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Principles and Legislative Recommendations of the Center for Law and Education to the Senate HELP Committee regarding the Reauthorization of NCLB¹

Table of Contents

Overview	1
I. Save accountability – combine tighter definition of AYP with less punitive approaches to gaps	
A. The current understanding of the “accountability” system	3
1. “Sanctions” if don’t meet the “required” achievement levels based on a single test	3
2. The backlash	3
3. The efforts to accommodate the concerns and backlash ..	4
a. Growth Models	4
b. Students with Disabilities.	4
c. Statistical Significance and Confidence Intervals.	4
B. A better way to conceptualize AYP – keep (and tighten) the method of identification, but change what it’s used for.	7
C. Elements of a continuous improvement system – 3 prongs	8
D. Fixes to problems in the assessment/AYP portion of the accountability system.	11
1. Reliance on a single test	11
2. Exclusive reliance on math and reading (and science)	12
3. Too little attention to advanced levels of performance	13
II. Too much tail (assessment of, and accountability for, program outcomes) wagging the dog (high-quality programming) – because we are not feeding the dog enough to stand up straight.	14
A. Need to recognize that the state assessments in Section 1111 and intervention system in Section 1116 are only a check on the system of education reform, rather than the system, and that the Title I program is	

¹This is an evolving document. The best particular solution to the complexities of issues in NCLB is not always obvious. As we continue discussions, we will share additional detail on these and other issues with the Committee.

mostly an investment in improving the system on the front end – accompanied by billions of program dollars and critical, but widely ignored school-level provisions for ensuring that schools provide students with the key elements of a high-quality education that will allow them to achieve in the first place. 14

B. Addressing the need to implement the provisions of Section 1114, 1115, and 1118, the district and state responsibilities for ensuring school implementation and capacity for these tasks, and USED’s responsibility for ensuring capacity and compliance. 15

III. Issues and Concerns Specific to Students with Disabilities 16

IV. Other (partial) 20

A. Distribution of funds – reduce, and ideally eliminate, two inequities 20

1. High poverty schools in higher poverty districts 20

2. High-poverty secondary schools. 21

B. Targeted Assistance Schools (section 1115) 21

C. Teacher quality 22

Overview

As a voice for the rights of low-income children and families to high-quality education, the Center for Law and Education has focused on Title I throughout its thirty-seven year history. We have actively participated in its various reauthorizations, with a heavy emphasis on changes designed to boost the quality of the program as well as to improve its responsiveness to families. And we have worked in the field, assisting schools and educational agencies, educators, parents, and advocates to address problems and implement the program successfully.

We look at the provisions of the law through the lens of whether they concretely advance and effectuate operationalize the right of every child (and low-income children in particular) to a high-quality education. To best do so, we devote much of this paper to (A) reconceptualizing a framework for “accountability” that is both strong and constructive:

- (1) On the one hand, hold on to (and indeed enhance) a tight definition of adequate yearly progress – one that ensures that no child is being left behind and subjected to lower expectations or less attention when they are not on a path to proficient and advanced levels of achievement.²
- (2) On the other hand, dramatically change the *meaning* and consequences of gaps in AYP to a more constructive and less punitive approach, consistent with continuous improvement in which the shift to making higher standards real means that virtually all schools will need to work on improving some areas -- so that both the rhetoric and the reality is not a badge of dishonor and the primary motivation for improvement is not fear. This is a far preferable approach to abandoning – either through wholesale departure or a thousand cuts – the goal for each child of proficient and advanced levels of achievement. This will allow us to hold on to, and make sense of, a tight AYP definition – as indicating which students and programs need additional help and attention, not as a “grade” of the school.
- (3) Shift the balance of attention so that Title I is not so predominantly conceived of as little more than state assessment, determination of AYP, and consequences for inadequate progress. Title I already has a lot to say about what schools need to do (together with parents) to develop and provide the key elements of a high-quality academic program (e.g., enriched and accelerated curriculum, effective instruction, timely and effective individual attention) that will enable children to achieve in the first place (in sections 1114, 1115, and 1118), along with what districts and states need to do both to facilitate and to ensure schools’ carrying out of those obligations. That is the heart of real school reform. And that is what the vast bulk

²As will be seen, we do not view this as inconsistent with a “growth” model, and indeed certain versions of a growth model could actually help ensure this, but only if that model is effectively built around triggering attention whenever children are not on a path to quickly reaching proficient and advanced levels of achievement; variations that substitute lesser forms of gains for that target are unacceptable.

of the billions in Title I funds are for – program – but it is as almost as if those provisions did not exist. While there may be improvements in those provisions that could be made, the main attention they should receive in reauthorization is in how to get them implemented.

Most importantly, that attention is central to the real improvement of the quality of education our children receive. Secondly, it will help to right the balance in dealing with the “accountability” structure.³ The state assessment/AYP/intervention structure of the law should be understood as a check on the system of reform, not as the system of reform. This re-balancing of attention to these other parts of the Act will promote that understanding. After all, it is children, not schools and school systems, that “achieve.” The obligation of schools and school systems is to provide to each child with the elements of a high-quality education that will enable the child to achieve. True accountability, including accountability to the family of that child, lies in meeting that obligation.

In short, we believe that in addressing the controversies and concerns that have emerged since 2001, it is important to (1) hold on to a tight definition of adequate yearly progress (AYP), one that is consistent with the law’s premise that no child should be left behind, while (2) revisiting the actions that flow from gaps in AYP in order to foster a continuous improvement approach that minimizes punitive responses from above and defensive responses from below (rather than creating holes in the definition of AYP for fear of “punishing” the wrong folks), and (3) at the same time, bring to the fore the critical but ignored parts of the law that are central to ensuring that schools provide the elements of a high-quality education, which every child deserves and needs in order to reach high levels of achievement in the first place.

(B) This reconceptualized accountability framework allows us to attend to specific issues affecting students with disabilities. In particular, once we get out of the mode that suggests schools are to be “sanctioned” for having students whose needs require extra attention in order to achieve at the high level expected for all, we can more directly eliminate the various pressures to obscure the extent to which education of students with disabilities is falling short, including the various strategies, some already adopted, others proposed, for not having to count students with disabilities, or for accepting reduced outcome expectations that discriminate on the basis of their disabilities.

(C) Finally, we make additional, initial recommendations on a variety of other more

³It is worth noting that the common understanding of the law is precisely backwards in this regard. AYP and the goal of 100% proficiency by 2014 are treated as if they were legal requirements when they are not. They are targets, and failure to reach them does not constitute non-compliance. At the same time, the key provisions that *are* legal requirements that do demand compliance, are not even recognized. These include the school obligations to provide key elements of a high quality education, and the district and state obligations to ensure and support implementation of those school-level obligations (along with the obligation to develop effectively designed improvements when targets are not met).

specific topics, albeit ones that are related to the two broad issues noted above. We expect to supplement these as the reauthorization dialogue continues.

I. Save accountability – combine tighter definition of AYP with less punitive approaches to gaps

A. The current understanding of the “accountability” system

1. “Sanctions” if don’t meet the “required” achievement levels based on a single test

As widely understood, NCLB stands first and foremost for a system in which “sanctions” of increasing severity are imposed on schools that don’t meet the “required” achievement levels for even a single student subgroup (based on a single test). The main driver of schools’ efforts to do a better job of enabling students to become proficient, in this view, is the desire to avoid being labeled as failing to make AYP and suffering the consequences. Whatever the extent that this understanding departs from the actual language of the Act – and in many ways it does – it is widely shared among those overseeing it, those seeking to implement it, and those wanting to change it.

2. The backlash

It is not surprising that with that understanding of the law, school systems respond with a varying mix of good faith efforts to boost the quality of education and attention for students who have traditionally been left behind along with less constructive responses to staving off punishment felt to be unwarranted – such as focusing curriculum and instruction on the test (rather than on the broader range of knowledge and skills in the standards which the test is designed to measure), lowering the expected levels of proficiency, finding ways not to include students in the AYP calculations, and organizing opposition to the law. And as long as the assessment and AYP process is seen as a way of grading schools, with negative consequences attached to those grades and with the process based on schools all achieving the same level of proficiency for all students each year, it seems inevitable that those in schools with more students who start out further behind will feel they are being graded unfairly and will, among other things, push for a different grading system based on equal gains or value added (despite the very serious implications for reducing expectations that students already behind will ever catch up through accelerated and enriched curriculum). Indeed, once it is assumed that the purpose of an assessment and accountability system is to judge the quality of the school, then commentators are almost inevitably driven to the conclusion that comparing yearly gains among schools is fairer than criteria tied to proficiency.⁴

⁴See, for example, Paul E. Barton, *“Failing” or “Succeeding” Schools: How Can We Tell?*, American Federation of Teachers (2006).

3. The efforts to accommodate the concerns and backlash

Since enactment of NCLB, the Department has been faced with this dilemma: We need to make sure we're not over-identifying schools that don't deserve to be punished, so we need to loosen the definition of AYP (or reduce the scope of students to which it applies) in various ways. And that is how the dilemma is being framed for Congress in reauthorization.

a. **Growth models**, notwithstanding their appeal and potential value, will not obviate the need to deal with this dilemma. On the one hand, if growth models are (as we believe they should be) required to be built around enough annual growth to result in proficiency expeditiously (such as North Carolina's model of producing enough growth to result in proficiency for the individual student within four years, which means that students who start further behind will need to achieve bigger gains), but the response to failing to make sufficient growth is viewed as punitive, it will still be perceived as unfair. Schools with students who are further behind will feel, "Why are we being punished when our students have shown just as much growth as other schools that are not?" On the other hand, if there is any loosening of that definition of sufficient growth, in order to accommodate that concern, it will undermine the core principles of NCLB – we will see children's growth deemed adequate even though it is not sufficient to put them on a path where they will become proficient; i.e., we will accept lower expectations for what some children should learn. In other words, while there are versions of the growth model that do not entail abandoning the goal of proficiency for some children, those versions will not satisfy the concerns about unfair judgments of schools *unless* we shift the understanding of, and responses to, gaps in making adequate yearly progress in more constructive and less punitive directions. The basic need articulated here remains – to stick to a measure of AYP that truly catches any kids not on a sufficiently accelerated path to proficiency, while removing the stigma, and reducing the punitive implications, of that identification.

If a growth model were to ensure that attributes above, so that it keeps the focus on whether students are on a quick path to proficient and advanced levels (rather than substituting gains for attainment of what we want all students to master), then we would be favorably inclined toward it. Under such circumstances, it could actually facilitate the underlying goal for AYP that we articulate above – by being tied more closely to whether each student is on a sufficiently accelerated path to achieving at the desired levels.

b. **Students with Disabilities.** Among the students whose educational destiny hangs most in the balance in the efforts to accommodate concerns are students with disabilities. *More specific recommendations for students with disabilities, consistent with our overall revised approach to accountability, are provided in Section III.* In this section, we preliminarily just highlight the general problems from trying to accommodate the current backlash against NCLB.

First is the current notion of allowing 3% of all students, or approximately 30% of students with disabilities to count as proficient based on lower standards – an outgrowth of the effort to reduce the backlash against NCLB's widely perceived unfairness to schools. As has been pointed out, there is no solid evidence that 30% of students with disabilities are simply and definitively incapable of attaining the same standards, even with

the best instructional practices (and in some cases additional time). Further, and even more important, there is no sound way to definitively determine, at the front end, *which* individual students will not be able, under any educational circumstances, to attain those standards. So even if the overall 30% threshold were a carefully determined and accurate reflection of the aggregate reality, we would still be consigning many individual students inappropriately to lower educational goals.

Second, students with disabilities form the subgroup that is most affected by statistical methods used to limit the reach of AYP, discussed next.

c. Statistical Significance and Confidence Intervals. As one part of the attempt to avoid making what are viewed as unfair judgments about schools, states have gotten approval for using a wide variety of (a) “n” thresholds as determinates of statistical significance and (b) confidence intervals. The results are that in many schools, there is no meaningful obligation to look at the performance of students with disabilities or, in others, of English language learners (or, in some non-urban schools, racial minorities). Alternatively, even in states with relatively low “n” thresholds, and thus more schools reporting on performance of students with disabilities, confidence intervals have been set so that in some cases the group is deemed to be making adequate progress even if *no* students are proficient (because in those cases, the bottom range of the confidence interval is a negative number).

These statistical concepts appear to have become unmoored from their meanings and from the context in which they are being used – i.e., applied without providing meaningful answers to the question of “statistically significant for what purpose?” or “confident of what?” In other contexts, the concepts are used to draw inferences from a sample representative group about a larger population – e.g., in conducting studies on a sample or doing political polling, taking into account the size of the sample, the results are significant as applied to a wider population at the .05 level, or we have confidence that the real value for the wider population is within a range of plus or minus 7% of the sample results. In other words, from the fact that x% of our sample had a certain characteristics, here are the conclusions that can meaningfully be drawn, with some level of certainty, about the population as a whole.

In the context of the framework in Title I, this use of statistical significance and confidence intervals seems out of place. The relevant inquiry is what portion of the students in a group within the school are proficient, and under Title I we assess the proficiency of *all* such students, rather than a sample – so the traditional use of statistical significance or confidence intervals seem out of place. Even reducing the threshold “n” size down to the low end does not resolve the problem and continues to abandon in practice the notion that no child should be left behind. An “n” size says, for example, that even if a school is doing *nothing* meaningful to address the particular needs of one group of students (for example ELL students or students with disabilities), there is no need to pay attention if the number of students in that group is small enough.⁵

⁵This problem is further exacerbated by allowing schools to ignore groups based not only on their absolute size but on their percentage of the overall school or district population. That is clearly a form of abandonment, and the only rationale – that we don’t want to label a school as

Alternatively, it might be argued that small subgroup populations don't allow accurate judgments to be made with great confidence about trends in a school's performance. The fact that the rate of proficiency for fifth graders from a particular group rose or fell 15% in a single year doesn't mean much if that change is the result of one student more or less becoming proficient. But that trend is not the operative inference for Title I purposes. Instead, the question is what portion of the students assessed are proficient, so that we can see where more attention is needed and children are not left behind.

Finally, it might be argued that these confidence intervals and thresholds for statistical significance are needed because even in making judgments about the population actually assessed the data from a single test is not completely valid or reliable -- i.e., they are needed to address the standard measure of error inherent in the particular test, particularly where a cut score is necessarily used to draw a bright line between proficient and not proficient. But first, it is not at all clear that the large and widely varying "n" thresholds have been carefully derived on that basis. Second, and most importantly, to the extent that the problem purportedly being addressed is unsound reliance on a single measure of proficiency, the answer lies primarily in implementing the largely ignored provision of the Act requiring multiple measures of proficiency, rather than disregarding the data. (See subsection D.1. below.)⁶

Exacerbating this problem is the fact that while the law allows states to average three years of data, which helps build a larger "n" of data points and also avoids relying on a single cohort of students, states are under no obligation to do so. So rather than pooling the available data in order to make more meaningful judgments, they are permitted to throw the data out by saying the "n" for any one year is too small.

Even if confidence intervals were appropriate in this context, it is necessary to look at the choice to use the *bottom* of the confidence interval as the threshold. That reflects a judgment that what is important is avoiding a false negative -- i.e., wrongly deciding that the group is not performing well enough when in fact they might be (putting aside, the earlier jump in logic -- based on the percentage assessed who were proficient, what's the larger group of students who might have a higher rate of proficiency? Why would you not want to make the exact opposite judgment, that in the interests of leaving no child behind, what is most important is not ignoring a group who, based on the results, may in fact not be performing well enough, and so use the *top* of

failing overall based on outcomes for one relatively small sector -- should properly fade away once we instead abandon the notion that AYP is a bright-line on/off measure for grading and labeling a school.

⁶ Further, how many of the states saying that they are using these approaches in order to avoid making unsound judgments about aggregate scores are at the same time turning around and making judgments about individual scores for high-stakes purposes of graduation and promotion, etc.? The standard measure of error for an individual score is vastly greater than for aggregate data (at the same time that professional testing standards are clear that a greater degree of validity and reliability, not a lesser degree, is needed when making high-stakes individual decisions).

the confidence interval as the threshold?

As this last issue suggests, the various problems identified here would be much easier to sort out and address if we were clearer on the purpose for making AYP determinations and how they are to be used. The more we can clarify that the purpose, in practice not just theory, is to identify where students are not on track to becoming proficient, in order to provide the necessary attention, additional resources, and changes in approach – rather than to label and punish schools – the easier it will be to rein in approaches under which students either do not get counted or are incorrectly deemed to be making sufficient progress, which takes us to the next section.

B. A better way to conceptualize AYP – keep (and tighten) the method of identification, but change what it’s used for.

1. It is appropriate, and practical, to have a 100% goal, so long as it is properly understood – as meaning you have to keep paying extra attention, in effectively designed ways, to every child who is not on a path to proficiency.
2. “Any little gap” should indeed require some action. We can have a system in which that is seen as viable if the action is viewed as both constructive and tailored to the particular issues, rather than creating an in/out dinged/safe single bright line (and so long as it is based on sound assessment of real achievement, addressed separately below). It is not unfair to require identification of, and effective attention to, every child who is not on a path to actually achieving the skills and knowledge we have agreed that all students should master.
3. If, as we should, we’re going to set much higher standards as a floor for what all kids should achieve, then of course we are going to find that virtually every school needs to improve, with at least some of its students, in some significant way. It is a recognition of need, not a badge of dishonor, and should be treated as such.
4. There is not a “requirement” to meet AYP, let alone to meet the 2014 goal. These are targets which if not reached, indicate that something must be addressed. Taking the steps set out in the law to address and try to improve the needed areas *is* a requirement, like any other requirements of the law.
5. Thus, we are seeking to keep tight definition of AYP but with a “kinder, gentler” understanding of what needs to happen when any kids are not on the path.

C. Elements of a continuous improvement system – 3 prongs

1. Some of this is about changing the rhetoric, and the theory of change, behind the accountability system.

- a. Drop the notion that the driving force here is or should be that schools which do not meet targets will face consequences, as a negative incentive to achieve. (Along with other terms like “failing schools,” “sanctions,” etc. – which do not appear in the law but are frequently used in discussing it.)
- b. Emphasize that this is about attending to kids who are not on a path to learning what we say we want them to learn, and about assisting schools to ensure the steps needed to do that.
- c. Identifying schools most in need of resources and technical assistance as “priority schools” would help institutionalize this sense (while recognizing that change in rhetoric alone is not enough).

2. Make the change in rhetoric real by ensuring that the existing provisions that focus on assistance and capacity building are fully implemented.

- a. As widely recognized, this is in part a matter of resources.
- b. It is also, however, a matter of taking seriously the variety requirements for states (and districts) appearing throughout Section 1111 (and Section 1112) – to provide the necessary support and technical assistance, as well as oversight, needed for schools to implement high-quality programs of sufficient quality and intensity to all children to achieve at the level the state has said they should. States are not feeling the same pressure that districts and schools are to ensure that this single system of accountability is effective, despite both the requirements of Title I and the states’ own constitutional mandates for a thorough and efficient system of education and educational adequacy.

3. Revise provisions to make the continuous improvement, tailored approach more evident

- a. (As AYP targets go up as we get closer to 2014, it’s true that more and more schools will be in need of some improvement. That should not be treated as a problem but rather as part of why the

improvement process needs to be reconceptualized.)

- b. Provide more explicit language in Section 1116 on identifying the particular areas that need to be worked on.
- c. Clarify and strengthen the connections between this improvement process and making changes in the Section 1114 plans for enabling all children to reach advanced and proficient levels that every school (or at least every schoolwide project school) has.
- d. In backing away from a punitive, “sanctions”-based approach under Section 1116, we should retain a sense that schools with the greatest challenges, in terms of their continued distance from the achievement goals for all, should be getting commensurately greater attention and resources.
- e. In addition, with a more constructive, nuanced, and less punitive system, there should still be a role in certain instances for forced interventions that are not necessarily viewed as purely supportive by the staff of the school, but that type of intervention should not be triggered by lack of AYP alone.
 - (1) Instead, the trigger should be based on some analysis that combines a look at the data with a look at the school’s response – including how the school has fulfilled its responsibilities both for development and implementation of core program plans under section 1114 and improvement plans under section 1116⁷ – and concludes that, without such interventions (e.g. of the types currently in school restructuring), the kinds of changes necessary to produce the level of programmatic change needed to achieve the desired outcomes are unlikely, to the detriment of children.
 - (2) The criteria for this type of intervention deserve further discussion, but to the extent that their application would leave the states with a fair amount of discretion in comparison with current law,⁸ there should be (a) a

⁷Keeping in mind that failure to fulfill the planning and implementation requirements of section 1114 or the program improvement requirements of section 1116 *is* a compliance issue, unlike AYP itself.

⁸It is, however, worth noting that the current law is already somewhat more nuanced and discretionary in this regard than is often acknowledged – for instance the inclusion of hiring a consultant as one option for corrective action.

negotiated process for USED approval of a detailed state plan for how and when such interventions would be instituted, (b) opportunity for real involvement by advocates for students and parents (including public interest organizations) in the development, review, and approval of such plans, and (c) a monitoring process for ensuring that continued failure to provide students with sufficiently high-quality, effective education and assistance is not tolerated by the system.

- f. Where if at all, within a continuous improvement, non-punitive system, do NCLB's current **provisions for transfer and supplemental services** fit?
- (1) While these options are not about improving the school, they are also not intended as "punitive" – they flow from a commitment not to let kids languish, without options, during the often lengthy period while school improvements are being designed and fully implemented.
 - (2) From that perspective, we continue to support them (while fixing the well-documented barriers to making them work more effectively, such as timely parent information, faulty interpretation of civil rights requirements, etc.) – particularly in the context of a system in which wealthier families can afford housing in more desirable school districts and attendance zones and tutoring when their children are having difficulties.
 - (3) From that same perspective, we also believe that USED's original position on school capacity not being allowed to defeat the choice option deserves, in reconceptualized form, praise rather than ridicule. It is not a matter of failing to recognize capacity and overcrowding as a problem. Rather it is a matter of saying that districts (with state assistance) should deal with capacity and overcrowding resulting from this initiative in the same manner that it does when those problems are caused by other factors – without presuming that the students seeking to attend as a result of Title I are any less entitled to a chance to attend the higher achieving school (i.e., are any less members of the attendance zone) than the students who, typically by virtue of greater income, are fortunate to live within the existing school boundaries. From that perspective, the principle should be recognized as an extension of our most basic equity values that lay behind

the very much unfinished agenda, post *Brown v. Board of Education*, of equal educational opportunity and desegregation.

D. While our attention is thus largely on rearranging the consequences flowing from lack of AYP, we should nevertheless provide some fixes to problems in the assessment/AYP portion of the accountability system.

1. Reliance on a single test

a. Rather than requiring reliance on a single test, Title I (since 1994) has *required* (not merely permitted) that the state assessment system use multiple measures of achievement.

(1) This is necessary for validity, for sense of fairness about judgments being made, for generating useable information throughout the year (consistent with notion of continuous improvement rather than leading with the foot coming down once a year), and for tying instruction to the standards, rather than to a test.

(a) This last point is very much connected to addressing the fixation on test-driven outcomes and sanctions because USED has permitted assessment systems that do not provide sufficiently valid measures of the extent to which students have or have not mastered the standards. And in many states, the fact that the standards themselves may encompass rich learning goals that require students to construct knowledge and use sustained, discipline inquiry and critical thinking skills gets lost because the assessments do not – so that teachers and parents alike often feel that the state standards don't allow for that kind of teaching and learning, when it is often the weak assessment systems that are the main limitation.

(2) But this multiple measures requirement (along with other aspects of a truly valid assessment system) has been toothless because USED has made it so; it did so at states' behest, who (during negotiated rule-making for example) made it clear they wanted to continue to rely on their existing single-test systems.

- (3) The result is the widespread critique of NCLB as requiring student outcomes to be measured by a single test, when in fact it requires the opposite.
- b. Given the track record (since 1994), the law needs more specifics in this area. This should start with a clarification that multiple measures must involve multiple ways of measuring and demonstrating the *same* knowledge and skills (rather than, for example, saying that multiple measures are being used because one portion of the skills and knowledge in the standards are assessed through multiple choice questions and a different portion is assessed through brief constructed response).
- c. A serious program of technical assistance, development grants, etc. is also needed to help ensure development and use of valid systems of multiple measures

2. **Exclusive reliance on math and reading (and science)**

- a. Once we re-envision the response to AYP in a less punitive, continuous improvement mode, we can then more easily include additional AYP triggers – in particular other subjects for which state has standards for what all children should learn.
 - (1) While both the current law and the regulations do articulate the need to use whatever standards the state has chosen to develop for all students in other subjects, to determine whether students are meeting those standards, and to ensure that Title I students are taught the same subject matter in other, these provisions are largely unknown and ignored, while AYP concerns push those other subjects to the side. The result is another level of critique of NCLB for narrowing curriculum. And, after long ago moving away from pullout models of Title I, whereby students were removed from other classes for Title I reading and math services, we have now come full circle, whereby students are again being pulled from social studies and other subjects in order to get “double doses” of reading or math – often with too little attention to changing the nature and quality of the instruction that has failed to work in the first place.
 - (2) Statutory strengthening is needed – including through connecting to AYP in Section 1111 and improvement provisions in Section 1116. This becomes more feasible and

less onerous if we adopt the less punitive, less in/out, more continuous improvement model of response to assessment called for here. Schools, districts, and states, should be required to identify and take steps to address gaps in meeting standards in any subject which the state has determined all students should master.

3. Too little attention to advanced levels of performance

a. The problem

- (1) While the law makes constant reference to getting all students to proficient and advanced levels, there is virtually nothing to operationalize the latter, beyond reporting. The only thing that matters, in operational terms, is getting students to proficiency.
- (2) This is an equity problem especially for minority families with high aspirations. When they look at the achievement results in many schools (even schools designated as magnets for high achievement), they can see that their own children have virtually no chance in that school of reaching advanced levels, even where the school has made significant efforts to bring children to proficiency. Nothing in the law provides them any handles for or reassurances about changing that. Indeed the focus on proficiency alone cuts the other way.
- (3) It is also a problem that cuts across race and class and exacerbates the overall sense that NCLB is sacrificing educational excellence for narrow forms of achievement, feeding a false dichotomy between excellence and equity.

b. Remedies

- (1) If a less punitive, more continuous improvement model of attention and intervention is adopted, then it should be easier to require that meaningful benchmarks be set for achievement at advanced levels in all student groups, with improvement activities to include a focus on reaching those benchmarks as well as the benchmarks for proficiency.
- (2) There should be a variety of other provisions supporting this focus – building this focus into school, district, and state plans, individual student attention, federal technical assistance and support.

- (3) Such provisions should place an emphasis on defined “advanced” skills and knowledge in terms of enrichment, depth, and complexity – not simply acceleration (for students who have already mastered current grade level standards) to get to the next grade level’s standards sooner. This emphasis is needed because it is typically far easier for schools and districts to concentrate on the latter, which in turn exacerbates the sense that coverage and going faster is substituting for in-depth engagement of students.
- (4) Such provisions should also require implementation in ways that do not require the identification and segregation of students deemed “capable” of advanced levels but instead should be accessible to all. (This is another area where bright-line approaches – in this case, applying a general label of “advanced” students, distinguished from others – should be abandoned in favor of curriculum, instruction, and staff development that allow teachers to always be ready to take students to a deeper and more challenging level in any particular area of instruction.)

II. Too much tail (assessment of, and accountability for, program outcomes) wagging the dog (high-quality programming) – because we are not feeding the dog enough to stand up straight.

- A. **Need to recognize that the state assessments in Section 1111 and intervention system in Section 1116 are only a check on the system of education reform, rather than the system, and that Title I is mostly an investment in improving the system on the front end – the billions of federal dollars in the program are overwhelmingly to assist in improving the school level programs, so that students achieve in the first place. That program money comes attached to program provisions (particularly in sections 1114, 1115, and 1118) – for designing and implementing key program components (such as accelerated and enriched curriculum, effective instructive, timely and effective assistance for any individual student having difficulty mastering particular standards, high-quality staff development, etc.) – through a plan jointly developed with the parents of the school, under a process spelled out in the jointly developed and approved parent involvement policy, which also must spell out a variety of necessary components for building parents’ capacity to participate effectively.**

1. The recognition that those provisions for building a high-quality program at the front end will help to restore the sense of balance here – politically and otherwise. More importantly, it will create a focus on the long-ignored but most important part of the system.
2. At the same very same time that what is *not* actually a legal requirement for schools – to hit the AYP targets – is treated as if it were, what *is* in fact a legal requirement – to implement the quality provisions in section 1114 etc. – is treated as if it were not.

B. While there may be ways to improve the provisions of Section 1114, 1115, and 1118, the most important thing is to implement them, which has not happened. This pushes us back to Section 1111 and 1112 to focus on state and district responsibilities in those sections for ensuring both that schools comply with these provisions and that they have the capacity to do so, along with USED's responsibility for ensuring capacity and compliance.

1. Require USED to develop and implement a comprehensive plan in this regard, covering distribution of information, provision of technical assistance, and program assessment, monitoring, and enforcement. Submit the plan to Congress and provide annual reports on its implementation.
2. Establish a grant program to strengthen state and district capacity for both school capacity-building assistance and enforcement.
3. Provide for an independent study of the extent of implementation at school level and of district, state, and federal capacity-building assistance for schools and enforcement of school-level provisions.
4. Building of independent capacity of parent and community organizations to assist parents in participating in these provisions
5. Expand and strengthen the Parent Information and Resource Centers (and local family information centers) so that they are robust, independent, proactive, unconstrained, and highly skilled sources of assistance for enabling parents to be the real partners the law envisions in implementing these local quality provisions and for effectively bringing attention to problems in their implementation.
6. Create private cause of action to enable parents to address non-implementation – of both provisions that go to the quality of education and assistance their children are to receive and provisions that go to the parents ability to participate.
7. Focus Congressional oversight on implementation of these school-level

provisions and on district, state, and federal efforts to both assist and monitor implementation.

III. Issues and Concerns Specific to Students with Disabilities

- A. The NCLB requirements to disaggregate data in reporting student participation and performance, by type of assessment and level of performance, has underscored the need to close the achievement gap through improved teaching and instruction of students, especially those who are the primary beneficiaries of the Act – students from low-income families, who are disproportionately racial and language minorities and who have disabilities.

CLE recommends: Retain current requirements for the disaggregation of subgroups of students for purposes of adequate yearly progress, including performance and participation at 20 U.S.C. §6311 (b)(2)(C)(v)(II). CLE also supports the NGA Compact in recommending a requirement to disaggregate by subgroup graduation data and elementary school indicator data (e.g., participation in enrichment programs; G & T program) and use this disaggregated data for AYP determinations. Additionally, require all states to set goals for improving graduation rates and elementary school indicator by subgroup at the state, school district and school levels. [20 U.S.C. § 6311 (b)(2)(D)] .

- B. Data reporting the number of students in the aggregate and disaggregated by subgroup should reflect the actual numbers of such students who participated in the assessment(s) barring such data being personally identifiable. [20 U.S.C. §6311 (b)(2)(C)(V)(II)].

In addition, on minimum subgroup size ('n' size) and confidence intervals – see Sec. I.A.3.c.

- C. Instead of carving out exemptions from the “highly qualified teacher” requirement for special situations, such as multi-subject teachers, require through linkage to higher education legislation and other legislation relevant to professional development, pre-service, and in-service teacher training programs, that all core subject area teachers have the knowledge and instructional training to teach diverse students, including students from high poverty urban schools, in particular those from racial and language minority groups, students living in rural communities, and students with *high incident disabilities*.

CLE recommends improving comparability across classrooms, schools and school districts, by requiring all teachers of core subject areas to be culturally competent and to possess the knowledge and instructional skills to be effective teachers of authentic instruction and learning. In addition, such core academic subject matter teachers must as part of their preparation be prepared, either in conjunction with special educators or in consultation with special educators, to teach on a daily basis the 12-16% of students with high incident disabilities who with specialized instruction and related services are capable of participating in the regular education classroom.

- E. Codify current Title I regulations at § 200.20(c)(3) that require schools to use the student’s results from the first administration of the state assessment to determine AYP by revising 20 U.S.C. § 6311 (b)(2)(C)(iv) to read: “based primarily on the results from the first administration on the academic assessments described in paragraph (3).” Taking this action will help ensure that students are not specifically taught to the test using a narrow curriculum designed to accomplish a singular goal. This concern is especially well founded in states using their state assessments for dual ‘high stakes’ purposes, e.g., graduation with a regular high school diploma.
- F. Unlike English Language Learners (ELL) whose acquisition of language is expected to evolve over a period of 2-5 years, and whose success generally results in their removal from the ELL cohort, there is no corollary for students with disabilities. Amend the definition at 20 U.S.C. § 6311 (b)(2)(C)(V)(II)(cc) of students with disabilities by adding the clause “who are eligible for services under the Individuals with Disabilities Education Act (IDEA) at time of assessment.” This additional language clarifies that the performance of students who previously received special education services but are no longer eligible for services at time of test administration shall not be considered part of AYP determination for the ‘students with disabilities’ subgroup. This minor addition will preclude schools from inappropriately classifying students as having a disability and then counting them as part of the former special education subgroup, and thus, inflating that subgroup.
- G. Codify the U.S. ED’s one percent (1%) policy allowing students with the most significant cognitive disabilities who even with the best instruction are unable to demonstrate progress toward achieving the state standards to be assessed against alternate achievement standards using alternate assessments. However, *given the consequences of an erroneous determination, tighten the criteria for eligibility* as follows:
1. Replace “students with the most severe cognitive disabilities” with “only that very limited portion of students with the most significant cognitive disabilities who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education and accommodations. This determination must reflect the judgment of qualified professionals based on clear, valid, documented evidence.”
 2. With this bright line, many more students with cognitive disabilities who are now being assessed based on alternative assessments based on alternate standards, will not meet the eligibility criteria for being assessed [and taught] based on “alternate” achievement standards.
 3. This result is consistent with research findings evidencing improved and accelerated student achievement following best practice interventions.

- H. Reject as inconsistent with the mandate of NCLB at §6311(b) [establishing the same academic standards for all students] and constitutional and civil rights statutes, any policy [e.g., U.S. ED’s proposed two percent (2%) policy] that would allow certain students with disabilities, who cannot be defined and delineated without error, to be assessed on the basis of “modified” achievement standards that also have yet to be defined. The setting of lower standards for certain students with disabilities will inevitably mean that most of those students will not be taught those skills and bodies of knowledge expected for all students, at the levels expected for all students, that are not included in the same form in either the alternate or the modified standards. (The lower standards set for these students will set the ceiling of their education as they are incorporated in their IEPs and their overall instruction.) This is clearly a violation of Section 504, at the least in those cases where there is not *irrefutable evidence* that giving any such student the same access to the same level is pointless.
- I. Affirm that the purpose of the assessment system under Title I is, in fact, to determine whether the student has received high quality instruction in the first place. State accountability systems are expected to make schools and school districts accountable to parents and students, not subject students to reduced standards of learning when the school/school district have failed to effectively educate the student to meet grade level proficiency.
1. Many existing State assessments lack validity and reliability evidence necessary to support the inference that a particular student with a disability is precluded by the nature of that disability from achieving grade-level proficiency.
 2. A student’s performance on the State assessment may as likely reflect that the student has not received adequate or effective instruction by a highly qualified teacher in the core subject area being assessed or the obstacle to achievement may be the assessment instrument.
- I. Currently few states have developed alternate assessments based on grade level achievement standards designed to assess the SAME content standards with the SAME definition of "how well and how much" of the content as is measured by the regular assessment. Heightened focus and funding on the development of such alternate assessments that demonstrate comparability to the regular assessment are essential
- J. Protect students from being subject to overbroad criteria, without adequate justification, and which on their face sweep in more students than fit the underlying standard the Department is seeking to establish, such as:
1. The conclusion that 3% of the overall student population (or 30% of students with disabilities) are simply incapable of mastering the regular standards applicable to other students, even with high-quality instruction or, at least for 10% of the students, the “best” education;

2. The different criterion, articulated in the proposed regulations at §200.1(e)(2)(ii)(A), that provides for students being subject to modified standards because their IEP team is ‘reasonably certain’ that they cannot master the regular standards, even with high-quality education – which means that students can and will be effectively limited to being taught to lower standards even if they would have at least a one-in-four chance, one-in-three chance, or even 49% chance of mastering the higher standards if properly taught (even assuming that our concerns, articulated in the point immediately above, about the basis for that conclusion, were not valid). In the aggregate, this thus sweeps in good numbers of students who, in fact, *would* achieve full proficiency (e.g., one out of every four students who has a 25% chance), even applying the questionable assumptions made in the Department’s proposed regulation.
 3. The assumption that allowing up to 3% of students with proficient scores on reduced standards is consistent with and narrowly tailored to focusing on the 3% of students who are purported incapable of mastering (or to a reasonable certainty, incapable of mastering) the higher standards applicable to other students is flawed. In fact, this would permit, and result in, **much more than 3% of students to be subject to the lower standards**, because it allows up to 3% of the total scores to consist of students who score *proficient* on the lower standards, which means that the total of students who are measured against the lower standards for AYP purposes will consist of that 3% *plus* all the students who score *below* proficient on the modified or alternate standards.
 4. The basic structure of the Department’s proposal to develop and use an alternate assessment based on modified achievement standards for certain students with disabilities, despite its intent, sets up the conditions for turning NCLB on its head. For all other students, the core structure of NCLB creates a presumption that students’ not becoming proficient or advanced performance in relation to the full range of state standards indicates that the quality of their instruction needs to be improved in order to get them to proficient and advanced levels. For the students at issue here, that presumption becomes non-operative. (Instead, for these students, the conclusion is drawn that the reason that are not fully mastering the standards is that they are simply incapable of doing so – and the assessment results are themselves used to justify that very divergent conclusion.)
- K. Consistent with the proposed comments of the National Down Syndrome Society and others, expand current requirements at 20 U.S.C. §6311(b)(1) (D)(i) and 20 U.S.C. §6311 (b)(3)(C) to require that academic standards and assessments are consistent with the principles of universal design for learning.
- L. Ensure additional support for research about the use of particular accommodations for students with particular types of disabilities in state assessments. Standard 10.1 of the AERA Testing Standards states: *"In testing individuals with disabilities, test developers, test administrators, and test users should take steps to ensure that the test score*

inferences accurately reflect the intended construct rather than any disabilities and their associated characteristics extraneous to the intent of the measurement" (AERA, et al., p. 106). Currently there is a great deal of variance in the type of accommodations approved and used in assessing students with disabilities. It is important to be able to determine whether test accommodations improve the scores of students with disabilities? If so, whether such score gains reflect increased validity or unfair advantage? What specific types of accommodations are best for specific types of students?

CLE recommends that further experimental studies on appropriate accommodations and their use should be undertaken, including

- Repeated measures designs: Test SWD with and without accommodation.
- If comparisons to non-disabled students is an issue, include those students in both conditions.
- Could also conduct studies between groups (SWD, non-SWD, random assignment to standard and accommodated conditions).

Consideration should be given to creating a national peer review panel comprised of persons with special expertise to evaluate state assessments and the appropriateness of their proposed accommodations. Among other things, the panel would review whether the proposed accommodations hurt or promote valid score interpretations for students with disabilities by removing barriers (irrelevant variance)

IV. Other (partial)

A. Distribution of funds – reduce, and ideally eliminate, two inequities

1. High poverty schools in higher poverty districts

- a. Under the current system of distribution, there are good reasons for the long-standing requirement that districts distribute Title I funds only (to oversimplify) to schools whose poverty rate is above the district average, and to limit the number of schools funded to those that can be served with sufficient size, scope, and quality (though the latter mandate has not been treated as seriously as it should). But this produces major inequities in that a school with a poverty rate of 50% or more may get no Title I funds because it's in a district with an overall poverty rate that's even higher, while a school with only a fraction of that rate across the district line in the suburbs is a Title I school because it's the highest poverty school in a wealthier district. This makes no sense from an equity or educational point of view – to base a high-poverty school's Title I funds, and thus needed services to its children, on the poverty levels of the *other* schools in the district where it happens to be located.

- b. A remedy for this problem would be to put a major part of the Title I funding on a statewide ranking basis, where schools get served in order of poverty, regardless of their district averages. (In order to avoid narrowing the political base for the program, a significant portion of the funds could remain distributed on the current method, rather than shifting everything into the new formula.)
- c. This should also be a part of (and shape the phase-in of) any move to more “fully fund Title I”

2. **High-poverty secondary schools.**

- a. There is a conflict between disproportionate numbers of secondary schools not making AYP (in large part because achievement gaps grow the longer students remain in school) and historical decision to let districts choose to concentrate Title I funds in elementary schools, regardless of poverty or achievement.
- b. First step to remedy this was taken in 1994, when districts were prohibited from skipping any high-schools with poverty rates above 75% while serving elementary schools below that, but this is not enough – many high schools in need of Title I are not getting served while lower poverty schools are.
- c. We need to continue down the road paved by the 1994 provision, by having districts select all their schools in rank order of poverty.
- d. The question of whether there need to be distinct program provisions for high-school reform doesn’t undermine this proposal, since for the foreseeable future there’s not likely to be a separate funding stream with the magnitude, similar to Title I, that would be needed to do the job; the kinds of provisions that would go into a sensible high-school reform program could be built into the provisions applicable to high schools under Title I; and anything less than we suggest would undercut the push for “full funding” of Title I – i.e., making sure the program is adequate to serve all eligible K-12 students.

B. Targeted Assistance Schools (section 1115)

- 1. **Require a program plan, as in schoolwide programs SWPs, for spelling out how the school will implement each of the required program components.**
 - a. The obligations in Section 1115 really cannot be met without a plan.

- b. The plan should be jointly developed with the parents of Title I children, parallel to the requirement for joint development of the Section 1114 plan.
- c. This can be integrated with the overall improvement plan that many states require as a matter of state law, provided that it is adapted to fully meet the above requirements.

C. Teacher quality

In addition to a variety of other efforts needed to boost teacher quality:

1. Change the label – to the extent that the key definition in the Act remains focused primarily on whether the teacher is certified in, or majored in, the field that s/he is teaching, don't call that “highly qualified,” when it obviously is not.
2. Focus on facilitating, as quickly as possible, the transition in each state to a system in which being credentialed means actually having the high level of skills and knowledge necessary to enable all the students in one's classroom to reach proficient and advanced levels of achievement.
3. Uncouple the provisions in Section 1114/1115 from the current definition of HQTs. The school-level plan for ensuring that all the teachers in the school are highly qualified shouldn't be short-circuited by pointing to the credentials – it should be focused on the school determining whether its teachers have the needed skills and knowledge to enable the students in their classes to reach proficient and advanced levels, addressing more meaningful, rigorous criteria for determining the those skills and knowledge. [This uncoupling could be done by changing the term HQT in the definition to something else (as recommended in #1 above), such as “in-field teachers,” changing all the references in other sections keyed to that definition to the new term, but leaving the term “highly qualified teachers” in this section, not linked to that credential-based definition. Second choice, if the definition of HQT is left as is, would be to use a different term in Section 1114.]