sup> Lucille Eber et al., *Wraparound and Positive Behavioral Interventions and Supports in the Schools*, 10 J. EMOTIONAL & BEHAV. DISORDERS 171 (2002).

<sup>26</sup> Eric J. Bruns et al., *Spreadsheets, Service Provides, and the Statehouse: Using Data and the Wraparound Process to Reform Systems for Children and Families*, 38 AM. J. COMMUNITY PSYCHOL. 201, 207 (2006).

# 118B

Policies that promote positive relations between faculty and students<sup>27</sup> as well as meaningful parent and community involvement<sup>28</sup> can also help improve attendance and reduce the likelihood that students will drop out. When teachers create more positive relationships with their students, student motivation, educational persistence, and student achievement improve.<sup>29</sup> As a critical component of effective truancy and dropout prevention programs, schools need to provide high-quality professional development for all school personnel,<sup>30</sup> including training with respect to culturally responsive pedagogy and discipline practices.<sup>31</sup>

As attempts are made to address the dropout problem, it is critical to understand the link between dropping out and educational program quality in that the vast majority of students who drop out have first experienced academic problems, become disengaged from their classes, and fallen far behind in the credits they need to graduate.<sup>32</sup> The relationship between the right to a high-quality education and the right to remain in school is reciprocal. On the one hand, in order to receive a high-quality education, students must be in school. At the same time, a key element for ensuring that students will complete school is providing them with a high-quality educational program.

## **b. Changing Policies and Practices that Increase the Likelihood of Dropping Out**

Behind the ostensibly voluntary decision of a student to leave school lies a variety of policies and practices that can have the effect of “pushing” students out of school by increasing the likelihood that they will drop out.<sup>33</sup> Fulfilling the recommendation’s call for addressing the dropout problem and enabling students to complete their education requires attention to and revision of such policies and practices.

### ***Failing to count all students, including those who have left school or have been retained in grade, when determining the proportion of students who have attained proficiency***

The proportion of students who have become proficient on the state’s academic standards has

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<sup>27</sup> See Sabrina ZirkeI, *The Influence of Multicultural Educational Practices on Student Outcomes and Intergroup Relations*, 110 TCHRS. C. REC. 1141, 1161-62 (2008).

<sup>28</sup> See Sam F. Drew, Jr., *The Power of School-Community Collaboration in Dropout Prevention*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 65-77 (Jay Smink & Franklin P. Schargel, eds., 2004); Karen L. Mapp, *Family Engagement*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 99-113 (Jay Smink & Franklin P. Schargel, eds., 2004).

<sup>29</sup> ZirkeI, *supra* note 27, at 1161 (internal citations omitted).

<sup>30</sup> Mary Reimer, *Professional Development*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 187-96 (Jay Smink & Franklin P. Schargel, eds., 2004).

<sup>31</sup> Ana Maria Villegas, *Preparing Culturally Responsive Teachers*, 53 J. TEACHER EDUC. 20 (2002); KATHLEEN A. KING, NANCY J. HARRIS-MURRI, & ALFREDO J. ARTILES, U.S. DEP’T. OF EDUC., CTR. FOR CULTURALLY RESPONSIVE EDUC. SYS., PROACTIVE CULTURALLY RESPONSIVE DISCIPLINE (2006)

<[http://www.ncrest.org/Exemplars/exemplar\\_culturally\\_responsive\\_discipline.pdf](http://www.ncrest.org/Exemplars/exemplar_culturally_responsive_discipline.pdf)> (last visited Apr. 9, 2009).

<sup>32</sup> MELISSA RODERICK, CLOSING THE ASPIRATIONS-ACHIEVEMENT GAP IMPLICATIONS FOR HIGH SCHOOL REFORM: A COMMENTARY FROM CHICAGO 7 (2006) <[http://www.nslc.org/highschools/pdfs/MDRC\\_CPSstudy.pdf](http://www.nslc.org/highschools/pdfs/MDRC_CPSstudy.pdf)> (last visited Apr. 9, 2009).

<sup>33</sup> Portions of this section are adapted from PAUL WECKSTEIN, CENTER FOR LAW AND EDUCATION, CLOSING THE CIRCLE ON THE RIGHT TO QUALITY EDUCATION (forthcoming).

become a crucial measure of accountability under NCLB that determines whether a school is making “adequate yearly progress” (AYP). Under current state approaches, schools’ proficiency rates are artificially inflated when students who are struggling academically and drop out or are retained in grade are not counted in determining the proportion of the cohort that has become proficient. This practice creates an inaccurate picture and also reduces the likelihood that schools will make efforts to help these students catch up and remain in school with their peers.

A student who is struggling academically is treated as a “liability” if s/he remains in school and fails to show proficiency on the state assessments. If, instead, that student leaves, the liability is taken off the books<sup>34</sup> – i.e., the school’s proficiency rate looks better, even though the real proportion of the class that has demonstrated proficiency has not changed. Meanwhile all efforts to help the student become proficient cease. Similarly, if a student is left back, s/he no longer counts in determination of how many of his/her original cohort attained proficiency, likewise creating an inaccurate picture and an incentive for the practice of grade retention, which is associated with continued low achievement and eventually dropping out.<sup>35</sup> In contrast, counting the entire cohort, including those who have left school or been left behind, provides a more accurate picture of real proficiency rates, removes incentives to push students out, and creates positive incentives to attend to the achievement of those students most in need of attention.<sup>36</sup>

### ***Failing to Treat Students Who Must Pass Tests for Promotion or Graduation with Basic Fairness***

Students denied promotion or graduation on the basis of their performance on a test, even if they have passed their courses, are at risk of dropping out. Therefore, this recommendation supports adherence to two basic principles of fundamental fairness for the use of high-stakes testing that are required by law<sup>37</sup> and widely accepted professional standards for educational testing.<sup>38</sup> These

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<sup>34</sup> Under NCLB, graduation rates are used as an additional, separate measure of AYP in high schools, and, along with regulations to require more uniform, accurate ways of measuring them, there are proposals to create a more uniform standard for adequate progress in them. But even the most ambitious of these proposals will still allow schools to be deemed to be making AYP on graduation rates even though large numbers of students are dropping out. Thus, unlike anything that can be done with the graduation rate alone, the recommendation here will truly mean leaving no child behind.

<sup>35</sup> See *infra* notes 39-42 and accompanying text for a discussion of grade retention.

<sup>36</sup> This approach will not necessarily cause a dramatic increase in the number of identified schools – on average the true proficiency rates will be lowered by including these children, but so will the annual targets, which are based on the state’s starting point. See 20 U.S.C. § 6111(b)(2)(E).

<sup>37</sup> See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS (Dec. 2000) <[www.ed.gov/offices/OCR/archives/testing/TestingResource.doc](http://www.ed.gov/offices/OCR/archives/testing/TestingResource.doc)> (last visited Apr. 9, 2009); NAT’L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION (Jay P. Heubert & Robert M. Hauser eds., 1999). The legal principles flow from both the Due Process Clause, in assuring fundamental fairness when denying students of their property and liberty interests in education, and the civil rights requiring that educational institutions receiving federal funds must demonstrate the educational necessity of policies and practices that have a disproportionate impact in terms of race, national origin, disability, or gender (and if there are other means of accomplishing the important educational goals equally well with less disproportionate impact, they must be used instead). Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and 34 C.F.R. § 100.3(b)(2), art 100; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 34 C.F.R. Part 104; and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and 34 C.F.R. Part 99. Cf. C.F.R. § 100, App. B, Part K. See

# 118B

principles are as follows: (1) students have received sufficient high-quality curriculum, instruction, and assistance to master the skills/knowledge that the tests seek to measure (it is fundamentally unfair to deny students the means to learn what they are held accountable for mastering); and (2) the assessments provide a fair and accurate determination of each student's mastery and can adequately distinguish between students who have reached sufficient levels of mastery and those who have not, for all students, including students of different races and backgrounds and students with disabilities. These principles are key to scrutiny of practices such as: the use of tests that have not been shown to be a good measure of mastery of the skills and knowledge embedded in state standards; the use of varying definitions of proficiency and cut-off scores based on political considerations; and claims that students who fail these tests have had an adequate opportunity to learn when they are concentrated in the very schools that the state has determined, using the same tests, are not making AYP in enabling students to become proficient.

Rigorous adherence to these two legal and professional principles should not be seen as an unfortunately necessary counterweight to efforts at school reform, but rather as a major tool for stimulating and ensuring reform. By insisting, in this high-stakes context, on good evidence that educational programs actually deliver the elements of a high-quality education that enable mastery of the skills and knowledge students are supposed to learn and that the tests accurately determine whether students have attained them, these principles will help ensure that the reforms in the systems for program delivery and for student assessment are real, not just claimed.

## *Reliance on Grade Retention as a Response to Students' Academic Struggles*

Research has shown that grade retention does not result in improved student achievement and, in fact, is a strong predictor of students' dropping out.<sup>39</sup> Students who are retained are more likely to leave school because retention does not address the reasons that the instruction the student had received was ineffective and because retained students, who are older than their classmates, are more likely to feel further disconnected from their peers. One study found that being retained a grade increases the risk of dropping out by 40-50% and that being retained for more than one grade, increases the risk of dropping out by 90%.<sup>40</sup> Moreover, students from racial and ethnic minorities, male students, and students from low-income backgrounds tend to be retained at significantly higher rates than their peers.<sup>41</sup> In place of grade retention, schools should focus on providing each student with a high-quality education, including the provision of effective instruction and individualized assistance. Preventive and intervention strategies should also be

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also *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Brookhart v. Illinois Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Anderson v. Banks*, 540 F. Supp. 761 (S.D. Ga. 1982).

<sup>38</sup> AM. EDUC. RESEARCH ASS'N, AM. PSYCHOL. ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS OF EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999). See also NAT'L COUNCIL ON MEASUREMENT IN EDUC., CODE OF PROFESSIONAL RESPONSIBILITIES IN EDUCATIONAL MEASUREMENT (1995); U.S. DEP'T OF EDUC., *supra* note 37; NAT'L RES. COUNCIL, *supra* note 37.

<sup>39</sup> Linda Darling Hammond, *Standards, Accountability, and School Reform*, 106 TCHRS. C. REC. 1047, 1049 (2004); Melissa Roderick, *Grade Retention and School Dropout: Investigating the Association*, 31 AM. EDUC. RESEARCH J. 729, 747 (1994).

<sup>40</sup> See Franklin P. Schargel, *Who Drops Out and Why*, in HELPING STUDENTS GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 33 (Jay Smink & Franklin P. Schargel, eds., 2004) (internal citation omitted).

<sup>41</sup> Samuel J. Meisels & Fong-Ruey Liaw, *Failure in Grade: Do Retained Students Catch Up?* 87 J. EDUC. RES. 69, 71 (1993).

used to address problems early on before they escalate.<sup>42</sup>

### ***Failing to Address Credit and Graduation Issues for Highly Mobile Students***

Students whose families have moved (including migrant and homeless families) can face severe problems in not having their work properly credited. Because multiple districts within the same state often have different graduation requirements, and because various schools offer different classes and use different methods for calculating credit, highly mobile students often have difficulty obtaining credit for previously-completed work.<sup>43</sup> Moreover, even when these students receive the proper credits, these credits may not be counted as core courses for graduation but, rather, may be counted as electives. The denial of credit for highly mobile youth often results in their being retained and becoming older than their grade-level peers.<sup>44</sup> This recommendation urges that there be a fair way of crediting these students and adjusting for work done elsewhere.

### ***Age Restrictions on the Right to Remain in School***

Age restrictions on the right to attend are another type of policy that improperly pushes youth out of school. Students with disabilities have an entitlement under federal law to receive educational services until the age of 22.<sup>45</sup> Other students, however, are sometimes pushed out when they are unable to complete high school by a certain age.<sup>46</sup> There are approximately 40 states that have a maximum age limit, beyond which students are not entitled to a free education.<sup>47</sup> The upper age limit among state statutes ranges from 19 in Montana<sup>48</sup> to 26 in Texas,<sup>49</sup> with the average being 21. Even when states allow students to receive an education up until a particular age, school districts sometimes encourage older students who have not yet reached the upper threshold, but who are at risk of bringing down the district's test scores, to withdraw.<sup>50</sup>

Particularly affected by this issue are older students who have been retained, students who have failed several classes, or immigrant students who have had minimal formal education.<sup>51</sup> Because

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<sup>42</sup> See Shane R. Jimerson & Phillip Ferguson, *A Longitudinal Study of Grade Retention: Academic and Behavioral Outcomes of Retained Students Through Adolescence*, 22 SCH. PSYCHOL. QUARTERLY 314, 334-35 (2007); Lynn S. Fuchs & Douglas Fuchs, *A Framework for Building Capacity for Responsiveness to Intervention*, 35 SCH. PSYCHOL. REV. 621, 621 (2006).

<sup>43</sup> Legal Center for Foster Care & Education, Am. Bar Ass'n, *Foster Care & Education Q & A: Credit Transfer and School Completion* 1 (2008) <[http://www.abanet.org/child/education/publications/qa\\_credit\\_transfer\\_final.pdf](http://www.abanet.org/child/education/publications/qa_credit_transfer_final.pdf)> (last visited Apr. 9, 2009).

<sup>44</sup> *Id.*

<sup>45</sup> 20 U.S.C. § 1412(a)(1)(A).

<sup>46</sup> See BETSY GOTBAUM & ADVOCATES FOR CHILDREN, PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES (Nov. 21, 2002) <<http://www.advocatesforchildren.org/pubs/pushout-11-20-02.html>> (last visited Apr. 9, 2009).

<sup>47</sup> Anthony De Souza, Education Commission of the States, *School Attendance Age Limits* (last modified June 2007) <<http://www.ecs.org/clearinghouse/74/74/7474.pdf>>.

<sup>48</sup> MONT. CODE ANN. § 20-5-101.

<sup>49</sup> TEX. EDUC. CODE ANN. § 25.001.

<sup>50</sup> See JAY SMINK & JOANNA ZORN HEILBRUNN, NATIONAL DROPOUT PREVENTION CENTER/NETWORK, LEGAL AND ECONOMIC IMPLICATIONS OF TRUANCY 11 (2005) <[http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/29/dd/ec.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dd/ec.pdf)> (last visited Apr. 9, 2009).

<sup>51</sup> *Id.*

# 118B

interventions for English language learners (ELLs) tend to focus on younger students, the educational needs of older immigrants are often overlooked.<sup>52</sup> These students have a shorter amount of time in which to gain language fluency while concomitantly trying to master complex material.<sup>53</sup> If an ELL arrives in this country at an older age, the student's entitlement to education ends once s/he reaches the upper age limit, even if the student has not had sufficient time to learn English or acquire the knowledge/skills embedded in the state content standards. In this situation, the district is essentially able to "push out" the student. Moreover, even for ELLs who have not yet reached the upper age limit, there is the possibility that districts may informally counsel older students to drop out. It is important for school districts to have adequate interventions to address the educational needs of older immigrant students as well as a sufficient number of qualified personnel. In addition, districts should utilize high-quality, age-appropriate instructional materials to engage these students as active participants in the learning process.

## 2. Limiting Exclusion from and Disruption of Students' Regular Educational Programs as a Response to Disciplinary Problems

This recommendation urges schools to limit the use of exclusion as a disciplinary response to problematic behavior. Removing a student from his/her educational program through suspension or expulsion, when the student's behavior is not substantially likely to cause injury to self or others, runs counter to the goal of schools to ensure that all students receive a high-quality education aligned with challenging state standards. In fact, research has found that suspension is associated with poor academic achievement and grade retention.<sup>54</sup> Moreover, once students are suspended, they may develop low self esteem, feel alienated from their peers, and have negative attitudes about school.<sup>55</sup> For disengaged students, exclusion rewards the desire not to attend school, and the practice results in students' missing important classroom instruction, falling even further behind in their work, and ultimately dropping out of school.<sup>56</sup> Exclusion may also contribute to students' involvement in delinquency by providing them with extra time without adult supervision, during which they can become targets for gang recruitment and other problems.<sup>57</sup> Research suggests that using exclusion as a means of punishment is ineffective in

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<sup>52</sup> Erica Higgs, *Specialized High Schools for Immigrant Students: A Promising New Idea*, 34 J.L. & EDUC. 331, 331-32 (2005).

<sup>53</sup> JORGE RUIZ-DE-VELASCO & MICHAEL FIX, *OVERLOOKED & UNDERSERVED: IMMIGRANT STUDENTS IN U.S. SECONDARY SCHOOLS* 45 (The Urban Institute, 2000) <<http://www.urban.org/UploadedPDF/overlooked.pdf>> (last visited Apr. 9, 2009).

<sup>54</sup> See Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 26 (Johanna Wald & Daniel J. Losen, eds. 2003) (internal citations omitted). See also Lawrence M. DeRidder, *How Suspension and Expulsion Contribute to Dropping Out*, 56 EDUC. DIGEST 44-47 (Feb. 1991).

<sup>55</sup> See COMMISSION FOR CHANGE IN THE OAKLAND PUB. SCHS., *CHILDREN IN SCHOOL: SOUNDING THE ALARM OF SUSPENSIONS* 11 (Aug. 1992), available in ERIC, ED No. 350680.

<sup>56</sup> See AM. PSYCHOL. ASS'N, *ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* 5, 49-50 (2006) <<http://www.apa.org/releases/ZTTFReportBODRevisions5-15.pdf>> (last visited Apr. 9, 2009); Ruth B. Ekstrom *et al.*, *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 563 (1986).

<sup>57</sup> Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999).

helping students change problematic behavior or in making schools safer.<sup>58</sup> Because of the significant, negative effects of exclusion and the disruption of the student's educational program, the use and educational impact of exclusions should be limited in the following manner:

***a. Implementing Evidence-Based Preventive School-Wide Practices for Improving Student Behavior and Creating a Safe School Climate More Conducive To Learning***

Research has highlighted the effectiveness of school-wide proactive and positive approaches to avoid problematic behavior as opposed to approaches that are reactive and punitive in nature.<sup>59</sup> School-wide programs that promote a safe learning environment<sup>60</sup> and target bullying and aggression have also been found to reduce behavior problems, vandalism, and delinquency.<sup>61</sup> In addition, schools should emphasize the development of appropriate behavioral intervention plans (BIPs) for students exhibiting behavioral challenges. BIPs specify strategies, interventions, supports, program modifications, and supplementary aids and services that will help the child improve challenging behavior and become more successful in school.<sup>62</sup> Under current federal law, schools are required to develop a BIP based on a functional behavioral assessment (FBA) for a child with a disability when it has been determined that the child's violation of a school rule has been a manifestation of his/her disability.<sup>63</sup> Schools should likewise be encouraged to develop such a plan for *any* student whose challenging behavior places him/her at risk of being removed from his/her learning environment. Furthermore, schools should consider using "restorative justice" practices, according to which all those affected by an alleged incident are involved in determining a resolution.<sup>64</sup> The use of restorative justice in schools focuses on repairing relationships and involving the school community, and may include practices such as peer mediation, classroom circles, and family group conferences.<sup>65</sup>

***b. Restricting Exclusion Offenses to Those That Are the Most Serious or Dangerous and Cannot Be Handled Without Such Exclusion***

First, it is recommended that exclusion from a student's regular education program be limited to those most serious or dangerous offenses that cannot be handled without such exclusion. As

<sup>58</sup> Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1071-72 (Carolyn M. Evertson & Carol S. Weinstein, eds., 2006). 9

<sup>59</sup> See, e.g., George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. OF POSITIVE BEHAV. INTERVENTIONS 131, 133 (2000).

<sup>60</sup> Ronald D. Stephens, *Creating Safe Learning Environments*, in HELPING STUDENT'S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 79-95 (Jay Smink & Franklin P. Schargel, eds., 2004).

<sup>61</sup> JAMES ALAN FOX ET AL., FIGHT CRIME: INVEST IN KIDS, *BULLYING PREVENTION IS CRIME PREVENTION* 1-2 (2003) <<http://www.fightcrime.org/reports/BullyingReport.pdf>> (last visited Apr. 9, 2009).

<sup>62</sup> See ROBERT A. GABLE ET AL., ADDRESSING STUDENT PROBLEM BEHAVIOR—PART III: CREATING POSITIVE BEHAVIORAL INTERVENTION PLANS AND SUPPORTS 5 (2000), available in ERIC, ED No. 443 245.

<sup>63</sup> 20 U.S.C. § 1415(k)(1)(F)(i).

<sup>64</sup> See, e.g., SMALL SCHS. PROJECT, DISCIPLINE APPROACHES (2004), [www.smallschoolsproject.org/PDFS/Planning\\_Resources/winter2004/winter2004-discipline.pdf](http://www.smallschoolsproject.org/PDFS/Planning_Resources/winter2004/winter2004-discipline.pdf).

<sup>65</sup> Carol Chmelynski, *Restorative Justice for Discipline with Respect*, 25 SCH. BD. NEWS 5 (2005) <<http://www.nsba.org/HPC/Features/AboutSBN/SbnArchive/2005/May2005/Schoolsfind%e2%80%98restorativejusticemoreeffectivethanexpulsion.aspx>> (last visited Apr. 9, 2009).

# 118B

stated in the 2001 ABA Report, harsh zero tolerance discipline policies lead school administrators to utilize a one-size-fits-all model, according to which all disciplinary incidents – both minor and major – are treated with the same degree of severity.<sup>66</sup> Although the purpose behind such policies is to remove students perceived as violent and dangerous, in actuality the majority of school-based incidents for which students are excluded relate to minor disciplinary offenses such as tardiness, absenteeism, disrespect, and altercations between students.<sup>67</sup>

***c. Requiring Use of Other Preventive and Supportive Interventions to Resolve Disciplinary Issues Prior to Exclusion.*** (Note: While a. deals with positive schoolwide approaches to reduce discipline issues, this calls for positive approaches when they arise.)

Because disciplinary exclusions should be limited to those incidents that are narrowly defined as *the most* serious or dangerous, schools should be required, prior to removing a student from his/her regular program, to try other preventive and supportive interventions. Such interventions, which are varied in nature, can be provided in a small group setting (e.g., social skills training); on an individualized basis (e.g., a behavioral contract or self-management strategies); or for the entire class (e.g., a timeout or differential reinforcement).<sup>68</sup> The goal should be for schools to reconceptualize discipline in a manner that, to the greatest extent possible, avoids exclusion.

***d. Minimizing the Length and Educational Impact of Exclusions***

To offset the significant consequences associated with exclusion, laws and policies should limit the length of time and educational impact of exclusion once the decision has been made to remove a student from his/her regular educational program for alleged disciplinary violations. For all periods of exclusion, regardless of the length, students should be provided every opportunity to complete missed class work, homework, or exams. Furthermore, such exclusions should take place within the school building when the student's continued presence does not constitute a danger. For example, the use of in-school suspensions can allow students to remain in school and receive in-school academic tutoring and support in those limited instances when a student is unable to return immediately to his/her regular classroom after a serious disciplinary incident. Students receiving in-school suspensions should also be provided instruction in skill-building related to the behavioral problem or to conflict resolution, including de-escalation strategies and peer mediation, as well as effective academic assistance.<sup>69</sup>

***e. Assuring that Each Excluded Child is Provided High-Quality Education During Exclusion Periods and Given Aid in School Reintegration***

In order to ensure that students do not fall further behind in their coursework during periods of exclusion from their regular program, during such times students be provided access to a high-quality education. Above it was recommended that exclusion take place within the school

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<sup>66</sup> AM. BAR ASS'N (ABA), ZERO TOLERANCE POLICY REPORT (2001) <<http://www.abanet.org/crimjust/juvjus/zerotolreport.html>> (last visited Apr. 9, 2009).

<sup>67</sup> Skiba & Peterson, *supra* note 64, at 373.

<sup>68</sup> See Frank M. Gresham, *Current Status and Future Directions of School-Based Behavioral Interventions*, 33 SCH. PSYCHOL. REV. 326, 330 (2004).

<sup>69</sup> See Russell J. Skiba *et al.*, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317 (Dec. 2002).

building where the student's continued presence does not constitute a danger and that the student be given the opportunity to complete any missed class work, homework, or exams. This complementary recommendation is to ensure that high-quality education, and not merely the capacity to make up work and exams, be provided during exclusion, whether or not the exclusion takes place in the school building. It is also consistent with the accompanying ABA recommendation concerning the right to a high-quality education. In addition, it recognizes that students who have been out of school will need help in reintegrating.

*f. Prohibiting Use of School Exclusion as a Response to Truancy*

Many schools have policies authorizing the suspension and further exclusion from learning opportunities of truant youth, who most likely are already behind in their work. Moreover, in many school districts, students are denied course credit and given a mandatory class failure after a certain number of unexcused absences in a marking period. Such an approach is counterproductive because it essentially removes any incentive for the student to return to class and hand in assignments.<sup>70</sup> As described earlier, research has found that a number of school-related factors are associated with the likelihood that a student will become truant, including lack of engaging curriculum and/or instruction, lack of attention to students' learning needs, unwelcoming climate, and inflexibility toward students' cultural needs.<sup>71</sup> Given the illogic of punishing truant behavior through disciplinary exclusion, the use of exclusion as a response to truancy should be eliminated.

**3. Providing Full Procedural Protections in Exclusion Proceedings and Appropriate Due Process in Other School Disciplinary Processes, and Implementing Disciplinary Procedures in a Fair, Non-Discriminatory and Culturally Responsive Manner**

Because exclusion negatively impacts the academic performance of students and can ultimately lead them to drop out, this recommendation urges that students be afforded full procedural protections in any disciplinary proceedings that could result in exclusion from their regular education program. Ensuring such protections in expulsion proceedings was a focus of the IJA/ABA *Juvenile Justice Standards* on "Schools and Education," which included the following:

1. Prior to a private hearing before an impartial hearing officer or tribunal, the student has a right to written notice of the charge(s) against him or her that is received long enough before the hearing to enable the student to prepare a defense;
2. At the hearing, the student is entitled to be represented by counsel, to present and hear evidence, cross-examine witnesses, make oral and written arguments and obtain a record of the proceedings; and
3. The student is entitled to a decision made by an impartial decision maker, based on the facts and evidence presented at the hearing and has a right to judicial review of the final decision.<sup>72</sup>

Affording students the opportunity to be represented by counsel helps to "improve the fairness

<sup>70</sup> See SMINK & ZORN HEILBRUNN, *supra* note 50, at 20-21.

<sup>71</sup> See *supra* notes 20-21.

<sup>72</sup> IJA/ABA *Juvenile Justice Standards* "Standards Relating to Schools and Education," Standard 5.3 (1982).

# 118B

and overall quality of the hearing,” helps ensure that the evidence is presented in a logical and appropriate manner, and facilitates an effective process for questioning witnesses and making legal arguments.<sup>73</sup> A number of states require by statute that students have the opportunity for representation when charged with certain offenses that may result in their removal from school.<sup>74</sup>

Recent case law has affirmed the right to counsel for students in truancy proceedings affecting the youth’s rights to liberty, privacy, and education.<sup>75</sup> Similarly the ABA, through its “Civil Gideon” policy, has affirmed the need for a civil right to counsel in areas of basic human need. Access to counsel in proceedings that can lead to school exclusion can make a critical difference in terms of a student’s successful completion of education. For parents with adequate financial means, it would not be unusual to find counsel representing students at school exclusion hearings. For those families unable to afford counsel for their child, there should be access to counsel without cost. Unfortunately, there is a scarcity of legal counsel available to represent low-income youth, who are primarily urban and minority students, in school expulsion hearings, despite the fact that these students are disproportionately affected by suspensions/expulsions.<sup>76</sup>

While the IJA/ABA standards focused on expulsion hearings, this recommendation urges that full procedural protections be extended to students in every disciplinary proceeding that could result in an exclusion from the regular education program, regardless of the length of removal – particularly in light of the core principle that the only time such exclusions should be considered is for the most serious or dangerous offenses. One of the shortcomings of the U.S. Supreme Court’s decision in *Goss v. Lopez* pertained to the fact that the case did not explicitly state that a student is entitled to a full hearing for short-term removals (i.e., less than 10 school days); rather, the case merely stated that, in such instances, the student is entitled to “an opportunity to be heard.”<sup>77</sup> As a result, principals often implement a low threshold of due process for short-term removals. Finally, given the significant loss of educational opportunity associated with exclusion, it is recommended that the school district bear both the burden of production (i.e., coming forward with the evidence) and burden of persuasion (i.e., convincing the impartial hearing officer that the allegation is true) in all such disciplinary proceedings.<sup>78</sup>

## 4. Reducing Criminalization of School-Related Behavior

While recognizing that there are times when police and court involvement become necessary, this recommendation targets three areas in which the criminalization of school-related behavior

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<sup>73</sup> *Id.* at 114-15.

<sup>74</sup> See CAL. CODE § 48918(b)(5)(expulsion); KAN STAT. ANN. § 72-8903(a)(1)(suspension and expulsion); MASS. GEN. LAWS CH. 71, §§ 37H (expulsion and appeal of expulsion for possession of dangerous weapon or controlled substance, or for assault on school staff), 37H ½ (appeal of suspension for issuance of felony complaint or felony delinquency complaint, and appeal of expulsion for felony conviction, or adjudication or admission in court of guilt); MINN. STAT. § 121A.47, subd. 2(f)(1)(exclusion and expulsion); N.Y. EDUC. LAW § 3214.3.c (suspension in excess of 5 school days); OHIO REV. CODE ANN. § 3313.66(D)(appeal of expulsion or suspension); WIS. STAT. § 120.13(1)(c)3 (expulsion). It is important to keep in mind that there is no uniform definition of suspension or expulsion; different states and school districts attach different meanings to these terms.

<sup>75</sup> See *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1017 (Wash. Ct. App. 2009).

<sup>77</sup> 419 U.S. 565, 579 (1975).

<sup>78</sup> 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 409 (5th ed. 1999).

should be reduced. First, this recommendation seeks to reduce the criminalization of truant behavior. Although much has been written criticizing the use of truancy officers and juvenile courts to address truancy,<sup>79</sup> many jurisdictions continue to treat truancy as a status offense. There is little evidence, however, that juvenile courts succeed in rehabilitating truant youth.<sup>80</sup> Rather, such youth have the potential to become repeat offenders or to engage in adult criminal behavior.<sup>81</sup> Moreover, juvenile court involvement results in youths' receiving a juvenile court record, raising serious implications with respect to future employment and educational opportunities.<sup>82</sup> Examples of truancy diversion programs that have been found to be effective include community truancy boards, through which community volunteers help negotiate agreements between schools, students and families, as well as youth courts, through which truant youth appear before a court run by their peers.<sup>83</sup>

Second, this recommendation urges the promotion of policies that reduce the criminalization of disability-related behavior. Schools too often criminalize the behavior of students with disabilities by making inappropriate referrals to law enforcement authorities rather than addressing the behavior as an educational issue. Although the 1997 reauthorization of IDEA added a provision stating that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities...,"<sup>84</sup> such referrals cannot be made in an effort to circumvent the obligations of the school district.<sup>85</sup> Under IDEA, the school is required to address the behavior of students with disabilities by providing appropriate special education and related services that meet students' individualized needs.<sup>86</sup> Referral of a student with a disability to law enforcement for school-related behavior may also implicate the student's rights under Section 504 of the Rehabilitation Act of 1973.<sup>87</sup>

Third, this recommendation urges the promotion of policies that reduce the criminalization of other school-related conduct that can be handled within the school's disciplinary system. In recent years, the increased presence of law enforcement officers on school grounds has led to arrests of students for minor infractions and has raised constitutional concerns regarding the questioning of students and the searching of students' personal items.<sup>88</sup> The New York Civil Liberties Union has reported that between 2005 and 2007, approximately 300 students under the

<sup>79</sup> See, e.g., Gordon Bazemore, Leslie A. Leip, & Jeanne Stinchcomb, *Boundary Changes and the Nexus between Formal and Informal Social Control: Truancy Intervention as a Case Study in Criminal Justice Expansionism*, 18 N.D. J. L. ETHICS & PUB POL'Y 521, 540 (2004) (internal citations omitted). See also Michael A. Lindstadt, *Employing Mediation to Approach Truants*, 43 FAM. CT. REV. 303, 307-08 (2005).

<sup>80</sup> Lindstadt, *supra* note 86, at 307-08.

<sup>81</sup> *Id.* at 308 (quoting Cleveland Bar Ass'n President, *FROM THE PRESIDENT, Tackling Truancy* (Feb. 2002)); see also Tom Gavin, *Truancy: Not Just Kids' Stuff Anymore*, FBI LAW ENFORCEMENT BULLETIN (Mar. 1997) <[http://findarticles.com/p/articles/mi\\_m2194/is\\_n3\\_v66/ai\\_19545728/](http://findarticles.com/p/articles/mi_m2194/is_n3_v66/ai_19545728/)> (last visited Apr. 9, 2009).

<sup>82</sup> Lindstadt, *supra* note 86, at 308.

<sup>83</sup> NAT'L CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, *REDUCING TRUANCY: PREVENTION BRIEF* <[http://www.promoteprevent.org/Publications/center-briefs/Truancy\\_Prevention\\_Brief.pdf](http://www.promoteprevent.org/Publications/center-briefs/Truancy_Prevention_Brief.pdf)> (last visited Apr. 9, 2009).

<sup>84</sup> 20 U.S.C. § 1415(k)(9)(A) (1997) (current version at 20 U.S.C. § 1415(k)(6)(A) (2008)).

<sup>85</sup> 143 CONG. REC. S4403 (May 14, 1997) (statement of Sen. Harkin).

<sup>86</sup> See *Morgan v. Chris L.*, 1997 U.S. App. LEXIS 1041, \*16 (6th Cir. 1997).

<sup>87</sup> 29 U.S.C. § 794(a).

<sup>88</sup> N.Y. CIVIL LIBERTIES UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 16-18* (2007) <[http://www.aclu.org/pdfs/racialjustice/overpolicingschools\\_20070318.pdf](http://www.aclu.org/pdfs/racialjustice/overpolicingschools_20070318.pdf)> (last visited Apr. 9, 2009).

# 118B

age of 16 in the New York City Public Schools were arrested on school grounds for minor, non-criminal violations such as trespassing or loitering.<sup>89</sup> In place of the criminalization of school-related conduct, schools should treat student behavior as an education issue and provide training to school personnel on a variety of topics, including child and adolescent emotional and cognitive development and culturally responsive discipline.

## **5. Establishing Programs and Procedures to Help Parents, Students, and their Legal Representatives Understand the Rights of Students to Remain in School**

Awareness by youth and their parents and representatives of the right of students to remain in school is an important part of securing that right. Without this awareness, large numbers of students will continue to leave school as a result of policies/practices that increase dropouts, disciplinary exclusions, and the criminalization of school-related behavior. Greater understanding on the part of students, parents, and representatives of their legal rights will facilitate the early identification of problematic school practices before the effects of such practices become exacerbated. Moreover, it is important for students and their parents and representatives to understand the interrelationship between the right to remain in school and the right to a high-quality education. In order to secure the right to remain in school, it is necessary for the right to a high-quality education within that school to be concomitantly enforced.

## **Defining and Assuring Standardized On-Going Monitoring, Reporting, and Accountability for Rates of Graduation, Dropout, Truancy, and Disciplinary Violations, with Data Disaggregated by Race, Disability and Other Disparately Affected Populations, and Ensuring that No Group is Disparately Subjected to School Discipline or Exclusion**

Finally, this recommendation promotes the adoption of national definitions of dropout and truancy that will prevent states from allowing certain students to slip through the cracks. In addition, there is a need for improved systems to collect and analyze data on graduation rates, dropout rates, school truancy, and disciplinary code violations. Requiring the accurate collection and analysis of these data will lead to better oversight and accountability through more effective monitoring of policies/practices that result in students' leaving school. In addition, such improved data measures will enable individual schools, local districts, and states to evaluate their own practices and to develop targeted interventions that address potential problem areas. These data should be disaggregated by race, disability, and other subgroups in order to monitor the extent to which such populations are disproportionately impacted by unfair policies/practices.

The harmful effects of school exclusion are particularly disturbing in light of the fact that research has long highlighted the disproportionate impact of school discipline policies on students of color, in particular African American males. A recent report has indicated that African American males receive out-of-school suspensions at nearly three times the rate as white, non-Hispanic male students.<sup>90</sup> Moreover, research has shown that students of color tend

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<sup>89</sup> Letter from Arthur Eisenberg, Legal Dir., N.Y. Civil Liberties Union and Catherine Kim, Attorney, Am. Civil Liberties Union, to Raymond Kelly, Comm'r, N.Y.C. Police Department (Oct. 7, 2008) <[http://www.nyclu.org/files/16\\_Kelly\\_letter\\_10.07.08.pdf](http://www.nyclu.org/files/16_Kelly_letter_10.07.08.pdf)> (last visited Apr. 9, 2009).

<sup>90</sup> SCHOTT FOUND. FOR PUB. EDUC., GIVEN HALF A CHANCE: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES (NATIONAL SUMMARY, 2008) <<http://blackboysreport.org/node/15>> (last visited Apr. 9, 2009).

to be disproportionately charged with minor offenses such as disobedience and disrespect, which are subjective in nature and allow for the introduction of racial bias.<sup>91</sup>

Students with disabilities are also disproportionately affected by suspensions and expulsions, often for behavior that is related to their disability, in violation of the Individuals with Disabilities Education Act (IDEA). A recent longitudinal study found that 33% of students with disabilities had been suspended or expelled at some point during their school careers.<sup>92</sup> In addition, students identified as having an emotional disturbance (ED) were found to be significantly more likely than students in any other disability category to be suspended or expelled. Sixty-three percent of students with ED had experienced disciplinary action in one school year, with the average being seven discipline incidents per student.<sup>93</sup>

Additionally, foster children have been shown to be more likely to be suspended or expelled. One study found that 67% of foster care youth had been suspended from school at least once.<sup>94</sup> Foster children are also more likely to be identified as eligible for special education services because of ED.<sup>95</sup> Moreover, children growing up in a home at or below the poverty level have been found to be more likely to be suspended/expelled than their peers.<sup>96</sup> Because of the strong evidence to suggest that students from certain subgroups are most affected by disciplinary exclusion and because of the harmful effects that this exclusion can have on the future life experiences of students, this recommendation urges the implementation of policies/practices that ensure that certain subgroups of students are not disparately subjected to school discipline.

### Conclusion

A prior ABA policy from February, 1995 recommended that school districts utilize curricula on dispute resolution and school-based peer mediation. Similarly, an ABA policy from February, 2001 supported the principles that school officials exercise sound discretion in cases involving problematic student behavior, that schools develop alternatives to expulsion or court referral, and that "zero tolerance" policies be opposed. The recommendation presented in this report builds on these prior efforts by encouraging law and policy change that will help students remain in school, promote a safe and supportive school environment, and enable students to complete school.

**Laura Farber, Chair**  
**ABA Commission on Youth at Risk**  
**August 2009**

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<sup>91</sup> CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 7 (2000).

<sup>92</sup> SRI INTERNATIONAL, NATIONAL LONGITUDINAL TRANSITION STUDY 2, FACTS FROM NLTS2: SCHOOL BEHAVIOR AND DISCIPLINARY EXPERIENCES OF YOUTH WITH DISABILITIES 3 (Mar. 2006)  
 <[http://www.nlts2.org/fact\\_sheets/nlts2\\_fact\\_sheet\\_2006\\_03.pdf](http://www.nlts2.org/fact_sheets/nlts2_fact_sheet_2006_03.pdf)> (last visited Apr. 9, 2009).

<sup>93</sup> *Id.*

<sup>94</sup> Nat'l Working Group on Foster Care and Educ., *Educational Outcomes for Children and Youth in Foster and Out-of-Home Care: Fact Sheet 2* (Oct. 10, 2006)  
 <[http://www.fostercaremonth.org/GetInvolved/Toolkit/Support/Documents/Educational\\_Outcomes\\_and\\_Foster\\_Care.pdf](http://www.fostercaremonth.org/GetInvolved/Toolkit/Support/Documents/Educational_Outcomes_and_Foster_Care.pdf)> (last visited Apr. 9, 2009).

<sup>95</sup> *Id.* at 4.

<sup>96</sup> Comm. on Sch. Health, A.m. Academy of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).



**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON YOUTH AT RISK**  
**COMMISSION ON HOMELESSNESS AND POVERTY**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges enactment and implementation of  
2 statutes and policies that support the right of youth who have left school to return to school to  
3 complete their education in high-quality, age-appropriate programs.

4

5 FURTHER RESOLVED, That the American Bar Association urges the enactment of laws and  
6 policies that establish programs and procedures to encourage and assist parents, students, and  
7 their legal representatives in understanding and exercising student rights to resume their  
8 education.

## REPORT

This recommendation deals with the millions of students living in the United States who have not attained a high school diploma and examines effective ways to allow them to complete their education. Students who have previously left school and try to resume their education face many barriers, including a lack of options of appropriate educational opportunities, ineffective or nonexistent tracking and reintegration policies, and age constraints. In addition, students dealing with disciplinary issues have difficulty returning to school if educational services are not provided during their time out of the classroom. If the disciplinary sanctions are also associated with court involvement, criminal sanctions, and time in juvenile detention facilities or comparable court-sponsored programs, the students face additional barriers when attempting to return to school.<sup>1</sup> In New York, more than two-thirds of high-school age court-involved students do not return to school after they are released from custody or a transitional school.<sup>2</sup> They are often let out in the middle of semesters after schools have stopped accepting students or during summers when schools are not ready to admit new students.<sup>3</sup> Moreover, many states have a maximum age limit, up to which students are entitled to receive a free public education.<sup>4</sup> Thus, students who have stayed out of school for several years but want to return sometimes need to find ways to finance their education while still battling many of the same issues that initially took them out of school.<sup>5</sup>

This recommendation attempts to address the above challenges by focusing on the right of students to resume their education. The recommendation builds upon two important prior ABA policies on public education reform. The first, from February 1995, recommended and encouraged school boards and school administrators to utilize curricula on dispute resolution and school-based peer mediation programs. The second, from February 2001, supported the principles that schools are safe places in which students can learn and develop; that in cases involving alleged student misbehavior school officials should exercise sound discretion consistent with due process and consider the individual student and the particular circumstances of misconduct; that alternatives to expulsion or referral for prosecution should be developed that would improve student behavior and school climate without making schools dangerous; and that "zero tolerance" policies, which mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances, nature of the offense, or the student's history, should be opposed in principle.

A youth's right to resume his/her education should be part of the larger goal of ensuring a high-quality education to all students and is a component of the broader solution to problems of push-

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<sup>1</sup> NAT'L CHILDREN'S LAW CTR., *IN SCHOOL, THE RIGHT SCHOOL, FINISH SCHOOL: A GUIDE TO EDUCATIONAL OPPORTUNITIES FOR COURT-INVOLVED YOUTH*, 3 (2007) (citing that problems include "paperwork being lost, records not being sent,... [and] being denied admission, credits and graduation.").

<sup>2</sup> Office of Justice Programs, Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Overcoming Barriers to School Reentry* (Pub. No. 03 )(2004) <<http://www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf>> (last visited Apr. 9, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> N. Y. EDUC. LAW § 3202.

<sup>5</sup> ADRIA STEINBERG & CHERYL ALMEIDA, *JOBS FOR THE FUTURE, THE DROPOUT CRISIS: PROMISING APPROACHES IN PREVENTION AND RECOVERY* 9 (2004), available in ERIC, ED No. 497 890.

# 118C

out and high school non-completion addressed in the ABA report on the right to remain in school. As described in that report, far too many students drop out of school each year without a high school diploma.<sup>6</sup> These youth face a series of negative outcomes, including fewer job opportunities, lower wages, unemployment, a greater likelihood of incarceration, and increased health problems.<sup>7</sup> Moreover, dropouts create significant economic and social costs for the broader society. The report further pointed out that certain subgroups of students are more likely to drop out of school. These include African American and Latino students and students with disabilities, in particular students identified as having an emotional disturbance.<sup>8</sup> Finally, a number of reasons were provided as to why students leave school, including being “pushed out” (through policies and practices that have the byproduct of increasing dropouts), “kicked out” (as a disciplinary measure), or “pulled out” (by criminalization of school-related behavior).<sup>9</sup>

The large numbers of youth who have already left school without securing a high school diploma compel the need to address the right to resume education. This requires more than simply declaring that right but ensuring that systems are in place for ensuring it, including high-quality alternatives beyond the right to re-enroll in the original school, which may be problematic for some students both because of the reasons they left in the first place and because they are significantly older upon return. The creation of high-quality alternatives requires systems of coordination to ensure that a range of good options are available and accessible. Thus, this recommendation calls for the enactment and implementation of statutes and policies addressing each of these aspects. Thus, on the one hand this recommendation calls for the enactment and implementation of statutes and policies to support the right to resume education in high-quality, appropriate programs and to help youth and their families and addressing each of these aspects. At the same time, the recommendation is made with the realization that fulfillment of those rights requires a commitment to making it a priority in order to fill in gaps in the law and create and coordinate the needed mechanisms, options, and systems to exercise those rights.

## **Making School Re-Engagement for Youth a National Priority with Financial Support**

All students are entitled to a high-quality education, including older students and students who have been excluded from school for disciplinary problems or truancy issues, and this recommendation entails making school re-engagement a national education priority. Few laws address the needs of students who have already left the education system by focusing on reintegrating these students back into high school or an alternate program. Some laws address aspects of the issues related to re-entry,<sup>10</sup> but these are scattered and lack the comprehensive effort that is necessary to prevent students who have left school from staying out permanently.<sup>11</sup>

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<sup>6</sup> See ABA Report on the Right to Remain in School notes 2-4, 10-16 and accompanying text (discussing the dropout problem).

<sup>7</sup> *Id.* at notes 10-16 and accompanying text.

<sup>8</sup> *Id.* at notes 3-4 and accompanying text.

<sup>9</sup> See generally *id.*

<sup>10</sup> See, e.g., 20 U.S.C.A. § 6561d(1)(c) (2002) (awarding subgrants to agencies that offer strategies of recovering students who have dropped out); N.Y. EDUC. LAW § 3202(1), (1-a) (requiring administrators to inform students in writing and orally of their right to re-enroll at any time if a student is being dropped from enrollment due to truancy).

<sup>11</sup> See STEINBERG & ALMEIDA, *supra* note 5, at 4 (evaluating dropout prevention programs and finding that federally funded programs “were not effective at stemming the loss of young people from our schools.”). See also U. S.

In some locales, community groups, local organizations, and school districts have created alternative education programs for students who have left school before graduating.<sup>12</sup> These programs often receive state and federal funding, and if the right to resume education is not strengthened and protected through supportive legislation, funding can be cut or eliminated altogether. Cutbacks in programs have already begun.<sup>13</sup> As local and state governments and the federal government begin to tighten their belts, the enduring presence and effectiveness of these programs is in serious jeopardy.<sup>14</sup> Threats to programs that provide an opportunity to resume education are threats to the exercise of the right to a high-quality education, as described in the accompanying ABA report, as well as to the opportunity to acquire the “basic tools by which individuals might lead economically productive lives to the benefit of us all.”<sup>15</sup>

To make school re-engagement a national priority, there are roles for government on the federal, state and local levels. The federal government and state legislatures can provide the basic funding, standards, and an accountability plan, and direct local school boards to develop a more comprehensive plan with community input to implement the right to resume education.<sup>16</sup> School districts and communities have the best understanding of the specific needs of their neighborhoods. An inclusive legislative scheme that protects the legal status of the right to re-enter could include, but is not limited to, the following goals: (1) providing youth with greater opportunities and support so that even after leaving school they can have access to a high-quality education, including programs to prepare students for postsecondary education and quality vocational opportunities, with the possibility of obtaining credits toward a high school diploma; (2) utilizing creative and effective tracking and re-entry systems; and (3) providing for greater awareness by parents, students, and their legal representatives of students’ rights related to resuming education.

Funding at the federal and state levels can be adapted to encourage school districts to promote the right of students to resume their education after they have left school. One option for a creative funding strategy is a policy such as that implemented in Oregon, where funds follow the student.<sup>17</sup> If a student is “pushed out” or if the student’s needs would be best met in an

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GOV’T ACCOUNTABILITY OFFICE, PUB. NO. GA O-08-313, DISCONNECTED YOUTH: FEDERAL ACTION COULD ADDRESS SOME OF THE CHALLENGES FACED BY LOCAL PROGRAMS THAT RECONNECT YOUTH TO EDUCATION AND EMPLOYMENT (2008) (arguing greater coordination between government agencies is necessary and that the Department of Labor should work with states and investment boards to provide better information and guidance to local agencies that are trying to re-engage youth).

<sup>12</sup> See generally NANCY MARTIN & BETSY BRAND, AM. YOUTH POLICY FORUM, FEDERAL, STATE, AND LOCAL ROLES SUPPORTING ALTERNATIVE EDUCATION 25-30 (2006) (describing alternate education programs and the roles of government through policy and legislation, discussing the problems with the systems currently, and making recommendations for policy makers).

<sup>13</sup> PAUL E. BARTON, POLICY INFO. CTR. EDUC. TESTING SERV., ONE-THIRD OF A NATION: RISING DROPOUT RATES AND DECLINING OPPORTUNITIES 21 (2005), available in ERIC ED No. 485 192 (showing that federal investment in second-chance programs has dropped from \$15 billion in the late 1970’s to \$3 billion today).

<sup>14</sup> *Id.* (noting a decrease in federal funding of second-chance or dropout recovery programs occurring at the “same time that the earning power of dropouts is in sharp decline.”).

<sup>15</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

<sup>16</sup> U. S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 11, at 39 (citing the federal government’s role as “providing funding, oversight, and technical assistance...and hold[ing] programs accountable for meeting performance goals”).

<sup>17</sup> MARTIN & BRAND, *supra* note 12, at 12.

# 118C

alternative program, funding follows the student into that program.<sup>18</sup> Recognition and support in the way of funding grants and legislative protection to programs that provide multiple pathways to graduation are important in ensuring the right to resume education.<sup>19</sup> Funding provisions that require certain progress goals to be met as a prerequisite for receipt of continued aid can discourage programs from taking on students who might not be able to meet those goals or meet them in the year required by the regulations.<sup>20</sup> Programs that provide opportunities for disconnected youth often use a combination of federal, state and local funding sources and greater coordination between sources should be encouraged so that it is easier to provide services to students most in need.<sup>21</sup> In the consideration of funding mechanisms, however, care must be taken not to contribute to the under-funding of public schools or the undermining, rather than advancing, of the obligation to provide a free public education. As discussed further below, all potential funding schemes with respect to alternative education programs should encompass an assurance that the programs provide their students with the same opportunity to meet the state's high academic standards as all other students.

## **Providing full opportunity and support for out-of-school youth to re-integrate into public school or other age-appropriate, high-quality education programs that enable them to receive a regular diploma and/or enter postsecondary education, including during any periods of illness, institutionalization, or incarceration**

This principle, which is the core of the right to resume education articulated in this recommendation, addresses both the right to re-enroll and the right to an alternative program that: (a) is age-appropriate, (b) is of high-quality, and (c) enables students to receive a regular diploma and have the opportunity to enter postsecondary education. This last recognizes that a regular diploma is often necessary for postsecondary and career opportunities that a G.E.D. does not provide and, at the same time, that there is a need for good programs in which older youth and adults can enroll directly in college. Finally, this principle explicitly recognizes that students who are incarcerated, institutionalized, or have illnesses that prevent them from attending their regular school should nevertheless be able to continue to receive a high-quality education during those periods.

While there should always be an option to return to the youth's home school, it should never be the only option. First, while efforts need to be made to welcome returning students and provide for their educational needs, the reality is that the characteristics of the school that may have contributed to the student's leaving in many cases will not always have changed dramatically for the better. Second, the returning student will often have the added burden of being older than his/her classmates, further contributing to a sense of isolation, not belonging, and feeling that s/he is being treated inappropriately for his/her age. This problem in relation to age is exacerbated by the fact that many students are already older than their classmates at the time they

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<sup>18</sup> *Id.* at 11; STEINBERG & ALMEIDA, *supra* note 5, at 8 (describing "children at risk" statutes in Wisconsin and Minnesota where state money follows children that satisfy statutory criteria for being "at risk." This scheme allows district to contract with private, nonprofit, nonsectarian agencies where their needs might be better served. These funding schemes are not without controversy and may increase competition with districts for scarce funds.)

<sup>19</sup> MARTIN & BRAND, *supra* note 12, at 12.

<sup>20</sup> U. S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 4.

<sup>21</sup> *Id.* at 3, 7 (2008) (finding that 12 different agencies fund different programs to help high school dropouts, homeless and runaway youth, incarcerated youth, or youth who have aged out of foster care).

drop out, often having previously been held back one or more grades, a major factor that leads students to drop out and then makes them even older if they later seek to return.

Supporting the right of students to resume their education can also be achieved by promoting high-quality, age-appropriate alternative education programs, which often provide opportunities for over-age, under-credited students. “Alternative education” is a broad term that is used to describe a wide variety of options outside the traditional K-12 school system that are targeted at students who have been unsuccessful in their prior school experiences.<sup>22</sup> These nontraditional alternatives can satisfy the concern of having older students interact with younger students in traditional high schools and provide an option that may better fit with the schedules and commitments of older students.<sup>23</sup>

Although the various forms of alternative education can help address some of the barriers of re-entry, there are a number of problems associated with alternative education.<sup>24</sup> First, not all states have laws regarding alternative education, and those that do tend to vary in inclusiveness and detail of standards.<sup>25</sup> In addition, finding appropriate programs that offer credits toward a high school diploma and are not already at maximum capacity can be difficult.<sup>26</sup> Some alternate systems find it difficult to offer special education services or programs necessary for effective advancement such as language assistance.<sup>27</sup> This is especially troubling due to the higher dropout rates for special education students and English language learners (ELLs).<sup>28</sup> Programs are also not always available in the student’s area, and transportation may not be provided.<sup>29</sup> Moreover, in order to meet certain goals to obtain funding, programs may not be able to provide assistance to students who have too few credits, a problem that is exacerbated as the ages of

<sup>22</sup> See LAUDAN Y. ARON, *THE URBAN INST., AN OVERVIEW OF ALTERNATIVE EDUCATION* 3 (Jan. 2006) <[http://www.urban.org/UploadedPDF/411283\\_alternative\\_education.pdf](http://www.urban.org/UploadedPDF/411283_alternative_education.pdf)> (last visited Apr. 9, 2009).

<sup>23</sup> In New York City, the Department of Education established an Office of Multiple Pathways to Graduation that provides students with a variety of resources and information on programs that are specifically for older students who have dropped out including transfer schools, work programs, and GED programs. See *ADVOCATES FOR CHILDREN OF N.Y., DEAD ENDS: THE NEED FOR MORE PATHWAYS TO GRADUATION FOR OVERAGE, UNDER-CREDITED STUDENTS IN NEW YORK CITY* 2 (2007).

<sup>24</sup> MARTIN & BRAND, *supra* note 12, at 25-30.

<sup>25</sup> See, e.g., CAL. EDUC. CODE §§ 48916(d), 48916.1 (West 2006) (requiring alternate education for expelled students under both zero tolerance and other provision and set minimum required features for alternate education programs); MICH. COMP. LAWS ANN. § 380.1280a (2005) (providing some general guidelines for alternative schools to comply with requirements for traditional high schools); MICH. COMP. LAWS ANN. § 380.1311 (1994) (allowing districts to provide alternate education programs for expelled students at their own discretion, but does not require alternate education programs or re-entry into mainstream schools); OHIO. REV. CODE ANN. § 3313.533 (West 2004) (setting requirements for boards of education and school districts when creating alternative schools and providing certain minimum standards of monitoring and accountability, but allowing leeway for districts to fill in the details of the plans); TENN. CODE ANN. § 49-6-3402(i)(1) (requiring that districts set up alternate schools for students in grades 7-12 with no similar requirement for grades K-6.). See MARTIN & BRAND, *supra* note 12, at 2 (noting that “[a]lthough 48 states define alternative education, their definitions vary tremendously, as do their approaches.”).

<sup>26</sup> BARTON, *supra* note 13, at 21.

<sup>27</sup> *ADVOCATES FOR CHILDREN OF N.Y.*, *supra* note 23 at 4.

<sup>28</sup> Suzanne E. Kemp, *Dropout Policies and Trends for Students with and Without Disabilities*, 41 *ADOLESCENCE* 235, 235-36 (2006) (reporting that between 32% and 36% of students with learning disabilities and 50% to 55% percent of students with emotional or behavioral disorders drop out).

<sup>29</sup> Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 *TENN. L. REV.* 265, 277 (2008) (finding the problems of transportation particularly acute since alternate programs often meet at night or outside the hours of operation for public transportation).

# 118C

dropouts decrease.<sup>30</sup> Similarly, certain programs, through a screening process, may turn away students who do not meet specific academic criteria, such as a minimum reading level, or who have substance abuse issues or criminal histories.<sup>31</sup>

An additional, significant concern associated with alternative education relates to the increased number of alternative education schools that have been created for students who have been deemed disruptive because of problematic behavior and consequently removed from their regular learning environment for alleged disciplinary violations. These schools often provide an academic program that is low level and remedial in nature, focusing on instruction in the “basics.”<sup>32</sup> What has evolved is essentially a separate system of education that is segregated and stigmatizing for students who have been subject to disciplinary exclusions. These students are disproportionately from low-income, racial and ethnic minority backgrounds and students with disabilities. In a 2009 study of alternative education schools in Mississippi, the American Civil Liberties Union found that these schools did not provide opportunities for students to engage in meaningful, challenging, and rigorous work and did not provide appropriate instruction to meet the individualized learning needs of their students.<sup>33</sup> At the same time, many of the schools provided for a shorter length of learning time as well as an excessive focus on behavioral modification at the expense of instruction.<sup>34</sup> These schools were also found to have a disproportionately large number of African American students and students with disabilities.<sup>35</sup>

Despite the concerns associated with current forms of alternative education, the availability of nontraditional education options that are both high-quality and age-appropriate is an important part of ensuring the right of students who have left school to resume their education. While some models of alternative education function as separate schools, alternative education programs do not need to be provided outside of the regular high school building. For example, “school-within-a-school” models have been shown to be effective.<sup>36</sup> These programs encourage school officials to take responsibility for students for whom the school may have played a role in “pushing out.”

The best approach may be for districts to provide a variety of high-quality and age-appropriate options, or multiple pathways to graduation.<sup>37</sup> Some programs may include internships or dual

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<sup>30</sup> ADVOCATES FOR CHILDREN OF NEW YORK, *supra* note 23, at 13 (finding a shift from dropping out occurring largely between grades 11 and 12 thirty years ago, to typically between grades 9 and 10 today).

<sup>31</sup> ROB BUSCHMANN & JOSHUA HAIMSON, MATHEMATICA POL’Y RESEARCH, BRING THEM BACK, MOVE THEM FORWARD 2 (2008) <[http://www.mathe-matica-mpr.com/publications/pdfs/bringback\\_moveforward.pdf](http://www.mathe-matica-mpr.com/publications/pdfs/bringback_moveforward.pdf)> (last visited Apr. 9, 2009).

<sup>32</sup> CAMILLA A. LEHR ET AL., ALTERNATIVE SCHOOLS: FINDINGS FROM A NATIONAL SURVEY OF STATES 15 (2004) <[http://ici.umn.edu/alternativeschools/publications/alt\\_schools\\_report2.pdf](http://ici.umn.edu/alternativeschools/publications/alt_schools_report2.pdf)> (last visited Apr. 9, 2009).

<sup>33</sup> AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MISSISSIPPI, MISSING THE MARK: ALTERNATIVE SCHOOLS IN THE STATE OF MISSISSIPPI 19 (Feb. 2009) <[http://www.aclu.org/pdfs/racialjustice/missingthemark\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf)> (last visited Apr. 9, 2009).

<sup>34</sup> *Id.* at 38.

<sup>35</sup> *Id.* at 6-7.

<sup>36</sup> See John H. Tyler & Magnus Lofstrom, *Finishing High School: Alternative Pathways and Dropout Recovery*, 19 FUTURE OF CHILDREN: AMERICA’S HIGH SCHOOLS 77, 91 (2009).

<sup>37</sup> See BUSCHMANN & HAIMSON, *supra* note 31, at 17 (advocating for a “portfolio” of options or tiers within programs that can admit a wider range of students at different levels of commitment and academic progress); MARTIN & BRAND, *supra* note 12, at 8 (advocating for a “menu of education options”).

enrollment to earn both high school and college credit, and some may operate out of community college campuses.<sup>38</sup> These programs tend to involve participation from a group of collaborating providers such as schools districts, community colleges and local businesses.<sup>39</sup> In these programs, students can acquire specific skills necessary to take college courses so that they are adequately prepared to handle the rigors of college classes. Such programs can be especially beneficial because, in addition to potentially providing an opportunity for a high school diploma, they can encourage students to look beyond high school towards their future, including postsecondary education and careers.<sup>40</sup> Programs that involve a holistic approach to learning, including non-academic services and a focus on empowering students, may also be appropriate.<sup>41</sup> Finally, for those students who must remain outside of traditional high school, even temporarily due to illness, institutionalization, or incarceration, there should be an opportunity for them to continue their studies in high-quality alternative programs in separate school buildings.

Regardless of the type of alternative education model, it is important to ensure that all such options guarantee the same core elements of program quality to which all students are entitled, as articulated under the separate ABA recommendation on that topic, including, among other things, an accelerated and enriched curriculum, effective instruction by highly-qualified teachers, and individualized attention to differences. Youth attending alternative education programs or schools should have the same opportunity to meet their state's challenging academic standards as all other students. It is also important for monitoring systems to be developed that assess the quality and effectiveness of the diversified alternative models available and provide for various measures of student progress including, but not limited to, graduation rates.<sup>42</sup>

### **Developing Evidence-Based Collaborative and Creative Tracking and Re-Entry Programs among School Districts, Community Colleges, and the Private and Non-Profit Sectors**

To protect students after they have left, a system of tracking these students should be implemented by school districts, along with attempts to use this tracking system to contact former students and help them re-enter programs.<sup>43</sup> Tracking systems now being planned or implemented for measuring dropout rates should also be used to recover students.<sup>44</sup> Tracking can make it easier for students to obtain their records and re-enroll at their own initiation. When

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<sup>38</sup> STEINBERG & ALMEIDA, *supra* note 5, at 6.

<sup>39</sup> OFFICE OF THE SUPERINTENDENT OF PUB. INSTRUCTION, WASHINGTON, HELPING STUDENTS FINISH SCHOOL: WHY STUDENT'S DROP OUT AND HOW TO HELP THEM GRADUATE 67 (2006) <<http://www.k12.wa.us/research/pubdocs/pdf/dropoutreport2003.pdf>> (last visited Apr. 9, 2009) (describing the "Middle College concept" which involve partnerships between boards of education and colleges and various programs throughout the country).

<sup>40</sup> STEINBERG & ALMEIDA, *supra* note 5, at 9.

<sup>41</sup> U. S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 4.

<sup>42</sup> BUSCHMANN & HAIMSON, *supra* note 31, at 22.

<sup>43</sup> Russell Rumberger, *Fewer And Fewer High School Students Make It To Their Graduation: Instead, They Drop Out: Four Strategies, If Used Together, Could Stem The Tide*, THE SACRAMENTO BEE, Sept. 14, 2008, at E1 (arguing that the tracking system will also increase accountability).

<sup>44</sup> In 2004, only about one-fifth of states have systems already in place that can track school completion. BARTON, *supra* note 13, at 7 (2005).

# 118C

students are tracked, it is possible to know where they have been and what services they require.<sup>45</sup>

Given the need for a range of options, some not at the regular high school or run by the school district, the right to resume education will not be exercised in a meaningful way if there is not good coordination to enable the student to learn about various programs being run by various government and non-government providers, including enough information about each to make good choices. States and/or school districts need to be vested with the responsibility and obligation to create and foster that collaborative system.

School districts or states should be encouraged to provide centers or centralized and easily accessible information for students who want to return. These can protect against procedures that cause students to lose time searching for available programs or remain outside of school because of an inability to maneuver through the complex bureaucratic system necessary to re-enter.<sup>46</sup> Re-enrollment centers can also provide assistance in helping people re-integrate easily into a school program.<sup>47</sup> For example, The Philadelphia School District created a Re-Engagement Center to facilitate school re-integration. This center provides opportunities for students to be assessed to determine where they are academically and what services might benefit them upon re-entry.<sup>48</sup> If legal services were also made available through enrollment centers, when students are being denied the right to re-enter or are being unlawfully pushed out of school, more options would be available to them to challenge these practices. For court-involved students, effective advocacy is especially important when they are trying to re-enroll. Probation or parole officers can provide help in re-enrollment of students and can be trained in how to get students back into school as quickly as possible by attorneys or other knowledgeable people about enrollment policies.

## **Establishing Programs to Encourage and Assist Parents, Students, and their Legal Representatives in Understanding the Right of Students to Re-Enter School**

Parents, students, and legal representatives need to be provided information about the right of students to resume education. Districts and administrators should be required to inform students of their right to re-enter when they become aware that a student is leaving school or has already left school for a period of time, and should make all efforts to contact and encourage re-entry,

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<sup>45</sup> In Wisconsin each student is given an identification number and a school must submit information to a central reporting agency regarding the student's school, enrollment date, exit information if applicable, high school completion credential type, grade-level placement, disability information, economic disadvantage status, English language proficiency information, any other outside services a student is receiving, and reasons why they might be out of district. Wisconsin Department of Education, Preparing Your School District for the Individual Student Enrollment System (ISES), <<http://dpi.wi.gov/lbstat/isesprepar.html>> (last visited Apr. 9, 2009). See also Bill Gates & Melinda Gates, *A Bold Vision for Stimulus, Education Reform*, ROLL CALL, Feb. 10, 2009 (arguing for longitudinal data systems that will help teachers identify the needs of students).

<sup>46</sup> STEINBERG & ALMEIDA, *supra* note 5, at 7 (2004) (describing a program in Chicago where a Reenrollment Center is part of the newly created Dropout Prevention and Recovery Department and will "serve as the door to a range of quality learning options for reconnecting out-of-school youth.").

<sup>47</sup> Office of Justice, *supra* note 2 (describing a re-enrollment program for court-involved youth).

<sup>48</sup> Kristen A. Graham, *A Path To Success Open Quietly for Dropouts*, PHILA. INQUIRER, Aug. 20, 2008, at B2.

especially when a student is temporarily absent due to disciplinary actions or illnesses.<sup>49</sup> In addition to informing students and their guardians that a student has a right to re-enter, alternative education options should be suggested.<sup>50</sup> Re-enrollment centers and tracking mechanisms discussed above can be another avenue to spread information about rights associated with returning to school. One school district's commitment to informing students and encouraging re-entry included a door-to-door campaign. Former students who failed to register for school were paid a house visit as part of an initiative to lower the dropout rate. Volunteers carried registration paperwork to assist in the process of re-entry.<sup>51</sup> Making students and their supporters aware of their rights and of ways of exercising their right to resume education can be effective in ensuring that all students eventually graduate.

### CONCLUSION

Failing to guarantee the right of re-entry for youth who have previously left school creates significant costs to the future of the youth involved and to the community and state in which the youth reside. In recognition of the consequences that ensue when students leave the education system, both state governments and the federal government need to take steps towards addressing the needs of students who have already left school as well as those who will leave in the future so that all students have access to a high-quality education. The proposed recommendation encourages the passage of laws and implementation of policies to make school re-engagement a national and state priority, calls for the provision of the necessary support and high-quality opportunities for that re-engagement, urges the development of tracking and re-entry programs, and makes the right of students to resume their education more widely known. These provisions, if implemented, will help ensure that the right of students to resume their education is protected and enforced.

**Laura Farber**  
**Chair**  
**American Bar Association**  
**Commission on Youth at Risk**  
**August 2009**

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<sup>49</sup> See N.Y. EDUC. LAW § 3202 (1-a) (McKinney 1995) (requires that a student and their guardian be informed orally and in writing of their right to re-enter but applies only to situations where a school is dropping a student because of absence for more than twenty consecutive days).

<sup>50</sup> See e.g., OR. REV. STAT. ANN. § 339.250 (9)-(11) (West 2003) (providing that before a student leaves school due to expulsion, when there has been erratic attendance records, or when there has been more than one serious discipline problem within a year, a document must be provided to the student and their guardian listing alternative education options or other appropriate programs).

<sup>51</sup> Jamie Rogers, *Educators Visit Homes to Help Bring Students Back to School*, FLORENCE MORNING NEWS, Aug. 24, 2008.