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# INSTITUTE FOR LANGUAGE AND EDUCATION POLICY

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September 5, 2007

The Honorable George Miller  
Chairman  
Committee on Education and Labor  
United States House of Representatives  
Washington, DC 20515

The Honorable Howard P. "Buck" McKeon  
Senior Republican Member  
Committee on Education and Labor  
United States House of Representatives  
Washington, DC 20515

The Honorable Dale E. Kildee  
Chairman  
Subcommittee on Early Childhood,  
Elementary and Secondary Education  
United States House of Representatives  
Washington, DC 20515

The Honorable Michael Castle  
Senior Republican Member  
Subcommittee on Early Childhood,  
Elementary and Secondary Education  
United States House of Representatives  
Washington, DC 20515

Dear Sirs:

Thank you for the opportunity to comment on the Miller-McKeon discussion draft for reauthorization of Title I of the Elementary and Secondary Education Act (ESEA). We are pleased to hear that the draft is a "work in progress" and respectfully ask that our recommendations for amendments receive serious consideration.

The Institute for Language and Education Policy is a nonprofit organization founded in 2006 and dedicated to promoting research-based policies for serving English language learners (ELLs). Our members include educators, researchers, parents, university professors, graduate students, teachers-in-training, and other advocates for ELLs in 36 states and several foreign countries.

We applaud the leaders of the House Committee on Education and Labor for addressing a number of flaws in the No Child Left Behind Act (NCLB) that have created serious obstacles to effective schooling for ELLs. We believe that some proposed changes in the draft bill – such as allowing the use of multiple indicators of student progress, alternate forms of assessment, and locally designed assessments – could help to mitigate a few of these problems. For the most part, however, we are disappointed to find that the proposals generally fail to reflect the available scientific research or professional experience in educating ELLs. Thus they do not go nearly far enough in creating a fair, flexible, and beneficial accountability system tailored to the unique needs of these students.

Here are our major concerns about the Miller-McKeon discussion draft released on August 28:

### **Accuracy of assessments**

The draft bill, like current law, requires that ELLs be included in assessments for calculating adequate yearly progress (AYP) and that ELLs “be assessed in a valid and reliable manner.” Until students acquire sufficient English to take tests designed for proficient speakers of English, the draft bill requires that they be provided, “to the extent practicable,” accommodations and alternate assessments “most likely to yield accurate data on what students know and can do in grade level academic content areas.”

There is an important contradiction here that the draft bill fails to resolve. Either ELLs must be included in high-stakes assessments aligned to state standards, regardless of the tests’ validity and reliability. Or they must be exempted until valid and reliable assessments have become available. Which alternative is being proposed? Leaving this question unanswered would fail to rectify a fundamental flaw of NCLB – a mandate for the widespread use of invalid and unreliable tests – which has created several perverse incentives for schools. These include a narrowed curriculum, an overemphasis on test preparation, a stress on basic skills in English rather than critical thinking, the disruption of creative teaching strategies, and the dismantling of bilingual education programs, despite research evidence of their effectiveness.<sup>1</sup>

The problem: According to a broad consensus among psychometricians, very few content assessments or accommodations now available for ELLs are either valid or reliable. Yet, under NCLB requirements, invalid and unreliable assessments for these students have been widely used for making high-stakes judgments about school programs. No useful purpose can be served by such a “garbage-in-garbage-out” accountability system; indeed, much damage can be (and has been) done.

The draft bill addresses this quandary by requiring states to develop valid and reliable assessments for ELLs within two years or face a 25 percent reduction in Title I administrative funds. Believing that such a deadline can be met is wishful thinking at best. It ignores the numerous and substantial obstacles to developing assessments or accommodations that would be appropriate for a group of students who are extremely diverse in their levels of English proficiency, language and cultural background, and prior schooling.

The solution: Research efforts to develop accurate, meaningful, and instructionally useful tests – including accommodations, portfolios, and other alternate assessments – for ELLs should receive additional federal support (as the draft bill would provide). Meanwhile, Title I should clarify that, until content assessments have been proven valid and reliable for ELLs, they cannot be used for calculating AYP or for other high-stakes purposes. More accurate and more promising approaches, better focused on systemic school

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<sup>1</sup> See, e.g., Krashen, S., & McField, G., “What Works: Reviewing the Latest Evidence on Bilingual Education,” *Language Learner*, Nov.-Dec. 2005, pp. 7-10, 34 (available online at: <http://users.rcn.com/crawj/langpol/Krashen-McField.pdf>).

improvements, should be adopted to hold schools accountable for ELLs' achievement (see recommendations on pages 4-5 below).

### **Native-language programs and assessments**

The draft bill requires states to develop and provide native-language assessments for students from minority language groups that make up at least 10 percent of a state's ELL population, provided that the use of native-language assessments is "consistent with ... State law." The draft bill would also allow schools to use native-language assessments for ELLs for up to five years. While this provision would be an improvement over the three-year limitation in current law, we see no reason to set any arbitrary cutoff date, given the lack of any scientific justification to do so and the considerable diversity of ELL students.

The problem: Requiring states to assess ELLs in their vernacular would appear to be a simple way to resolve the validity/reliability issue. But this approach ignores an inconvenient reality: Native-language assessments are invalid and unreliable for the vast majority of ELLs – at least 85 percent, by our estimate – who do not currently receive content instruction in the native language. Mandating the development of such tests would be pointless in states where native-language instruction is seldom offered. It would also be quite burdensome, costly, and time-consuming – a diversion of resources that could be better spent on capacity-building efforts such as professional development and technical assistance with ELL program design. This is especially true in states that would be required to produce assessments in less commonly taught languages such as Tagalog (Hawaii), Yup'ik (Alaska), Hmong (Wisconsin), and Ojibwa (North Dakota). Moreover, allowing states to "opt out" of the requirement through legislation or regulation would create an incentive to deny native-language assessments to students for whom they are appropriate and further discourage the use of bilingual education.

The solution: Create positive incentives to expand both native-language instruction and native-language assessments by reauthorizing a competitive grant program to encourage such approaches, as provided under Title VII of earlier versions of the ESEA. Funding applications by states and school districts would be judged, among other things, on whether they applied research-based approaches in serving ELLs – thereby restoring a measure of quality control that has disappeared under NCLB's formula-grant system.

### **English language proficiency assessments**

The draft bill allows states to substitute, for up to two years, English language proficiency (ELP) assessments for language-arts content assessments for ELLs, based on the percentage of students "who move from the lowest 2 levels to a higher level" of English proficiency.

The problem: Numerous scientific studies have demonstrated that second-language acquisition is a protracted process. It takes ELLs from four to seven years, on average, to catch up with proficient English speakers on English-language content assessments. Moreover, the research evidence shows wide variations in children's acquisition of a second language, affected by factors such as socioeconomic status, parental literacy rates, and individual aptitude. Thus there is no scientific basis whatsoever for the standard of progress that the draft bill would establish (nor for the assumption that language arts

assessments in English would be valid and reliable for ELLs above level 2 on ELP assessments). There is also a danger that the provision would create incentives to focus exclusively on basic English for children at levels 1 and 2, at the expense of instruction in academic content.

The solution: Include progress for all ELL students on ELP assessments (not limited to two years) as one of several indicators of ELLs' progress, including class grades, grade promotion and graduation rates, teacher assessments, portfolios of student work, and other alternate assessments.

### **ELLs as a subgroup**

Recognizing that, when ELLs are reclassified as English-proficient, the effect is usually to lower average scores for the ELL subgroup, the draft bill would allow schools to count former ELLs for up to three years for purposes of calculating AYP. Recognizing that newly arrived ELLs, speaking limited English, also tend to pull down average scores, it would exempt such students from language-arts assessments for up to 12 months after they enter U.S. schools, while still requiring them to be assessed in math and science (apparently without regard to the validity or reliability of such tests).

The problem: Again, none of these provisions has any basis in scientific research. Taken together, they would possibly postpone the day of reckoning for some schools. But they fail to address the basic mathematical reality: The ELL subgroup – which is defined by its lack of proficiency in academic content because of the language barrier – will never achieve full proficiency by any deadline, much less by 2014, as required by the draft bill. It is fundamentally illogical, not to mention unfair, to define a subgroup that is essentially on a treadmill, with average scores that are constantly slipping backward. Even if every individual student makes good progress, all schools with an ELL subgroup are set up for ultimate failure. This is absurd.

The solution: Establish a different type of subgroup for ELLs, with a different set of requirements that recognize the unique situation of these students. Track the achievement of cohorts of individual ELLs, using multiple indicators reference above. Judge their progress against growth rates established as reasonable and feasible by scientific research, rather than against arbitrary AYP targets. Place a premium on English acquisition and long-term academic outcomes, rather than on short-term performance in meeting state standards for English-proficient students that are often inappropriate for ELLs.

### **Holding schools accountable for meeting ELLs' needs**

With only minor modifications, the draft bill would reauthorize NCLB's one-size-fits-all approach to accountability. It fails to recognize that ELLs are, in effect, the square peg in this system – they simply don't fit. As children who must acquire a second language at the same time they are learning academic content, ELLs differ substantially from English-proficient students. Yet, as a direct result of NCLB, schools are facing pressure to treat ELLs essentially the same, defying the spirit of the Supreme Court's decision in

*Lau v. Nichols*,<sup>2</sup> which ruled that ensuring equal educational opportunity for ELLs means addressing their unique needs.

The often-expressed rationale for the inclusion of ELLs in NCLB's generic accountability system is that it would force schools to "pay attention" to these students. No doubt that goal has been achieved. Unfortunately, the results of this attention have been, on balance, far more harmful than beneficial.

The problem: High stakes are currently attached to ELLs' short-term performance on invalid, unreliable assessments and judged against arbitrary, unrealistic targets for AYP. Schools have naturally responded by stressing test preparation and low-level skill-building (primarily in English), rather than supporting proven approaches such as bilingual education. Instruction is being tailored to serve the cause of assessment rather than vice versa. As a result, a generation of scientific research in program design, curriculum development, and best practices for ELLs is being widely ignored, to the detriment of these students.

The solution: Establish an accountability system for ELLs that considers educational "inputs" as well as "outputs." Such a system need not be created from scratch because its basic framework already exists. The *Castañeda* test, developed by a federal appeals court under the Equal Educational Opportunity Act of 1974,<sup>3</sup> has been used as an enforcement tool by the federal Office for Civil Rights for more than 20 years.<sup>4</sup> To pass this test, school districts must provide instructional programs for ELLs that have a valid scientific basis; they must support the programs with sufficient resources, materials, and trained personnel; and they must evaluate the programs for effectiveness and take corrective action if students are underperforming. State education agencies would be best suited to administer this flexible but substantive approach to accountability, ideally combined with school improvement programs.

### **Capacity-building for schools serving ELLs**

The draft bill would expand funding for school-improvement efforts – a welcome change. Unfortunately, the focus of such efforts is on enabling "needs improvement" schools to make AYP, narrowly defined, rather than on building schools' capacity to provide ELLs an all-round education.

The problem: Title VII of previous authorizations of the ESEA made capacity-building a high priority; NCLB largely eliminated this important goal. The timing could not have been worse, as the reduced federal support coincided with a rapid growth in ELL enrollments, especially in states with limited experience in serving immigrant children.

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<sup>2</sup> 414 U.S. 563 (1974).

<sup>3</sup> 20 U.S.C. §1703(f).

<sup>4</sup> The case was *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). Its "three-prong" test for ensuring that school districts meet their obligations toward ELLs was adopted as official policy by the U.S. Department of Education in 1986.

Nationwide, the number of teachers with ELLs in their classrooms increased from 15 percent in 1992 to 43 percent in 2002.<sup>5</sup> Only a tiny proportion of these teachers had received more than limited training in how to serve ELL students.

The solution: Reorient NCLB from its unbalanced stress on testing and sanctions to emphasize capacity-building for schools in serving ELLs and other “left behind” groups. Provide increased funding to strengthen the ability of state education agencies to assist school districts through technical assistance in program design and evaluation, professional training for in-service teachers, and development of local assessments for program improvement as well as accountability purposes.

Again, we are pleased to have this opportunity to comment on one of the most important pieces of legislation that this Congress will consider. Our recommendations reflect the concerns of large numbers of educators, parents, and experts in education who believe that NCLB has ignored the unique needs of ELLs. As a result, the law has not only failed to advance its ambitious goals. Worse, it has brought unintended consequences that must be corrected before more harm is done to children. We urge you to recognize these serious problems and act accordingly.

Thank you for your attention.

Sincerely,

A handwritten signature in black ink, appearing to read "James Crawford". The signature is fluid and cursive, with a long horizontal stroke at the end.

James Crawford, President  
Institute for Language and Education Policy

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<sup>5</sup> Zehler, A.M., Fleishman, H.L., Hopstock, P.J., Stephenson, T.G., Pendzik, M.L., & Sapru, S., *Descriptive Study of Services to LEP Students and to LEP Students with Disabilities* (Arlington, VA: Development Associates, 2003).