

The Campaign for Educational Equity  
Policy Paper No. 2

**OPPORTUNITY KNOCKS:**

**APPLYING LESSONS FROM THE EDUCATION ADEQUACY MOVEMENT TO  
REFORM THE NO CHILD LEFT BEHIND ACT**

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**MARCH 2006**

Produced by the National Access Network:  
[www.schoolfunding.info](http://www.schoolfunding.info)

A Project of:

**The Campaign for Educational Equity**

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This report is based in part on the discussion at a conference entitled, “NCLB: Developing a Common Agenda for Reform,” convened on November 11-12, 2004, at the Pocantico Conference Center thanks to the generosity of the Rockefeller Brothers Fund and the Rockefeller Foundation. The opinions expressed in this report reflect the views of the authors and not necessarily those of other conference participants or of the funders. The authors are also grateful to the Ford Foundation for its leadership in helping to launch the National Access Network as well as for its valuable ongoing support.

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## **PREFACE**

This paper, “Opportunity Knocks: Applying Lessons from the Education Adequacy Movement to Reform the No Child Left Behind Act,” is second in an ongoing series of policy papers by The Campaign for Educational Equity at Teachers College, Columbia University. The Campaign for Educational Equity was created in June 2005 to promote closing the gaps in education access, expectations, and outcome that separate America’s advantaged and disadvantaged students.

The nationwide effort to reform state education finance systems, now generally known as the education adequacy movement, has constituted a major means for promoting fair and full opportunities for all students by ensuring the most important foundation for school reform: adequate funding and essential educational resources. (To learn more about the history of the education adequacy movement, please refer to Policy Paper No.1: Rebell and Wolff, “Litigation and Education Reform: The History and the Promise of the Education Adequacy Movement,” March 2006, available from: [www.tcequity.org/publications](http://www.tcequity.org/publications)). Within the Equity Campaign, the National Access Network works to support and strengthen this movement by acting as a nationwide resource for litigators, advocates, legislators, state education department officials and other policy makers involved in school funding reform.

Promoting greater awareness of school funding adequacy cases is essential to completing their work and focusing policymakers on the next substantive area of reform: the effective deployment of new resources within schools and school systems to ensure educational equity. The federal No Child Left Behind Act (NCLB), given its broad impact on our nation’s schools, will be a critical factor in the success or failure of this effort. The law’s upcoming 2007 reauthorization constitutes an important occasion to ensure the compatibility of these crucial reforms. We offer this paper as a contribution to this endeavor.

In addition, The Campaign for Educational Equity is planning a major symposium for November 2006 that will be devoted to a thorough examination of the role of NCLB in our nation’s efforts to secure educational opportunity for all of our children.

## **EXECUTIVE SUMMARY**

Today, no national goal is more important or more urgent than ensuring the opportunity for a basic quality education for all of our children. In spite of steady improvements in the overall caliber of our nation's public schools and the educational attainment of our citizens, wide achievement gaps persist between poor and minority students and their peers in other groups. The reasons for these achievement gaps are clear. Poor and minority families' inequitable access to health care, stable housing and early childhood education, among other resources, put their children behind their peers even before they begin school. Because these children attend schools that commonly receive less funding and have fewer qualified teachers, larger classes, lesser facilities and poorer program offerings than schools attended by more affluent white students, they continue to fall further and further behind.

Over the last 15 years, states have invested in reforms to raise standards for all children and in assessment systems that attempt to measure school and student success. But inequitable state education finance systems continue to deprive many poor and minority children of the tools necessary to meet standards. These fiscal inequities, which have stymied education reform for decades, are finally on the verge of being dismantled. Lawsuits challenging state methods for funding public schools have been launched in almost all of the states, and in recent years these cases have been phenomenally successful. Since 1989, plaintiffs have prevailed in 21 of 28 highest state court cases (75 percent) that have sought to ensure that all students are provided the resources they need for a meaningful education and for meeting the challenging new state standards.

This movement to ensure adequate funding for a quality education began more than 30 years ago. Tying together and advancing a century of equity-oriented reforms, it has developed into the most vital present-day education rights movement. The courts' rulings, based on their states' constitutions, have revived and enhanced the principles of the American public school tradition and established education as a child's inviolable right. Education adequacy cases have also reinforced the standards movement. By strengthening and highlighting the educational standards designed by state lawmakers, promoting dialogue with state legislatures and education departments, and, most importantly, ensuring that schools have the resources and instructional capacity to provide all of their students, even those with more extensive educational needs, with the opportunity for a quality education, these cases are pressing states to fulfill the promise of standards-based reform.

### **ADEQUACY'S LESSONS FOR NCLB**

The adequacy movement has much to contribute to the national and federal policy conversations. The cases provide broad and balanced data on a wide range of educational policy issues; they test opposing views among experts in the crucible of trial; and they constitute a practical laboratory for implementing remedies in a sustained manner, with extensive oversight and evaluation. These pragmatic analyses have shown that meeting higher proficiency goals requires states, localities and the federal government to sustain a comprehensive educational enterprise. This enterprise must include adequate systemic funding based on actual costs and an accountability system to ensure effective spending that includes rigorous standards, accurate data from multiple measures of school quality and student achievement, and the capacity to use test results and other school quality data for school improvement. The role of state and federal education policy should be to support and "incentivize" this full agenda.

The enactment of the federal No Child Left Behind Act (NCLB) attempts a new and significant step toward equal education opportunity for all American students. NCLB has created a new sense

of urgency by setting a deadline for closing the achievement gaps between poor and rich, and minority and white, students. It holds states and school districts accountable for measurable progress in accordance with objective standards, and it appropriately requires disaggregation of data to report separately on the progress of students from distinct racial, socioeconomic, and special needs groups. Leading up to 2007, Congress should, however, closely examine the efficacy of the implementation of the law's important principles and reassess the specific means NCLB sets out to meet its aims. The positive aspects of the law should be retained, but the law's current shortcomings must be addressed.

## **RECOMMENDATIONS**

NCLB must be significantly strengthened in three major areas: *funding, standards, and capacity for school improvement*. Without these important revisions, states will continue to lack the means to meet the ambitious goals of NCLB, which parallel the legacy of *Brown v. Board of Education* to NCLB and the aims of the education adequacy movement.

### ***NCLB Must Ensure Adequate Resources***

A potentially fatal flaw of NCLB is its failure to address the severe resource deficiencies that are the root cause of the failure of many schools and school districts to provide all of their students a high-quality education. The extensive evidence compiled during the trials of over two dozen education adequacy litigations has made clear that the major explanation for poor academic performance, especially in urban and rural schools, is the severe resource deficiencies that plague most of these school systems. The research overwhelmingly establishes that money, *if well spent*, will make an enormous positive difference in educational opportunity.

The indispensable first step toward providing schools with adequate funding is assessing the actual costs of reaching student performance goals: it is necessary to determine what resources and conditions schools need to enable their students to meet the state's learning standards and how much funding is required to build and maintain those necessary resources and conditions. The federal government should *immediately* undertake a comprehensive national study that goes beyond efforts to date to gauge the administrative costs of NCLB's new mandates and assesses the costs nationwide of enabling all students to meet NCLB's goals. Such a comprehensive study is eminently feasible and it should be done prior to January 1, 2007, so that Congress and the public have accurate information on the true costs of meeting NCLB's goals to use in their deliberations on the 2007 reauthorization. Although the federal government need not be responsible for providing all of the necessary funding, it must identify the true costs of compliance with NCLB and determine a fair allocation of funding responsibility between the federal government and the states.

### ***NCLB Must Ensure Rigorous Standards***

*Academic Content Standards.* NCLB requires each state to adopt "challenging academic content standards in academic subjects that (1) specify what children are expected to know and be able to do; (2) contain coherent and rigorous content; and (3) encourage the teaching of advanced skills." However, the U.S. Department of Education (ED) has not defined "rigorous" in any substantive way, and, as a result, state standards vary considerably in rigor and may be too low on average to prepare U.S. students for the global competition they will enter after graduation—a task that many believe is critical to our national economic well-being. In addition, NCLB appears to be motivating some states to lower their proficiency demands.

The education adequacy cases provide a way for NCLB to add teeth to its requirements for rigor without mandating uniform national standards. State courts have reached a general consensus regarding the constitutional concept of a basic quality education that provides students with the essential skills they need to function productively in contemporary society. This definition (which is laid out on pages 8-9 of this report) should be incorporated into NCLB. It is sufficiently substantive that it will (1) provide a solid floor of educational rigor to the proficiency requirements of NCLB; and (2) broaden what is covered by the law. At the same time, it is sufficiently flexible that, within a reasonable range, each state, in accordance with its own constitutional traditions and legislative priorities, can apply the concept in its own way and chose to adopt proficiency standards that exceed this floor.

*Teacher Qualification Standards.* There is a strong consensus among educators, researchers and policymakers that of all of the resources that students require to receive a high quality education, none is more essential than effective teaching. NCLB recognizes the importance of well-qualified teachers and the need to close the “teaching gap” so that all children have equal access to quality teaching. However, NCLB does little to ensure that teachers in the nation’s classrooms—and especially in the classrooms of poor and minority students—actually are competent to meet their students’ instructional needs.

While “highly qualified” teachers under NCLB must be state certified, the law allows states to set their own certification standards and to create their own assessments of teacher competence. Certification criteria in many states are inadequate for ensuring that teachers are high quality, and few state teacher-licensing examinations are linked to specific areas of knowledge that students are required to know under state learning standards. The same is true of the “high objective uniform state standard of evaluation” (HOUSSE) standards that NCLB requires to determine the qualification of veteran teachers. NCLB should add substance to its abstract rigor requirements, without imposing uniform national requirements, by emphasizing that state teacher certification standards be based not on “minimum” competency but on proficiency in regard to state academic standards and on the ability to instruct students from diverse backgrounds effectively in the required subject matter. Existing loopholes in alternative certification procedures should also be plugged to ensure that all teachers entering the profession through this route are also “highly qualified.”

### ***NCLB Must Focus on Capacity Building for School Improvement***

NCLB’s current “accountability” system is rudimentary: it relies on student test scores in a very limited number of subjects, and it imposes sanctions on schools and districts whose students do not meet state-set test score targets. Courts in adequacy cases take a better approach to accountability and school improvement: they are increasingly including provisions for capacity-building reforms as part of their remedies. From the adequacy perspective, it is not enough to establish test score targets and identify low-performing schools; states and districts must ensure the resources and assistance that schools require to build capacity—that is, the capabilities needed to overcome the deficiencies and sustain improvement.

Accordingly, NCLB should require districts in need of improvement to develop a multi-year comprehensive capacity-building plan. The plan should address how resources will be used to provide all students with educational opportunity and should include strategies to improve student achievement and close achievement gaps. The plan should set forth annual and long-term benchmarks for measuring capacity improvement.

NCLB should further require states to provide substantive capacity-building support to all schools in need of improvement (SINIs) and districts in need of improvement (DINIs). This support should include quality curriculum and professional development to ensure sufficient instructional capacity aligned with state standards; leadership development to broaden and deepen the skills of school and district leaders; and technical and technological assistance with the use of assessments and data to improve instruction. This level of support will require much greater capacity and expertise in state education departments, as well as the capability to send teams of high quality, experienced professionals into low performing schools and districts to provide on-site assistance for extended periods of time.



## I. Introduction

Today, no national goal is more important or more urgent than ensuring the opportunity for a quality education for all of our children. In spite of steady improvements in overall caliber of our nation's public schools and the educational attainment of many Americans, wide achievement gaps persist between poor and minority students and their peers in other groups.<sup>1</sup> The reasons for these achievement gaps are clear. Poor and minority families' inequitable access to health care, stable housing and early childhood education, among other resources, put their children behind their peers even before they begin school.<sup>2</sup> Because these children attend schools that commonly receive less funding and have fewer qualified teachers, larger classes, lesser facilities and poorer program offerings than schools attended by more affluent white students,<sup>3</sup> they continue to fall further and further behind.

The chronic inequities that plague America's public education system have enormous costs to our nation. The annual price tag of inequitable education is in excess of \$250 billion per year in increased crime, compromised health, poor preparation for competitive employment and lost tax revenue.<sup>4</sup> The heavy toll on the social and civic fabric of the nation is an additional, inestimable price that we all continue to pay every year. If we are to meet the global economic challenges of an increasingly "flat world," if we are to prepare our students to be capable civic participants in our democratic society, and if we are to fulfill the moral imperative of ensuring that a child's racial/ethnic, socioeconomic or family background no longer predict their access to educational opportunity or their level of achievement, we must ensure that all of America's children receive a quality education.

Fifty years after the U.S. Supreme Court's decision in *Brown v. Board of Education*, states and localities around the country are still struggling to make education a right "available to all on equal terms." Over the last 15 years, states have invested in reforms to raise standards for all children and in assessment systems that attempt to measure school and student success. State education departments and local school districts employ a variety of programs and practices aimed at improving the achievement of low-performing schools and students. But inequitable state education finance systems, rooted in our country's tradition of local control of schools, continue to deprive many poor and minority children of the tools necessary to meet standards.

At long last, these fiscal inequities that have stymied education reform for decades are on the verge of being dismantled. Lawsuits challenging state methods for funding public schools have been launched in almost all of the states, and in recent years these cases have been phenomenally successful: since 1989, plaintiffs have prevailed in 21 of 28 highest state court cases that have sought to ensure that all students are provided the resources they need for a meaningful education that meets

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<sup>1</sup> National Task Force on Minority High Achievement, *Reaching the Top: A Report of the National Task Force on Minority High Achievement* (New York: The College Board, 1999).

<sup>2</sup> In his book *Class and Schools: Using Social, Economic and Educational Reform to Close the Black-White Achievement Gap* (New York: Economic Policy Institute and Teachers College, 2004), Richard Rothstein demonstrates that achievement gaps can be attributed to social class and cultural characteristics. Members of lower social classes lack access to any number of resources, including educational resources, that affect learning (13-59).

<sup>3</sup> A study by the Education Trust reveals that 38 of 49 states studied underfund school districts serving large numbers of poor children, with an average gap of \$1,436 per student (*The Funding Gap 2005*, Education Trust, 2005, 4). New York State leads the nation with the largest funding gap between its highest and lowest poverty districts (3, 6). See also *CFE v. State*, 801 N.E.2d 326 (N.Y. 2003); *Beating the Odds IV: A City-By-City Analysis of Student Performance and Achievement Gap on State Assessments Results from 2002-2003 School Year* (Council of the Great City Schools, 2004).

<sup>4</sup> Henry M. Levin, "The Social Costs of Inadequate Education: A Summary of the First Annual Teachers College Symposium on Educational Equity" (The Campaign for Educational Equity, Teachers College, Columbia University, 2005). Retrieved from The Campaign for Educational Equity site: [www.tcequity.org/publications](http://www.tcequity.org/publications).

challenging state standards. State courts have begun to focus on the hard questions of what specific resources are needed to provide the opportunity for a quality education to all students, to assess the shortfalls in these resources and to order states to bridge these resource and opportunity gaps.

At the same time, with the passage of the No Child Left Behind Act of 2001 (NCLB), the federal government has taken a more central role in education than ever before. NCLB's mandates affect state, district and school policies and practices. The law reaches into nearly every public school classroom to influence teaching and learning nationwide. With this larger role, specific federal policy initiatives can further the common goal of educational opportunity or hinder it.

If federal and state actions operate at cross purposes, a unique historical moment to provide millions of poor and minority students a meaningful educational opportunity—and better prepare all of our students to function productively as citizens in a democratic society and compete in the global economy—will have been wasted. To guarantee against this, national policy makers must thoroughly understand the nature of the state-level reforms being engendered by the education adequacy movement. From the perspective of this major national movement, this paper proposes to link federal education policy and reform efforts to the values and constitutional guarantees that have emerged from decades of experience in this “laboratory of the states.”

The litigation movement to ensure adequate funding for a quality education began more than 30 years ago. Tying together and advancing a century of opportunity-oriented reforms, it has developed into the most vital present-day education rights movement. The courts' rulings, based on their states' constitutions, have revived and enhanced the principles of the American public school tradition and established education as a child's inviolable right. They have also reinforced the standards movement. By highlighting state educational standards, promoting dialogue with state legislatures and education departments and, most importantly, ensuring that schools have the resources and instructional capacity to provide all of their students, even those with more extensive educational needs, the opportunity for a quality education, these cases are pressing states to fulfill the promise of standards-based reform.

As the movement has matured, plaintiffs' arguments have grown more strategic, and the courts have become increasingly sophisticated in their remedial orders. Recent decisions reflect a growing understanding of the concrete measures necessary to ensure real education opportunity for students currently being denied. These decisions—with their broad scope that takes in the entire education enterprise and their persistent focus on creating meaningful opportunity—provide a constructive, capacity-building approach to the goal of fulfilling the promise of standards-based reform. As such, the education adequacy movement points to the future of successful national education policy.

Our focus on NCLB is therefore a natural outgrowth of the adequacy lawsuits and our experience up to this point. While there are many areas of NCLB that need to be addressed in the 2007 reauthorization debate, the specific recommendations contained in this paper come directly from the lessons learned from the education adequacy cases. The Campaign for Educational Equity intends to further research the issues and provide additional recommendations following its November 2006 Symposium, which will focus on NCLB reauthorization themes.

## II. PROPOSALS FOR THE 2007 REAUTHORIZATION OF NCLB

Much like courts' decisions in the liability stage of adequacy lawsuits, the present iteration of NCLB seeks to set high standards and establish states' basic goals and responsibilities for students and their public schools. The next iteration of the law, like the remedy stage in the litigations, must wrestle with its implementation. Leading up to 2007, Congress should closely examine the efficacy of the implementation of the law's important principles, reassess the specific means NCLB sets out to meet its aims, hone the policies and practices, and make the mid-course corrections necessary to ensure that the critical aims of equal opportunity will actually be met. To this end, the following section lays out the positive aspects of the law that should be retained and points to NCLB's current gaps, recommending new approaches for dealing with funding, standards and school improvement.

### A. NCLB'S POSITIVE IMPACT

The central goals and the implementing principles of NCLB are of critical national significance and a tremendous asset in school-funding adequacy cases. They must be vigorously enforced if we are to provide quality education to our underserved students and actually close achievement gaps. The central goals and implementing principles that must be preserved are as follows:

- First, is the basic premise that virtually all students can master challenging state academic content if provided appropriate resources and services. NCLB's acceptance of this premise—which also underlies standards-based reform—has had a powerful impact and is fueling efforts by researchers, educators, parents, and advocates to pursue serious strategies for closing achievement gaps.
- Second, is the requirement that states and school districts be held accountable for measurable progress in accordance with objective standards. Federal commitment to measurable progress and transparent reporting has accentuated awareness of the problems and the potential for truly achieving equal opportunity. Armed with this information, education advocates, the media, and the state courts are pressing state and local officials to address deficiencies in education programs and resources.
- And, third, is the disaggregation of data to report separately on the progress of students from distinct racial, economic, and special needs groups. Disaggregation has properly emphasized the extent to which large numbers of poor, minority, disabled and non-English-speaking students throughout the country are being denied equal educational opportunity. It has also highlighted the plight of under-achieving students in many generally high-performing schools and school districts.

### B. PROBLEM AREAS

Judges in school funding cases throughout the country have already asked, “Why are some children not learning?” In state after state, they have found answers based on school and classroom realities, school data, education research, and expert testimony presented as evidence at trial. Now there is a vast wealth of evidence from these trials. Indeed, these cases may be considered the best current example of Justice Brandeis's famous formulation of federalism, where states serve as “laboratories”<sup>5</sup> for developing innovative public policy, in this case, education policy. This extensive database—and the pragmatic wisdom it conveys—has barely been tapped.

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<sup>5</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

What the courts' extensive, pragmatic analyses have shown state by state is that meeting broader federal proficiency goals—or satisfying state constitutional opportunity requirements—requires states, localities and the federal government to sustain a high quality educational enterprise. This enterprise must include adequate systemic funding based on actual costs and an accountability system that includes rigorous standards; comprehensive planning; multiple measures of school quality and student achievement; and the ability to use test results and other school quality data for school improvement. The role of state and federal education policy should be to support and “incentivize” this full agenda.

To play its role, NCLB must be significantly strengthened in three major areas: *funding, standards,* and *capacity for school improvement.* Without these important revisions, states will continue to lack the means to meet the ambitious goals that are the legacy of *Brown* and common to NCLB and the education adequacy movement.

### ***1. NCLB Must Ensure Adequate Resources***

A potentially fatal flaw of NCLB is its failure to address the severe resource deficiencies that are at the root of the failure of many schools and school districts to provide all of their students a high-quality education. The extensive evidence compiled during the trials of over two dozen education adequacy litigations has made clear that the severe resource deficiencies that plague most of these school systems are a major cause of poor academic performance, especially in urban and rural schools. Simply stated, students who must attend school in overcrowded classrooms with inexperienced, poorly trained teachers and without sufficient, up-to-date textbooks, laboratories and computers are not likely to progress to acceptable academic levels.

The research community overwhelmingly supports what parents, students and educators have always known: Money, if well spent, will make an enormous positive difference in educational opportunity.<sup>6</sup> In dozens of education adequacy litigations, experts have squared off on this question, and overwhelmingly, the judges have concluded that “only a fool would find that money does not matter in education.”<sup>7</sup> As the chief justice of the Arizona Supreme Court has put it:

Logic and experience tell us that children have a better opportunity to learn biology and chemistry, and are more likely to do so, if provided with the laboratory equipment for experiments and demonstrations; that children have a better opportunity to learn English literature if given access to books; that children have a better opportunity to learn computer science if they can use computers; and so on through the entire state-prescribed curriculum...It seems apparent to me...that these are inarguable principles. If they are not, then we are wasting an abundance of our taxpayers' money in school districts that maintain libraries and buy textbooks, laboratory equipment and computers.<sup>8</sup>

Plaintiffs' wins in 21 of the 28 state adequacy cases that have been decided in the past 16 years demonstrate that severe resource gaps exist in many states. NCLB's goals cannot be achieved unless this problem is promptly addressed. Adequate funding, therefore, is a *sine qua non* for effective

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<sup>6</sup> See e.g., Ronald F. Ferguson, “Can School Narrow the Test Score Gap?” in Christopher Jencks and Meredith Philips, eds., *The Black-White Test Score Gap* (Washington, D.C.: Brookings Institution Press, 1998) and Eric Hanushek, *Making Schools Work: Improving Performance and Controlling Costs* (Washington, D.C.: Brookings Institution Press, 1994). This research is summarized in Michael A. Rebell and Joseph J. Wardenski, “Of Course Money Matters” (Campaign for Fiscal Equity, 2004).

<sup>7</sup> *Hoke County Bd. of Educ. v. State of North Carolina* No. 95 CVS 1158 (N.C. 2000).

<sup>8</sup> *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P2d 806, 822 (Ariz. 1994) (Feldman, C.J., specially concurring).

accountability. It makes no sense to hold teachers and administrators, and our children, responsible for high test scores if they are denied the essential resources they need to reach these goals. Although the federal government need not be responsible for providing all of the necessary funding, it should be responsible for identifying the true costs of compliance with NCLB and determining a fair allocation of funding responsibility between the federal government and the states.

The indispensable first step toward providing schools with adequate funding is assessing the actual costs of reaching student performance goals. It is necessary to determine what resources and conditions our children need to be able to meet state learning standards and how much funding is required to build and maintain those essential resources and conditions. To answer these questions, states and education advocacy organizations have increasingly turned to “costing-out studies” to obtain rationally based, objective information on how to fund public education so that all students have a genuine opportunity. An education adequacy costing-out study determines the amount of money actually needed to make available the education services required to provide children an opportunity to meet the applicable state learning standards. Since 1991, when a business group in Massachusetts conducted an education cost study for that state, 47 education adequacy cost studies have been undertaken in 36 states.<sup>9</sup> Typically, the cost studies have revealed underfunding of 20 to 30 percent.<sup>10</sup>

An additional impetus for cost studies has come from the courts that have found their state's school funding system unconstitutional. In Arizona, Arkansas, New York, Ohio and Wyoming, the courts ordered the states to conduct cost studies as part of their remedial orders.<sup>11</sup> In others, such as Kansas and Montana, the courts have analyzed and relied on cost studies as evidence in adequacy trials.<sup>12</sup>

There have been a number of studies by the U.S. General Accounting Office<sup>13</sup> and states such as Connecticut, Minnesota and Hawaii<sup>14</sup> of the additional testing and administrative costs imposed on the states by NCLB. These studies have found without exception that the costs of NCLB significantly exceed the federal funds allocated to each state. Producing, administering, and reporting the results of the tests mandated by NCLB places a large strain on state budgets, as does the implementation of sanctions for schools that fail to make adequate yearly progress (AYP). Far larger, of course, are the costs of actually raising student achievement to meet NCLB's goals.

Schools, districts and states increasingly voice their frustration at the difficulty of meeting the demands of the law without adequate funding. One school district in financial distress, Reading, PA,

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<sup>9</sup> For further information on costing-out methodologies and specific costing-out studies, see the ACCESS site: [www.schoolfunding.info/policy/CostingOut/overview.php3](http://www.schoolfunding.info/policy/CostingOut/overview.php3).

<sup>10</sup> William J. Mathis, “Two Very Different Questions,” *Education Week*, April 21, 2004.

<sup>11</sup> For more information on these studies, see the ACCESS site: [www.schoolfunding.info/policy/CostingOut/factsheetslist.php3](http://www.schoolfunding.info/policy/CostingOut/factsheetslist.php3).

<sup>12</sup> On the Kansas decision, see: [www.kscourts.org/kscases/supct/2005/20050103/92032.htm](http://www.kscourts.org/kscases/supct/2005/20050103/92032.htm);

The Montana decision is *Columbia Falls Elementary School District No. 6 v. State*, No. BDV-2002-528 (First Judicial Dist. Ct. Apr. 15, 2004), aff'd, 109 P. 3d 257 (Mont. 2005).

<sup>13</sup> U.S. General Accounting Office, *Title 1: Characteristics of Tests Will Influence Expenses; Information Sharing May Help States Realize Efficiencies*, (GAO-03-389, May 2003); *No Child Left Behind Act: More Information Would Help States Determine Which Teachers Are Highly Qualified*, (GAO-03-0631, July 2003); *Education Needs to Provide Additional Technical Assistance and Conduct Implementation Studies for School Choice Provision*, (GAO-05-7, December 2004); *No Child Left Behind Act: Additional Assistance and Research on Effective Strategies Would Help Small Rural Districts*, (GAO-04-909, September 2004).

<sup>14</sup> Connecticut State Department of Education, “Cost of Implementing the Federal No Child Left Behind Act in Connecticut, Part 1: State-Level Costs” (March 2, 2005); “Part 2: Local-Level Costs” (April 5, 2005); State of Minnesota Office of Legislative Auditor, “Evaluation Report: No Child Left Behind, Report #04-04” (March 2004); Robert Palaich, John Augenblick, and Justin Silverstein, “Estimating the New, Marginal Costs of No Child Left Behind in Hawaii” (Hawaii Educational Policy Center, July 2004).

is in active litigation against the Pennsylvania Department of Education, contending that the designation of some of its schools as failing to make AYP under NCLB was unfair because the Pennsylvania Department of Education did not provide the technical assistance and resources necessary for school improvement. A cost study conducted by six of the schools in need of improvement determined that they would need \$26 million to come into compliance but would receive only \$8 million in Title 1 money. The case is now on appeal to the Pennsylvania Supreme Court.<sup>15</sup>

The State of Connecticut recently filed suit against the federal government claiming that Secretary Spellings violated the “unfunded mandates provision” of NCLB by requiring the state to comply with “rigid, arbitrary and capricious” interpretations of NCLB’s yearly testing requirements even though Connecticut already had a rigorous state testing regimen in place that required, among other things, testing every two years. The Connecticut lawsuit further alleges that the federal government violates Congress’s spending power under the United States Constitution by “mandating, directing and/or controlling” the allocation of state and local resources by forcing Connecticut to pay for the unfunded testing NCLB mandates, thereby diverting funding for programs that state and local officials deemed important.<sup>16</sup>

In April 2005, nine school districts in Michigan, Texas and Vermont, together with the National Education Association (NEA) and 10 state NEA affiliates filed suit in federal court asking the court to declare that NCLB requires the *federal* government to pay for the law’s new mandates. The case was dismissed by a federal district court, but the NEA has pledged to appeal it to the U.S. Court of Appeals.<sup>17</sup> This suit does not, however, identify the full costs of meeting the proficiency requirements of NCLB, nor does it offer any fair or feasible methodology for allocating these costs between federal and state authorities.<sup>18</sup>

The larger and more significant question of adequate funding goes well beyond the issues raised in these lawsuits. It involves the cost of providing the teaching quality, smaller classes, extra time on task and other inputs that are obviously necessary if all children are to be given a meaningful opportunity to meet state learning standards. There is increasing recognition of the importance of calculating these costs, as is exemplified by the strong recommendation in the recent report of the National Conference of State Legislatures’ NCLB Task Force for “a comprehensive study on the costs to states and local districts of (1) complying with the administrative processes of NCLB; and (2) achieving the proficiency goals of NCLB and/or closing the achievement gap.”<sup>19</sup> The federal government should *immediately* undertake a comprehensive national study that goes beyond efforts to

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<sup>15</sup> *Reading School District v. Dep’t. of Education*, 875 A.2d 1218, 2005 Pa. Commw. LEXIS 298 (2005).

<sup>16</sup> *State of Connecticut v. Spellings*, Civ. No. 305CV1330 (D. Conn., 2005). See also Nelly Ward, *NCLB Rebellion Heats Up as Connecticut Sues Secretary Spellings* (August 24, 2005). Retrieved from the ACCESS site: [www.schoolfunding.info/news/federal/8-24-05ctnclbsuit.php3](http://www.schoolfunding.info/news/federal/8-24-05ctnclbsuit.php3).

<sup>17</sup> *School District of the City of Pontiac v. Spellings*, Civ. No. 05-71535 (E.D. Mich., 2005).

<sup>18</sup> To date, Ohio and Texas are the only states where these full cost issues have been studied and estimated. The Ohio study, which concluded that the annual cost to the state of complying with NCLB will reach \$1.447 billion by 2010, considered the incremental costs of reaching 100 percent proficiency as required by the federal law, but it focused only on students in grades K-3 and did not also analyze the base costs of first reaching the 75 percent proficiency standard required under state law. Whether pre-NCLB spending, 75 percent proficiency, or cost levels related to the state’s own constitutional requirements would be the appropriate base cost for establishing the states’ responsibilities for education funding is a key conceptual question that needs to be addressed before a fair division of funding responsibility between the federal government and the states can be determined. The Texas study determined that for all districts in Texas to make AYP in 2005-2006 only, Texas would need to increase its annual education spending by \$1.65 billion. When the same cost function was used to determine costs for reaching 70 percent proficiency, an achievement target that will soon be required, the cost rises to \$4.67 billion, 16.7 percent of the state’s total public school revenue for 2004. For more information on these studies, see ACCESS site: [www.schoolfunding.info/policy/CostingOut/factsheetslist.php3](http://www.schoolfunding.info/policy/CostingOut/factsheetslist.php3).

<sup>19</sup> National Conference of State Legislatures, *Task Force on NCLB Final Report* (February 2005), 44.

date to gauge the administrative costs of NCLB's new mandates and assesses the costs nationwide of enabling all students to meet NCLB's goals. Such a comprehensive study is eminently feasible and should be done prior to January 1, 2007, so that Congress and the public have accurate information on the true costs of meeting NCLB's goals to use in their deliberations on the 2007 reauthorization.

## 2. NCLB Must Ensure Rigorous Standards

*Academic Content Standards.* NCLB requires each state to adopt “challenging academic content standards in academic subjects that (1) specify what children are expected to know and be able to do; (2) contain coherent and rigorous content; and (3) encourage the teaching of advanced skills.”<sup>20</sup> This requirement incorporates into national policy the essence of the standards-based reforms that have been adopted by all 50 states.<sup>21</sup> The fate of these promising state-based initiatives, therefore, is now directly tied to the development and implementation of this federal act. NCLB's mandate that state standards be “coherent and rigorous” and that they “encourage the teaching of advanced skills” potentially means that states that had previously adopted weak standards would now be required to upgrade them. This has not proved to be the case. The ED has not defined “rigorous” in any substantive way,<sup>22</sup> and as a result state standards vary considerably in rigor<sup>23</sup> and may be too low on average to prepare U.S. students for the global competition they will enter after graduation—a task that is critical to our national economic well-being.<sup>24</sup>

Results of the federal National Assessment of Educational Progress (NAEP), released in October 2005, confirm discrepancies between state proficiency standards and the national assessments—as well as among states.<sup>25</sup> Almost all states report that, based on their own tests, large proportions of their students meet high standards. Yet in most states the percentage reaching proficiency on the NAEP test (which was given to a representative sample of fourth and eighth graders) was significantly lower. Only in South Carolina, Missouri, Wyoming and Maine did state results match the federal exam.

Of even greater immediate concern is that NCLB appears to be motivating some states to lower their proficiency demands. As implementation has progressed and an increasing number of schools and school districts are being stigmatized as “needing improvement,” many local education officials have quickly come to realize that the number of schools on the widely publicized SINI lists often directly correlates to the rigor of the standards. This creates a “perverse incentive” for states to

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<sup>20</sup> 20 U.S.C. 6311(b)(1)(D).

<sup>21</sup> Iowa does not have state standards, but does require school districts to have local standards.

<sup>22</sup> The implementing regulations, 34 CFR sec 200.1, actually tend to weaken state standards since they require states only to adopt academic content standards in mathematics, reading/language arts, and, beginning in 2005-2006, science. States are, in essence, being told that standards in other major subject areas like history, civics, art and computer science, which most of them had already adopted, are of lesser significance.

<sup>23</sup> A 30-state analysis by the Thomas B. Fordham Foundation concludes that, on average, state standards and assessments are “mediocre” and certainly “not yet up to the task of ‘leaving no child behind’ ” (2). Average quality on state standards is rated only as “fair,” with significant variations among the states and only a handful rising to an acceptable level (2-3). See Richard W. Cross, Theodor Rebarber, Justin Torres and Chester E. Finn, Jr., “Grading the Systems: The Guide to State Standards, Tests, and Accountability Policies” (Thomas B. Fordham Foundation, January 2004). The Fordham Foundation's analyses of English and math standards in 49 states and the District of Columbia show similar results. See Sandra Stotsky, “The State of State English Standards 2005” (Thomas B. Fordham Foundation, January 2005); David Klein, “The State of State Math Standards 2005” (Thomas B. Fordham Foundation, January 2005). See also Lauren Resnick and Chris Zurawsky, “Getting Back on Track: Standards-Based Reform and Accountability,” *American Educator*, Spring 2005, 12. Retrieved from: [www.aft.org/pubs-reports/american\\_educator/issues/spring05/kober.htm](http://www.aft.org/pubs-reports/american_educator/issues/spring05/kober.htm).

<sup>24</sup> See *Ready or Not: Creating a High School Diploma that Counts* (The American Diploma Project, February 2004).

<sup>25</sup> See Sam Dillon, “Students Ace State Tests, but Earn D's from U.S.,” *The New York Times*, November 26, 2005, for specific comparisons.

lower their standards or proficiency levels in order to reduce their number of SINIs.<sup>26</sup> Some states have already moved in this direction. For example, Pennsylvania, Colorado and Louisiana have recently lowered their proficiency levels.<sup>27</sup> As Richard Rothstein writes, “Lowering the proficiency standards can make it appear that the achievement gap has been eliminated when it actually has not.”<sup>28</sup>

Some states, like Missouri, have received authorization from ED to lower their annual proficiency targets in the near term and defer higher performance goals to future years.<sup>29</sup> A recent study commissioned by Florida’s district superintendents concluded that if the 2005 targets are imposed, 90 percent of schools will fail to make AYP. Last year, 77 percent of Florida schools fell short of AYP goals.<sup>30</sup> As a result of the study the superintendents association is advocating lowering the proficiency target to a level at which two-thirds of the schools would make AYP.<sup>31</sup>

In the long term, this trend could undermine both NCLB and standards-based reform, which is a mainstay of the adequacy movement. Congress and ED have allowed this unfortunate situation to unfold because of their understandable reluctance to impose uniform federal academic content or uniform federal tests on the states. But Congress’s decision to incorporate state standards into this mandatory federal act, and to intervene massively in the state-level standards-based reform process, requires the federal government to take some effective action to ensure the integrity of the standards that are central to NCLB’s vital goals.

The education adequacy cases provide important guidance on bottom-line “rigor” for state standards. The many state courts that have dealt with this issue have arrived at a general consensus regarding the constitutional concept of a basic quality education that provides students with the essential skills they need to function productively in contemporary society:

(1) The constitutional standard for a basic quality education is one that provides students with the essential skills they need to function productively as capable voters, jurors, and civic participants in a democratic society and compete effectively in the 21<sup>st</sup> century global economy.

(2) The types of knowledge and skills that students need to be effective citizens and workers are

- sufficient ability to read, write and speak the English language and sufficient knowledge of fundamental mathematics and physical science to enable them to function in a complex and rapidly changing society;
- sufficient fundamental knowledge of social studies, that is, geography, history, and basic economic and political systems, to enable them to make informed choices with regard to issues that affect them personally or affect their communities, states and nation;

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<sup>26</sup> See James E. Ryan, “The Perverse Incentives of the No Child Left Behind Act,” *New York University Law Review*, vol. 79, no. 3, June 2004, 932-989.

<sup>27</sup> David Hoff, “States Revise the Meaning of ‘Proficient,’” *Education Week*, October 9, 2002. Dan Hardy, “Rule Changes Aided School Progress,” *Philadelphia Inquirer*, October 28, 2004. See also G. Gage Kingsbury, Allan Olson, John Cronin, Carl Hauser, and Ron Houser. *The State of State Standards: Research Investigating Proficiency Levels in 14 States* (Northwest Evaluation Association, November 21, 2003).

<sup>28</sup> Richard Rothstein, *Class and Schools*, 15.

<sup>29</sup> Missouri Department of Elementary and Secondary Education, “State Sets New ‘AYP’ Targets for Schools in 2005” Retrieved from: <http://dese.mo.gov/news/2005/ayp.htm>

See also Mike Sherry, “Missouri Lowers Testing Goals” *Kansas City Star*, January 22, 2005.

<sup>30</sup> Florida Association of District School Superintendents, *Viable Options: Results of Computer Simulations for Calculating Adequate Yearly Progress in Florida Schools* (January 2005).

<sup>31</sup> *Ibid*, 9-10.

- sufficient intellectual tools to evaluate complex issues and sufficient social and communication skills to work well with others and communicate ideas to a group; and sufficient academic and vocational skills to enable them to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

(3) The essential resources students need to acquire this knowledge and these skills are

- qualified teachers, principals and other personnel;
- appropriate class sizes;
- high-quality early childhood and preschool services;
- adequate school facilities;
- supplemental programs and services, including summer and after school programs, for students from high-poverty backgrounds;
- appropriate programs and services for English language learners and students with disabilities;
- instrumentalities of learning, including, but not limited to, textbooks, libraries, laboratories and computers; and
- a safe, orderly learning environment.<sup>32</sup>

NCLB should reflect this consensus definition. It is sufficiently substantive that it will (1) provide a solid floor of educational rigor to the proficiency requirements of NCLB and (2) guard against a narrow interpretation of the opportunities schools need to provide. At the same time, it is sufficiently flexible so that, within a reasonable range, each state, in accordance with its own constitutional traditions and legislative priorities, can apply the concept in its own way and can choose to adopt proficiency standards that exceed the adequacy floor.

While we propose federal adoption of a core definition of a basic quality education that provides the essential skills to function productively as citizens in the 21<sup>st</sup> century, we are not recommending a uniform national standard or national tests. We are saying that NCLB’s vision and commitment to closing achievement gaps require a clear national statement of what academic proficiency means.<sup>33</sup> Highlighting the standard that has emerged by virtual consensus from the states will provide this national focus, underscore and reinforce the importance of the pioneering work of the state courts in this area, provide guidance to other state courts and offer a substantive benchmark for state policy makers. In short, it will provide a true national vision and national benchmark without undermining the states’ prerogatives and operating authority in this area.

NCLB requires that students be assessed through standardized tests in reading, math and science. Such tests do not measure many of the skills relevant to citizenship and employment at the core of the constitutional definition of a basic quality education,<sup>34</sup> so NCLB currently has no mechanism for assessing and crediting these important skills. Since the implementation of NCLB, time allocated to foreign languages, art and music has decreased at both the elementary and secondary levels, especially among schools with high minority populations. Studies confirm that NCLB’s emphasis on only three basic subjects has substantial negative impacts, especially for poor

<sup>32</sup> See discussion in Rebell and Wolff, “Litigation and Education Reform: The History and the Promise of the Education Adequacy Movement,” March 2006, 16-17 available from [www.tcequity.org/publication](http://www.tcequity.org/publication) for a full definition of the constitutional concept of an education that provides students the essential skills to function productively as citizens in the 21<sup>st</sup> century.

<sup>33</sup> As Resnick and Zurawsky write in “Getting Back on Track,” “To realize [the] benefits [of standards-based reform], someone has to create a curriculum or standards...to carry the load that is carried by other [high-achieving] countries’ national curricula” (17).

<sup>34</sup> Richard Rothstein, *Class and Schools*, 95.

and minority students.<sup>35</sup> The requirement to develop rigorous standards that reflect the skills and knowledge actually needed to meet state constitutional requirements should encourage statewide and national debates on what specific skills beyond reading, math and science are critical and need to be taught and assessed.

*Standards for “Highly Qualified” Teachers.* There is a strong consensus among educators, researchers, and policymakers that of all of the resources that students require to receive a high-quality education, none is more essential than effective teaching.<sup>36</sup> This commonsense notion that almost every parent holds has been tested and proven in empirical research many times. Tragically, poor children and children of color are more likely to be taught by unqualified teachers than other children. Secondary school students in high-poverty areas are twice as likely as those in low-poverty areas to have teachers who are not licensed in the subjects they teach; students in high-poverty and high-minority schools are more likely to be taught by inexperienced teachers, by newcomers with no practice-teaching experience, or even by a string of substitute teachers.<sup>37</sup>

Not surprisingly, the lack of quality teaching in poor urban and rural schools is always core evidence in education adequacy litigations. State defendants’ witnesses generally agree that teaching quality is of primary importance in education. The courts have consistently held that teaching quality “correlates with student performance” and have focused on the need to have quality teaching in all classrooms as a central aspect of the remedies that states must institute to meet their constitutional responsibilities.<sup>38</sup>

The North Carolina Supreme Court, for instance, concluded that students were failing at alarming rates and that it was necessary to “hold the State accountable” for the many programs and services missing from their schools. The court affirmed the trial court’s insistence that the state, as it reassesses its educational obligations, “must structure its proposed solutions to ensure there are competent teachers in classrooms, competent principals in schoolhouses, and adequate resources to sustain instructional and support programs.”<sup>39</sup> In Arkansas, the supreme court stated that the state’s initiatives to correct its educational deficiencies would depend on quality teachers and “quality teachers is an area where we have a crisis” due to an inability to attract or retain qualified teachers.<sup>40</sup>

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<sup>35</sup> In New York City, less than 20 percent of the city’s eighth graders met state social studies standards last year. Many attribute the steep decline in scores statewide to the lack of focus on subjects not included in NCLB. See David Herszenhorn, “Most City 8<sup>th</sup> Graders Miss State Norm in Social Studies,” *New York Times*, May 10, 2005. See also, The Council for Basic Education, “Academic Atrophy: The Condition of Liberal Arts in America’s Public Schools” (2004); The National Association of State Boards of Education, “The Complete Curriculum: Ensuring a Place for the Arts and Foreign Languages in America’s Schools” (2003); W. James Popham, *America’s Failing Schools* (New York: RoutledgeFalmer, 2004), 65.

<sup>36</sup> See William L. Sanders and June C. Rivers, *Cumulative and Residual Effects of Teachers on Future Students’ Academic Achievement* (Knoxville: Value-Added Research And Assessment Center, University of Tennessee, 1996); National Commission of Teaching and America’s Future, *Doing What Matters Most: Investing in Quality Teaching* (1997); The Education Trust, *Thinking K-16: Good Teaching Matters*, Vol. 3, No. 2 (Summer 1998); Ronald F. Ferguson, “Can School Narrow the Test Score Gap?” in Christopher Jencks and Meredith Philips, eds., *The Black-White Test Score Gap* (Washington, D.C.: Brookings Institution Press, 1998), 351; Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence* (Seattle: Center for the Study of Teaching and Policy, University of Washington, Document R-99-1, December 1999).

<sup>37</sup> Lynn Olson, “The Great Divide,” *“If I Can’t Learn from You...” Ensuring a Highly Qualified Teacher in Every Classroom.* (*Quality Counts 2003*), 13-14.

<sup>38</sup> *CFE v. State*, N.E.2d (N.Y. 2003); *Montoy v. State*, 112 P.3d 923, 935 (Kan.2005); *Columbia Falls Elementary School District No. 6 v. State*, No. BDV-2002-528 (First Judicial Dist. Ct. Apr. 15, 2004), aff’d, 109 P. 3d 257 (Mont. 2005). See also *Hoke County Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 636 (2005); *Abbott v. Burke*, 748 A.2d 82, 89-91 (N.J. 2000).

<sup>39</sup> *Hoke County Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 636 (2005).

<sup>40</sup> *Lake View School District v. Huckabee*, 76 S.W.3d 250 (Ark. 2002)

NCLB recognizes the importance of well-qualified teachers and the need to close the “teaching gap” so that all children have access to quality teaching; the language of the law resonates with repeated references to significant improvements in the caliber of the nation’s teaching force. In reality, however, NCLB does not ensure that teachers in the nation’s classrooms—and especially in the classrooms of poor and minority students—actually are competent to meet students’ instructional needs.<sup>41</sup> While “highly qualified” teachers under NCLB must have a bachelor’s degree, be state-certified, and demonstrate mastery in the subjects they teach, the law allows states to set their own certification standards and to create their own assessments of teacher competence, with widely varying results.

Some states have taken the intent of the provisions to heart, but many others have established very minimal standards. The Education Trust has reported that some states maintain two sets of records, one for public reporting under NCLB and another with the states’ true definition of qualified teachers. For example, Utah’s submission to the federal government reported that 95.9 percent of its teachers were “highly qualified.” However, in an addition to its filing, Utah noted that only 25 percent of those teachers were “fully highly qualified,” and the other 71 percent had a vague “interim highly qualified” status.<sup>42</sup> Aside from such double ledgers, the fact that one state (Alaska) can report that only 16 percent of its teachers are currently “highly qualified,” while another state (Wisconsin) reports that 99 percent of its teachers are “highly qualified” suggests the variability of this standard from state to state.<sup>43</sup>

State certification requirements vary widely, and certification criteria in many states fail to ensure that teachers are high-quality. The same is true of the “high objective uniform state standard of evaluation,” or HOUSSE, standards that NCLB requires to determine the qualification of veteran teachers. Few state teacher-licensing examinations are linked to specific areas of knowledge that students are required to know under state learning standards. As the Education Trust found in comprehensive analysis of certification standards in all 50 states, teacher testing standards in most states assess only “minimum competency” and exclude only “the weakest of the weak.”<sup>44</sup> Almost by definition the rest cannot be considered “highly qualified.”<sup>45</sup>

NCLB must add substance to its abstract rigor requirements. Without imposing uniform national requirements, it should emphasize that state teacher certification standards be based not on “minimum” competency but on proficiency in relation to state academic standards that are consistent with the core constitutional definition of a basic quality education described above. In order to ensure that students from all subgroups will reach proficiency, teachers must also demonstrate the ability to instruct students from diverse backgrounds effectively in the required subject matter. National requirements based on proficiency in substantive state standards establishes a reasonably rigorous “floor” but presumes for state autonomy a wide range of discretion in

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<sup>41</sup> For example, the National Council of Teachers of Mathematics and the National Council of Teachers of English have issued guidelines on the knowledge and skills teachers need to be “highly qualified” in those subject areas. These definitions clearly exceed the minimum state certification standards. See National Council of Teachers of English, *A Policymakers Guide to Identifying and Supporting Highly Qualified Teachers of English Language Arts from the National Council of Teachers of English* (April 2004); National Council of Teachers of Mathematics, *Highly Qualified Teachers: A Position of the National Council of Teachers of Mathematics* (July 2005).

<sup>42</sup> The Education Trust, *Telling the Whole Truth [or Not] About Highly Qualified Teachers* (Dec. 2003), 5.

<sup>43</sup> *Ibid.*, 3.

<sup>44</sup> Education Trust, “Not Good Enough: A Content Analysis of Teacher Licensing Examinations” *Thinking K-16*, Vol. 3, No. 1 (Spring 1999), 2.

<sup>45</sup> NCLB does not emphasize the skills actually needed to be an effective teacher. While acknowledging that teachers need both subject matter and pedagogical knowledge to be considered highly qualified, the law and its regulations and guidance stress the former over the latter. See Michael A. Rebell and Molly Hunter, “‘Highly Qualified Teachers’: Pretense or Legal Requirement?” *Phi Delta Kappan* (May 2004), 690-696.

establishing specific certification, induction, mentoring and other professional development requirements above that floor.

NCLB also allows alternative certification programs to become loopholes that may allow individuals with inadequate skills to be deemed “highly qualified.” To prevent this, NCLB should include specific professional development requirements for alternative certification, including mentoring and pedagogical training to teach diverse students. The law must ensure that teachers complete these programs before being considered “highly qualified.” The law should also require states to implement certification procedures to ensure that all personnel working with children, including preschool teachers, after-school teachers, supplemental education services (SES) providers and other tutors, are high-quality professionals.

### ***3. NCLB Must Focus on Capacity Building for School Improvement***

NCLB currently employs a rudimentary “accountability” system ostensibly designed to assess, track and improve school quality and student achievement. To do this, it relies on student standardized test score targets in a very limited number of subjects and sanctions schools and districts in which any subgroup of students misses a target for two or more years. This approach to accountability has limited effectiveness to engender real school improvement and, in fact, may even hinder it. Courts in adequacy cases take a different and better approach to accountability and school improvement. Courts ordering finance reforms increasingly include capacity-building accountability provisions as part of their remedies. These provisions are designed to ensure that schools acquire the resources and capabilities needed to improve student achievement.

The 1989 decision of the Kentucky Supreme Court, one of the first of the current wave of education adequacy lawsuits, specifically held that a constitutional state education system must be “properly managed.” In direct response to the court mandate, the legislature promptly enacted the Kentucky Education Reform Act, or KERA, a sweeping set of reforms that included a range of significant capacity-building and accountability initiatives. Among other reforms, it established a statewide office of education accountability and invested in the expertise to run a comprehensive program of assistance for low-performing schools. KERA is generally acknowledged to have raised student achievement significantly; in Kentucky, 90 percent of the schools that receive assistance meet the goal of raising student achievement within two years.

In New Jersey, the *Abbott* decisions have also emphasized building the capacity of the schools to improve teaching and learning and close achievement gaps. These decisions stress that low-performing schools not simply be labeled “failing” but instead be provided the tools needed to improve and sustain improvement—adequate funding, essential programs (including high quality preschool for all at-risk three- and four-year-olds), and early literacy, summer school, and after-school programs. The *Abbott* decisions directly place on the state the obligation to use its statutory, regulatory and administrative authority to ensure the “effective and efficient” use of all funding to enable students to meet rigorous state academic standards.<sup>46</sup> In more recent *Abbott* decisions, the court went even further by ordering the state to implement an accountability system of baseline data and progress benchmarks to inform decisions about program improvement; whole-school reform in elementary schools; a “formal evaluation...to verify” whether those efforts are successful; and an

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<sup>46</sup> *Abbott v. Burke IV*, No. 149 N.J. 145, 693 A.2d 417 (1997); *Abbott v. Burke V*, No. 153 N.J. 480, 710 A.2d 450 (1998) 578, 832 A.2d 891 (June 2003).

external intervention process in low-performing schools that focuses on all aspects of the school, modeled on the Kentucky and North Carolina academic intervention team approaches.<sup>47</sup>

More recently, the adequacy litigation in Maryland spurred a new, comprehensive capacity-building accountability scheme that requires every local district to adopt and implement a thoroughgoing master plan to ensure that both new and existing revenues are targeted to improve student achievement. In New York, the court ordered a similar comprehensive planning process to “ensure that every school in [New York] City’s public school system will have the capacity to provide all of its students the opportunity for a sound basic education.”<sup>48</sup> It further ruled that comprehensive planning had to be coordinated with the phase-in of the additional operational funding and contain procedures for verifying the adequacy of the funds available to each school and to the public school system. In addition, the court ordered the New York City Department of Education to prepare an annual report to provide all stakeholders with the information necessary to track the additional funding and measure student achievement and other benchmarks to assess the performance of the schools.

In contrast with NCLB’s current “sanction and publicize” approach, capacity-oriented accountability, or “next generation” accountability as it has also been called,<sup>49</sup> seeks to ensure that resources translate into school improvement, that is, into both improved opportunities and outcomes. It is not enough just to identify low-performing schools; states and districts must ensure that the resources and assistance that schools require to provide a quality education are actually in place. Although capacity-oriented accountability may also include assessments, test score targets and sanctions, these are not ends in themselves. They are means for identifying shortcomings and then focusing resources in the areas of need to build capacity, that is, the capabilities needed to overcome the deficiencies and sustain improvement.

NCLB’s current school improvement provisions call for taking a series of actions designed to improve and “turn around” failing schools but simultaneously sanction such schools by allowing students to transfer out and by compelling the schools to fund SES provided by often unaccountable outside agencies. Rather than building school capacity to provide a quality education, the transfer<sup>50</sup> and supplemental services<sup>51</sup> requirements divert energy and resources from schools’

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<sup>47</sup> *Abbott v. Burke V*, No. 153 N.J. 480, 710 A.2d 450 (1998); *Abbott v. Burke X* (Mediation Agreement Order) 177 N.J. (2003).

<sup>48</sup> *Campaign for Fiscal Equity v. State*, No. 111070/93, slip op. at 6 (Sup. Ct. N.Y. County Mar. 16, 2005) (“Compliance Order”).

<sup>49</sup> See, e.g., Education Commission of the States, *Next-Generation Models of Education Accountability: An Introduction*, 1-3. Retrieved from: [www.ecs.org/clearinghouse/46/39/4639.doc](http://www.ecs.org/clearinghouse/46/39/4639.doc). See also W. Norton Grubb and Luis Huerta, “Straw into Gold, Resources into Results: Spinning Out the Implications of the ‘New’ School Finance,” *Journal of Education Finance*, in press.

<sup>50</sup> Few students eligible for school transfers have invoked the option (only 0.6 percent of eligible students in 2004-05, according to the Center on Education Policy’s *From the Capital to the Classroom: Year 3 of the No Child Left Behind Act* [March 23, 2005], 110). Most parents appear to prefer that their children remain close to home, and test scores that determine a school’s “SINI” status often are not available until after the deadline for notification of transfer eligibility. The provision also presents difficulties for receiving schools, which must find room for the transferees, whether or not they have the capacity to accommodate them. According to the Center on Education Policy, about a third of the districts they surveyed reported capacity problems and space limits (119). Moreover, in urban and rural districts there is often a paucity of appropriate receiving schools. Chicago officials predict that in 2005, only 20 out of 600 schools will receive transfer students, and there will be only 457 spots for 300,000 students. In rural districts, there is often only one elementary and secondary school. In Nebraska, for instance, 90 percent of the school districts have only one building at any grade level, so there simply are no other schools to which students may transfer. See Center on Education Policy, *From the Capital to the Classroom: Year 2 of the NCLB* (January 2004), 89, 93, 94; *From the Capital to the Classroom: Year 3 of the No Child Left Behind Act* (March 23, 2005); Jimmy Kim and Gail L. Sunderman, *Does NCLB Provide Good Choices for Students in Low-Performing Schools?* (The Civil Rights Project, Harvard University, 2004), 16-17; 28-29.

<sup>51</sup> Relatively few students make use of supplemental services and there is little evidence that supplemental services have raised student achievement. For example, only a small fraction of the millions of students across the country eligible for tutoring under NCLB are receiving the service. See Susan Saulny, “Tutor Program Offered by Law is Going Unused,” *The New York Times*, February 12, 2006. In addition, diverting Title I money to administering individual tutoring programs may

efforts. They require investment in unproven alternatives that may benefit only a portion of the children. These provisions are also inconsistent with the parental participation requirements of NCLB and with the democratic citizenship-building purpose of public education.

Districts that include SINIs must purposefully deploy their funding and human resources in order to build instructional capacity and leadership to raise student achievement in those schools. In this endeavor, there are no quick fixes or miracle cures. Understanding the critical process of efficiently and effectively building the capacity at both the district and school level to turn around low-performing schools requires much additional research, analysis and discussion. This will be a central focus of The Campaign for Educational Equity, where we expect to closely examine promising practices, like Ron Ferguson's notion of transformative school reform,<sup>52</sup> and consider how to bring these reforms to district-wide scale.

Nevertheless, it is clear that the current version of NCLB hampers strategic planning and implementation of change by draining funding and human resources away from school-based capacity building. Employing a one-size-fits-all remedy, NCLB applies sanctions without distinction between schools that narrowly miss test-score targets and those with large numbers of children who are behind. Complying with these mandates can actually hinder state and district efforts to use resources efficiently.<sup>53</sup> In addition, according to a report by the Center on Education Policy, most states surveyed lack capacity in staff size, staff expertise and funding to implement NCLB.<sup>54</sup> Current levels of funding are insufficient to carry out many of the requirements of the law, including providing technical assistance to SINIs, monitoring providers of supplementary services, training teachers, providing remedial assistance, and managing and collecting required data.

The ability of schools and districts to deliver a meaningful educational opportunity also depends on sufficient capacity at the state education department. A number of state education departments have achieved significant success in turning around low-performing schools by adopting capacity-building approaches that identify low-performing schools and provide their districts with concrete assistance.<sup>55</sup> They focus resources and talent on building capacity within schools and districts to

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make it more difficult for schools to improve, as Title I programs tend to help the entire school, while supplemental services focus on individual eligible students. Moreover, outside SES providers are not required to serve special education students and English language learners. See Gail L. Sunderman and Jimmy Kim, *Increasing Bureaucracy or Increasing Opportunities? School District Experience with Supplemental Educational Services* (The Civil Rights Project, Harvard University, 2004), 12. See, also, Public Education Network, *Open to the Public: Speaking Out on "No Child Left Behind"* (March 2005).

<sup>52</sup> Ronald F. Ferguson, "Toward Skilled Parenting and Transformed Schools Inside a National Movement for *Excellence with Equity*." Paper prepared for "The Social Costs of Inadequate Education" Symposium, (The Campaign for Educational Equity, Teachers College, Columbia University, October 24, 2005).

<sup>53</sup> See, e.g., the January 14, 2005, letter from Betty Sternberg, the Education Commissioner for the State of Connecticut, to now-U.S. Secretary of Education Margaret Spellings seeking, in part, more flexibility to make effective choices about using resources to help low performing students and schools. Retrieved from the ACCESS site: [www.schoolfunding.info/federal/NCLB/ctrequesttoed05.pdf](http://www.schoolfunding.info/federal/NCLB/ctrequesttoed05.pdf).

See also National Conference of State Legislatures, *Task Force on No Child Left Behind Report* (February 23, 2005), ch. 4.

<sup>54</sup> Center on Education Policy, *From the Capital to the Classroom: Year 3 of the No Child Left Behind Act* (March 23, 2005). The report's findings are based on surveys of education officials in 49 states and a nationally representative sample of 314 school districts, and on case studies of 36 districts and 37 schools.

<sup>55</sup> See Southern Regional Education Board, *Getting Results with Accountability: Rating Schools, Assisting Schools, Improving Schools* (2000). Successful models include North Carolina's "state assistance teams," which undertake comprehensive assessments and evaluations of teachers and administrators in low-performing schools. See, also, Helen F. Ladd, "Policy Brief on Accountability." (Paper prepared for the Education Finance Research Consortium's Symposium on Education Finance and Organization Structure in New York State Schools, March 5, 2004, 7) and Kentucky's Highly Skilled Educators Program, "an innovative approach to school-level reform, providing direct, on-site assistance to schools [in which] a member of the Kentucky Highly Skilled Educators cadre assists a school in strengthening its curriculum, instruction and assessment practices. In addition, this individual, supported by members of a regional team, assists the school staff as they improve learning for all children and work toward exceeding the school's improvement goal". See: [www.education.ky.gov/KDE/Administrative+Resources/School+Improvement/Assistance+to+Schools/Highly+Skilled+Educators/default.htm](http://www.education.ky.gov/KDE/Administrative+Resources/School+Improvement/Assistance+to+Schools/Highly+Skilled+Educators/default.htm).

serve high-needs students through state academic assistance teams that provide targeted assistance and expertise to these schools.

Since NCLB, state education departments have been required to do more, but often with a staff that has been substantially reduced in recent years. Michigan's state education department, for example, has lost three-quarters of its employees over the past decade,<sup>56</sup> and the New York State Education Department office with prime responsibility for monitoring Title 1 and low-performing schools was reduced from a staff of over 90 professionals in 1991 to fewer than 30 professionals in 2004.<sup>57</sup> The result of this severe lack of capacity at the state level is that no state is able to provide complete and targeted intervention services to all or even most of the schools and school districts that need its assistance.<sup>58</sup>

To ensure adequate capacity for school improvement, NCLB should establish requirements that push states to go beyond the identification of low-performing schools and strategically provide the resources and assistance that these schools and their districts require to build the capabilities needed to overcome their deficiencies and sustain improvement.<sup>59</sup> The Campaign for Educational Equity intends to study the issues in greater detail at its 2006 fall Symposium. For present purposes, however, it is clear that at the least NCLB should require states to ensure the development of multi-year comprehensive capacity-building plans in districts that are in need of improvement and to ensure low-performing schools the resources and capabilities needed to carry out their school improvement plans.

Like the plans now required in Maryland and New York, the district-level plan should go beyond the operational focus of the current improvement plans to detail how resources in each of the eight resource areas highlighted by state courts<sup>60</sup> will be secured and deployed to provide all students with educational opportunity and to implement specific strategies to close achievement gaps. It should explain how additional funding and school-based reforms will be coherently phased in to build needed capacities in each of the district's SINIs. The plan should also set forth annual and long-term benchmarks for measuring capacity improvement and include a system of evaluation to sustain effective reform. Finally, the plan should ensure that there is extensive public engagement of parents, community members, teachers and administrators throughout the process.

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<sup>56</sup> Joetta Sack, "State Agencies Juggle NCLB Work, Staffing Woes," *Education Week*, May 11, 2005, 25.

<sup>57</sup> Campaign for Fiscal Equity, *Sound Basic Education Task Force Final Report: Ensuring Educational Opportunity for All. Part III: A Constitutional System of Educational Accountability* (April 2004), 15.

<sup>58</sup> The Rennie Center for Education Research and Policy. *Examining State Intervention Capacity: How Can the State Better Support Low Performing Schools and Districts?* (Summer 2004), 5. In New York State, for example, a limited amount of targeted assistance is provided to approximately 50 schools on the state's list of schools furthest from meeting standards, even though by NCLB's definition over 500 schools are in need of assistance. See: [www.emsc.nysed.gov/irts/press-release/20050909/announce.html](http://www.emsc.nysed.gov/irts/press-release/20050909/announce.html)

<sup>59</sup> To build its schools' and districts' capacity for school improvement, Michigan has created a "School Improvement Framework." The framework is designed as a planning tool for schools in improvement, corrective action or restructuring. Based on evidence from the state's own experience with struggling schools and other research that suggested that improving academic achievement requires a well-resourced and coordinated multi-pronged strategy, the framework encourages a holistic approach to reform. It provides the restructuring strategies beyond the few mandated by NCLB and includes standards and benchmarks in a broad range of areas shown to be important to school improvement. See: [www.schoolfunding.info/news/federal/11-21-05CEPMirestructuring.php3](http://www.schoolfunding.info/news/federal/11-21-05CEPMirestructuring.php3)

<sup>60</sup> Ensuring sufficient essential resources is fundamental to any school improvement or capacity-building efforts, and initial investments here will pay dividends at an accelerated rate. For example, the presence of adequate resources is also likely to boost efforts to recruit and retain teachers who are truly "highly qualified." Poor working conditions such as over-large class sizes, dilapidated facilities, and inadequate administrative support contribute to the 50 percent attrition rate of new teachers in our nation's schools. See, e.g., Richard M. Ingersoll, "The Teacher Shortage: A Case of Wrong Diagnosis and Wrong Prescription," *NASSP Bulletin*, Vol. 86 No. 631 (June 2002); Donald Boyd, Hamilton Lankford, Susanna Loeb and James Wycoff, "The Preparation and Recruitment of Teachers, a Labor Market Framework" in Frederick M. Hess et al. (eds.), *A Qualified Teacher in Every Classroom?* (Cambridge: Harvard University Press, 2004), 149-171.

In addition, NCLB should require states to provide substantive capacity-building support to all SINIs and DINIs. This support should include quality curriculum and professional development to ensure sufficient instructional capacity aligned with state standards; leadership development to broaden and deepen the skills of school and district leaders; and technical and technological assistance with the use of assessments and data to improve instruction. This level of support will involve both a major enhancement of the expertise of the state education department staff in these areas as well as the development of the capacity to send teams of high-quality, experienced professionals into low-performing schools and districts to provide on-site assistance for extended periods of time. In order to accomplish these ends, NCLB obviously must ensure sufficient funding to build appropriate instructional and leadership capacity at the school level and appropriate oversight and support at the state education department level.

### **C. A FINAL ISSUE: ESTABLISHING A CREDIBLE GOAL FOR NCLB**

This brings us to a final issue: establishing a credible goal for these efforts. Currently, NCLB asks our nation's public schools to accomplish something unprecedented: that all children must be proficient in their state standards by a date certain—2014. The law's 100 percent proficiency goal has had important rhetorical power. For parents in many communities, it represents the assurance that *their children* will not be left behind. In reality, however, many researchers, educators and advocates consider the goal of 100 percent proficiency by 2014, and the adequate yearly progress (AYP) targets associated with it, to be grossly unrealistic. In fact, most states have put off having to confront this issue by back-loading the bulk of the progress they need to make into the later years of the 12-year implementation period. Given the penalties the law enacts for schools not making AYP, many groups are calling instead for a high but credible standard.

Clearly, the nation should strive to ensure that every child reaches proficiency. However, real motivation, realistic annual targets and long-term success depend on a credible goal. From the perspective of the education adequacy movement, the immediate critical need is to ensure 100 percent *opportunity*. This full opportunity standard is essentially the same as NCLB's overriding goal of ensuring that "all children have a fair, equal and significant opportunity to obtain a high quality education." The 2007 reauthorization of NCLB must focus on providing full resources, rigorous standards and capacity-building assistance. Policymakers must also explore what outcomes can realistically be expected—by 2014, 2024, or thereafter—once "a fair, equal and significant opportunity for a high-quality education" is actually provided to all students and how best to calculate adequate yearly progress in relation to meaningful outcome goals. The Campaign for Educational Equity symposium is dedicating its annual symposium to providing a thorough examination of NCLB through the lens of equity. This conference, planned for November 2006, will afford a major forum for research, analysis and discussion for exploring these vital issues, which have not, as yet, been fully tackled.

### III. CONCLUSION

The history of the U.S. public schools has been one of providing increasingly greater access to educational opportunity to this country's children. The burgeoning education adequacy movement gives this cause new momentum by successfully seeking to turn students' constitutional rights into meaningful educational opportunities in state courts around the country. The importance of the No Child Left Behind Act also cannot be understated: building on *Brown v. Board of Education*, NCLB establishes meaningful educational opportunity for all students as matter of law and, for the first time in our nation's history, requires schools to close achievement gaps.

But courts in adequacy cases have not stopped at articulating educational rights. They have gone on to weigh evidence and draw conclusions about what resources, policies and practices will make those rights a reality. State and federal lawmakers should now use the practical lessons provided by these cases to enrich policy. They should align the implementation of NCLB to support the reform momentum of the adequacy movement by ensuring that the law provides adequate funding; rigorous standards that prepare students for the global marketplace and makes them capable stewards of our democracy here at home; and capacity building so that all schools and districts truly develop the means to reach these goals.

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