Dr. Jacquelyn C. Jackson
Acting Director
Student Achievement and School Accountability Programs
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW, Room 3W230
Washington, DC 20202-6132

Re: Proposed Title I Regulations

Dear Dr. Jackson:

Attached are comments submitted by the Center for Law and Education on the proposed Title I regulations published in the Federal Register on August 6, 2002. While we have indicated our support for a number of positive provisions in the regulations, we are also very concerned about the large number of places where there are troubling departures from, or omissions of, the Act's requirements in the proposed regulations.

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches to these issues in implementing what is, we all recognize, an important and complex piece of legislation.

Sincerely,

Paul Weckstein, Co Director
Center for Law and Education
1875 Connecticut Avenue, NW, Suite 510
Washington, DC 20009
(202) 986-3000
pweckstein@cleweb.org

COMMENTS ON PROPOSED TITLE I REGULATIONS (August 6, 2002)

submitted by:
CENTER FOR LAW AND EDUCATION
1875 Connecticut Avenue, NW, Suite 510
Washington, DC 20009

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General Matters

1. Citations. Given the length and complexity of the statutory sections being addressed, and the significant reorganization and reordering of the Act's various provisions in the regulations, it would be very helpful, in the statutory citations at the end of each regulatory section, to refer not to the general section of the Act (e.g., §1116), but rather to the specific subsections and paragraphs being addressed. Otherwise, it is often extraordinarily difficult to connect them, and the Department as a result will undoubtedly get questions that could be obviated (for example, when someone questions or opposes a regulation that is in fact mirroring a provision of the Act, but because of the reorganization, people have difficulty finding the relevant provision).

2. State Plans Requirements. There are a number of very important requirements in section 1111 of the Act for descriptions and assurances in the State plan that are directly relevant to the topics being regulated here (e.g., schoolwide programs and high-quality teachers), even though they do not appear in the sections specifically devoted to those topics. The connection should be made, both in the regulations and elsewhere, or these key provisions and obligations will be ignored.

To highlight some of the most important:

Under Section 1111(b)(8) of the Act, the State plan must describe:

> "(A) how the State educational agency will assist each local educational agency and school affected by the State plan to develop the capacity to comply with each of the requirements of sections 1112(c)(1)(D) [LEA's school improvement responsibilities], 1114(b) [schoolwide

program components], and 1115(c) [targeted assistance school program components] that is applicable to such agency or school;

"(B) how the State educational agency will assist each local educational agency and school affected by the State plan to provide additional educational assistance to individual students assessed as needing help to achieve the State's challenging academic achievement standards;

"(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 1114(b)(1)(C) and 1115(c)(1)(E), including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps;

"(D) an assurance that the State educational agency will assist local educational agencies in developing or identifying high-quality effective curricula aligned with State academic achievement standards and how the State educational agency will disseminate such curricula to each local educational agency and school within the State; and

"(E) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging academic content standards adopted by the State."

These descriptions and assurances set forth important parts of the State obligations in the areas being regulated, as well as other areas. They should therefore be included in the applicable parts of the regulations. Further they should receive the Department's, and (through the Department) the States', full attention in taking the steps necessary to ensure that we reach the goals set forth in this Act. This has not happened to date and needs to be remedied – for example (and of particular importance), to the extent that the required descriptions above were not included in the Department's guidance and instructions to States on what they need to include in their consolidated State plans.

State Accountability System

§200.12 Single State accountability system

§200.12(b) – all public schools and LEAs.

Sec. 1111(b)(2)(A) of the Act provides the State accountability system shall:

"(ii) be the same accountability system the State uses for all public elementary schools and secondary schools or all local educational agencies in the State, except that public elementary schools, secondary schools, and local educational agencies not participating under this part are not subject to the requirements of section 1116;"

The proposed regulation here rearranges the words of the two clauses in the Act in an effort to make the meaning clearer:

"(b)(1) Except as provided in paragraph (b)(2) of this section, each State must use the same accountability system for all public elementary and secondary schools and all LEAs in the State. (2) The State may, but is not required to, subject schools and LEAs not participating under subpart A of this part to the requirements of section 1116 of the Act."

We believe however, that the change will actually tend to create confusion among some readers that will can to improper application. Moving the "except that" from the second clause to the first seems more likely to result in a reading, not intended by the regulations or the Act, that the non-participating schools are not required to be part of the same accountability system and be making adequate yearly progress (as stated in (a)(1) of the regulations and the Act). Additionally, it would be helpful to give some indication of what the application of the accountability system, and the obligation to make AYP, to these non-participating schools and districts does mean.

§200.12(c)(4) – guidelines for using alternative assessments only for students with the most significant cognitive disabilities.
[§200.13(b)(1) – same high standards of achievement for all public school students – exception for students with disabilities.
§200.13(c)(1) – process for lowering standards for students with the most significant disabilities who take an alternative assessment]

1. Distinguishing alternative assessment of the *same* standards vs. alternate standards

The proposed regulations at 200.12(c)(4)-(5) as well as 200.13 concerning use of alternate assessments are misleading to the extent that they fail to make absolutely clear that alternate assessments are recognized under Title I and IDEA as part of the State's accountability system for ensuring full participation of students with disabilities, and are not limited to students with cognitive disabilities so severe that they cannot be assessed in relation to the standards for all students. There needs to be provision, for those students who need them, for valid alternate assessment of the *same* proficiencies applicable to all students. This type of alternate assessment then needs to be distinguished from the smaller number of instances, which need to be carefully limited and controlled, for assessing certain of the most severely cognitively disabled students in relation to different standards.

Alternate assessments encompass those instances where a student with disabilities cannot be validly assessed with the regular State assessments, even with accommodations, but can be meaningfully assessed in relation to the same standards, but with a different, alternative form of assessment – i.e., s/he is capable of demonstrating some level of performance in regard to some or all the knowledge and skills in the State's content standards, but requires a different form of assessment to determine that level of performance. While many students with disabilities can be assessed with accommodations using the same assessments, of those who cannot, many can, and therefore must be, assessed with different instruments (for instance more performance-based or open-ended instruments) for validly measuring the same knowledge and skills – even if, in particular schools, such students are, initially at least, disproportionately failing to reach proficient levels. Here are examples of students who require alternate assessments [example is from Massachusetts' requirements for participation of students with disabilities in their state assessment system]:

* A student who, as a consequence of either severe emotional impairments or pervasive developmental or other disability is unable to maintain sufficient concentration to participate in standard testing, even with allowable test accommodations

* A student with multiple physical disabilities, severe health-related disabilities, severe cerebral palsy or other disability for whom the demands of a prolonged test administration would present a significant challenge

* A student with a significant motor, communication, or other disability who would require more time than is reasonable or available for testing, even with the allowance of extended time

These disabilities in and of themselves do not require assessment against different or lower standards – rather, they require alternative ways of assessing the students against the same standards. Unfortunately, and in conflict with both common sense and the law, §200.12(c)(4) would appear to require that students such as these must always either (a) be assessed with the same assessments (which clearly will not allow

them to validly demonstrate their proficiency in relation to the standards) or (b) be assessed with alternate assessments that are tied to different and lower knowledge and skills.

It is also accurate to acknowledge that an "alternate assessment" *measuring different or alternative standards* is necessary for certain students with the most significant cognitive disabilities to participate in the state's accountability system.

This distinction between alternate assessments of the same standards and alternate standards is also recognized under IDEA. It should be recognized here.

Despite the inclusive language of the Act, the proposed regulations at §200.12(c)(4) - 200.13 obfuscate this distinction between "alternate assessments" developed for students with disabilities who are learning to and being assessed based on the same standards expected for all students and that very small percentage of students whose cognitive disabilities are so severe that different standards may be needed (see below on additional safeguards needed in making that determination and preventing it from being applied overbroadly). The Act and proposed regulations require participation by all students in the State accountability system. For such participation to occur, States must provide the means for students with disabilities (such as those in the examples above) who, because of their disabilities, need different forms/types of assessments (beyond accommodation) in order to most validly and reliably measure the *same knowledge and skills expected of other non-disabled students*. At the same time, for a group of students with the most significant cognitive disabilities – who must be defined very carefully (see below) – to participate in the accountability system, they too will need an alternate assessment - an assessment that measures what they are learning - i.e., standards aligned with the State's content standards but as recognized by proposed regulation 200.13(c)(1) which may be set at a lower level, provided these decisions reflect professional judgment and clear, valid, documented evidence of the student's inability even with the best education and learning accommodations to make any progress on the standards applicable to all students.

This distinction as to the different types of alternate assessment – and the need for basing some alternate assessments on the same standards – does appear to be recognized or implicit elsewhere in the regulations and commentary, but then is both hidden and contradicted by §200.12(c)(4). The commentary at 67 Fed. Reg. 50987 refers to "alternate assessments" based on "alternate standards" being "an appropriate way to measure the progress of 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 education" [limited to .5% of the population of students with the most significant cognitive disabilities (.5%]), who under proposed regulation §200.13(c)(2) should be included in accountability measures using *alternate standards.* The commentary explains, however, that "[f]or accountability purposes, the performance of all other students with disabilities *(including any other students with disabilities who take an alternate assessment*) must be assessed against the academic content and achievement standards established [for all] under §200.1." *Emphasis added.* This connects to §200.13(c)(2)(iii) of the regulations: "For purposes of calculating adequate yearly progress for States and LEAs, the State must require that *grade-level academic content and achievement standards established under § 200.1 apply to any students taking alternate assessments that* exceed the number established under paragraph(c)(2)(ii) of this section." Clearly, there is no way to apply those grade level standards to these students, as required by this provision and as should indeed happen, unless the alternative assessments which these students take are measuring those grade-level standards.

In light of all this, subsection (c) of 200.12 is clearly incorrect in stating that "*alternate assessments are used only when appropriate for students with disabilities who have the most significant cognitive disabilities.*

To resolve this problem, in §200.12(c)(4), after "alternate assessments" insert "that are based on different achievement standards under §200.13(c)(1)". This will accomplish the needed limitation on

assessing students against different standards while recognizing that there is an independent need for some other students to be assessed with alternate assessments of the *same* standards. (See the comment below on how this group of students then needs further definition, building on language in the commentary, but not the proposed regulations.)

The proposed regulations 200.12(c)(4) and (5) need to define what is meant by an *alternate assessment that is not measuring the same standards set for all students* but has been developed for students with the most significant cognitive disabilities whose learning goals are aligned to the State standards but are not at the same level of difficulty or challenge expected of all other students. In other words the proposed regulations must explicitly distinguish *alternate assessments using alternate standards* that are intended only for the 0.5% or less of students with the most significant cognitive disabilities from alternate assessments that are developed for other students with disabilities who, because of their disabilities, need a different assessment to measure the same standards that are established for all students.

The term "significant cognitive disability" should also be defined so as to clarify who could conceivably be included within the school's .5% that might be determined by their IEP team, including the parent and student, as appropriate, to participate in an alternate assessment that is not measuring the same standards set for all other students. 200.13(c)(1).

Consistent with Title I, as amended by NCLBA, the State's accountability system must be effective in ensuring that all public elementary and secondary schools and LEAs in the State make adequate yearly progress which, based on §200.13(b), each State must define in a manner that "applies the same high standards of academic achievement to all public school students in the State" *except those provided for in paragraph (c)*. This exception language needs to be deleted or revised to be consistent with the revisions discussed here.

2. Needed criteria concerning students with the "most significant cognitive disabilities"

Based on the discussion above concerning the spectrum of students with disabilities taking alternative assessments, through definition and/or examples, the distinction between alternative assessments with alternative standards versus alternative assessments with the same standards expected of all other students must be spelled out. We support creation of a very narrow exception that would authorize only those students with the most significant cognitive disabilities taking an alternate assessment measuring other/lower standards that are as set forth in 200.13(c), urge that the word "must" replace "may" [200.13(c)(1)]; after "reflect professional judgment" add "based on clear, valid, documented evidence"; and explicitly state that the 0.5% limit shall apply to alternative assessments using lower standards.

We would also suggest that additional safeguards be taken by defining what is meant by "cognitive" so as to leave no chance of confusing students with learning disabilities.

In addition, §200.12(c)(4) should provide more guidance regarding the standard of "most significant cognitive disabilities." In particular, the language in the commentary on this point (FR 50987) is important and should be incorporated into §200.12(c)(4): 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."

§200.12(c)(5) – reporting percentage of students taking an alternate assessment

We support the proposed regulation requiring schools and LEAs to report the percentage of students taking an alternate assessment, with an amendment, noted below. This is important information. Efforts to interpret the assessment data on achievement of students with disabilities will be severely hampered if the various audiences do not have this additional information – particularly if there are significant or wide variations between schools or LEAs in this percentage of which they are not aware.

Based on the above discussion about the two types of alternate assessments, one assessing the same standards of learning, one involving a very limited number of instances of assessment of different/lower standards, it is important that such data be disaggregated and reported – in part, as a precautionary safeguard, in part, as a tool for learning and understanding. Thus, the regulation should be amended to report separately on (A) students taking alternate assessments of the same proficiencies, and (B) students taking alternate assessment of different proficiencies.

Adequate Yearly Progress

§200.13 Adequate yearly progress in general

§200.13(b)(1) – same high standards for all – exception for students with significant cognitive disabilities

See comments to §200.12(c)(4) and §200.13(c)(1) – delete or amend the exception.

§200.13(b)(4) – measure the progress of all public schools, LEAs, and the State

We support the language in underscoring the importance of assessment of *all* public schools and LEAs in the State.

§200.13(b)(7) – application to each subgroup

For clarity, add "separately" at the end of the lead paragraph, before the colon. (This is consistent with the statute and avoids any possibility of interpreting the language to mean that the same goals, objectives, and indicators could be applied to the listed groups collectively.)

§200.13(b)(7)(C) – definition of students with disabilities for purposes of AYP sub-group

This language is an accurate statement of the Act's provisions on this subject.

§200.13(c)(1) – defining achievement standards for students with significant disabilities who take an alternative assessment

See comments above to §200.12(c)(4), along with §200.13(b)(1). This provision should be retained but revised to deal with the need to distinguish between alternate assessments of the same standards and the much more limited use of alternate assessments for measuring progress on different standards, with a version of the regulation here as a way of getting at how standards should be set for those students with the most significant cognitive disabilities (while making it very clear that other students with disabilities may need a different alternative assessment of the *same* standards). To do so, we need clear language on how States/LEAs must distinguish these two groups, the criterion by which it is determined that a student should not be assessed on the same standards (see our suggestion for incorporating language from the Department's commentary on this point into §200.12(c)(4) above) , and the process for making that determination.

With those qualifications and revisions, we would support the provisions of 200.13(c)(1) (i), (ii) but then urge that they be made mandatory on the part of the State, thereby requiring that for those very limited 0.5% of students with the most significant cognitive disabilities who are assessed on different/lower standards through an alternate assessment that the State must through a documented and validated standards-setting process define achievement standards that are aligned with the State's academic content standards; and reflect professional judgment, *based on valid, documented evidence*, of the highest learning standards possible for those students.

§200.13(c)(2)(i) – including the alternate achievement standards for students with the most severe cognitive disabilities in calculating AYP

We support the proposed regulation that, in calculating AYP, authorizes a State to permit use of the achievement standards developed through the above described process [200.13(c)(1) (i), (ii)] for students with the most significant cognitive disabilities who take an alternate assessment, *provided that* the proposed regulations on reporting on the percentage of alternate assessments above and (as stated in this paragraph) the provision on limiting the use of alternate standards to 0.5%, below, are both adopted – otherwise, the calculation and interpretation of AYP will potentially be distorted.

Assuming adoption of these provisions, we propose amending this paragraph to require, rather than simply permit, the use of the achievement standards in calculating AYP, because not including them will have the effect of denying these students their right to participate fully in the accountability system.

§200.13(c)(2)(ii) and (iii) – limiting use of different achievement standards to 0.5%

We support paragraph (ii) limiting the use of different standards under (c)(1) to 0.5% of all students assessed, and paragraph (iii), saying that the regular grade-level standards apply to any students taking alternative assessments that exceed 0.5%, with the following change:
At the end, add "or that do not meet the criteria in paragraph (c)(1), whichever is less". (Our intent here is to address the fact that there may be fewer than 0.5% who meet the criteria in (c)(1) and should be assessed with a different standard. If so, all other students should be assessed against the grade-level standards.)

§200.13(d)(1) – accountability for schools (i) with no grade level being assessed or (ii) intended to serve students for less than a full year

We support the requirement to establish a way to hold these two types of schools /school structures accountable, but believe additional protections are needed to address issues that arise with "schools . . . whose purpose is to serve students for less than a full academic year." See our next comment to paragraph (d)(2), below. Also, in order to avoid abuses, we suggest that the regulations clarify what is intended here by "schools . . . whose purpose is to serve students for less than a full academic year".

§200.13(d)(2) – no requirement for formal assessment in order to meet the requirement in paragraph (d)(1) above

This language is (inadvertently) misleading and requires clarification with regard to its application to paragraph (d)(1)(ii) – schools whose purpose is to serve students for less than a full academic year. *All* students who are in a grade being assessed must be assessed under the formal state assessment system, including those who spend some of their time in such schools, and if they spend a full year within the LEA but not in any one school, they must be counted in the LEA's AYP determination, but not the schools'. [See, for example, final regulation §200.6(c) and proposed regulation §200.20(e), and the relevant statutory provisions.] Thus the students in the schools in (d)(1)(ii) *would* have to receive formal assessment, contrary to one reading of this paragraph. This needs to be reconciled with the intended purpose of the

paragraph – to note that while such assessment of these students is required, there needs to be a different mechanism, which need not be the formal assessment, for holding these *schools* accountable.

§200.15 Timeline

§200.15(b) – changes in State assessment system or definition of AYP may not extend the timeline

We support this language, which is a needed clarification, consistent with the Act.

§200.16 Starting points

§200.16(b)(2) – percentage of students proficient in the school at the 20th percentile

This language needs to be reworded to more accurately conform to, and convey the meaning of, the Act's language. The Act provides for identifying "the percentage of students at the proficient level who are in . . . the school at the 20th percentile in the state, based on enrollment, among all schools ranked by percentage of students at the proficient level." Sec. 1111(b)(2)(E). The proposed regulation, in contrast, identifies "the percentage of proficient students in the school in which is enrolled *the student at the 20th percentile* of the State's total enrollment" (emphasis added). The italicized phrase, which diverges from the Act is misleading – it should not be "the student" at the 20th percentile, but rather the *school* at the 20thpercentile. While we assume the Department shares our understanding of what the section requires, the language is quite confusing on the point.

§200.16(b)(2)(iii) – adding schools until reaching 20% of enrollment

While the method appears to accurately spell out the way to fulfill the Act's requirements, the Department may want to continue working on somewhat clearer ways of writing or explaining it, so that readers are not confused about enrollment versus proficiency – see comment above.

§200.16(c)(2) – separate starting points by grade span

We support this provision with the following qualification/concern. Should not it be "must" rather than "may"? Since schools' AYP is determined by assessments for the grade spans served by those schools, would not there be problems if the starting point were created by counting the assessment scores on assessments in grades other than those served by those schools?

§200.18 Annual measurable objectives

The parallel provision of the Act, Sec. 1111(b)(2)(G), has language dealing (partly through cross-references) with separate application of these objectives to each group to which AYP applies. It does this both by referring to Sec. 1111(b)(2)(C)(v) [in the lead paragraph (G), parallel to paragraph (a)(1) of the proposed regulations] and by explicitly referring to this separate application and again referring to (C)(5) [in paragraph (G)(iii), parallel to paragraph (a)(2) of the regulations]. The language and references in the Act should be incorporated here, to make the connections between the "annual measurable objectives" being referred to here and the objectives addressed in §200.13(b)(7).

§200.19 Other academic indicators

§200.19(a)(1)(i) – percentage of students graduating from high school with regular diploma (not including GED) in the standard number of years

We support the clarification that this does not include GEDs, but as in the case of the IDEA, which uses the same language as proposed here, we do need more clarification on what is a "regular" diploma. This is especially the case given the increasing number of states/districts that have different types of diplomas signifying differing levels of course completion and achievement.

§200.19(a)(1)(ii) – State development of alternative, more accurate measures of high school graduation rate

This language should be amended to more accurately convey the narrowness of, and high standard for, the allowance of alternative definitions that more accurately measure the high-school graduation rate – including incorporating all, rather than only some, of the conference report language on this point: i.e., that such measures must be based on a "longitudinal" system that follows "individual" student progress through high school. The Department's interpretation and implementation of this section must address the very large problems to date in inconsistencies among definitions and in failing to capture the full extent of students who drop out or fail to graduate with their peers.

§200.19(a)(2) - At least one academic indicator for elementary schools and at least one for middle schools

We support the proposed regulation's distinction between high schools and middle schools – requiring use of graduation rates for high schools and at least one other measure for elementary schools and middle schools. [We assume junior high schools fall within the definition of "middle schools"?]

§200.19(b) – State may include additional indicators

The Act says that any such additional indicators must be measured separately for each of the AYP subgroups. This is a significant clarification which has been omitted from the regulations and should be restored.

In addition, we question the reasons for, and impact of, other changes in the language that depart from the Act – in (b) saying "including, but not limited to" instead of "such as"; in (2) omitting "decreases" in the retention rates; in (4) and omitting "changes in" percentages of students taking gifted and talented, advanced placement, and college prep courses.

§200.19(e)(2) – use of the other indicators to identify additional schools

We believe that a careful reading of the structure and intent of this part of the Act requires that, at least for the mandatory additional measures – and particularly graduation rates – the system requires that they be used for purposes of identifying additional schools. Unless they are used for this purpose, the requirement [in subsection (a)] that the State *must* include them in defining AYP cannot be met, and the requirement essentially becomes meaningless – that is, if a State declines to use the required measure for this purpose, then it does not in fact become a part of the definition of AYP, since AYP can then be made without reference to it. And for graduation rates, in particular, to determine that schools and LEAs have made sufficient AYP to avoid identification, without any reference to what has happened to their graduation rate, clearly would contravene the Act. (For the "additional" measures in subsection (b), of course, the State is free to adopt or not adopt and use them for determining AYP, so the "may" is, in contrast, appropriate for them. The regulation needs to clarify this distinction.)

§200.20 Making adequate yearly progress

§200.20(c)(1)(i) – minimum of 95% in each group take the assessment – relation to requirement to assess all students

It is important for those reading the regulations to understand that the 95% requirement here does not change or reduce the separate and distinct requirement under the assessment regulations (and Act) to

assess *all* students. While a school that neglected to assess 4% of it students (or of any subgroup) may still be making adequate yearly progress, it would nevertheless be out of compliance with that separate requirement, just as schools making adequate yearly progress may nevertheless be subject to enforcement for failure to comply with other provisions of the Act. This particular one, however, needs explicit attention in the regulations, because the 95% rule is on the exact same subject matter as the 100% rule, and may be seen to override it. States, districts, and schools must not be left with a message that they are free to leave some students out (whether inadvertently and through lack of sufficient effort at inclusion or through purposely trying to figure out which 4.x% can be left out in an effort to boost scores), so long as they reach the 95% AYP trigger.

Thus, a specific reference to the "all" requirement in the assessment regulations, and how it is reconciled with the 95% requirement, is necessary here.

§200.20(c)(1)(i) – minimum of 95% in each group take the assessment – which students and assessments

The Act, Sec. 1111(b)(2)(I)(ii), has additional language after "take the assessments" that, among other things, makes it clear that this includes: (1) assessments of those students who have attended schools in the LEA for a full year, even though their academic performance on the assessments will not count for school-level AYP if they did not attend the school for the full year; and (2) students assessed with the accommodations, guidelines, and alternative assessments provided in the same manner as under IDEA.

§200.20(c)(2) – assessing students even when group size is too small to produce statistically significant results

We support this language.

§200.20(d)(1)(ii)(B) – delaying determination of AYP until the State has data from two to three years of data

This exception to the Act's language barring a delay in the implementation of the assessment and accountability provisions does not appear in the Act, and we believe it should be deleted. The Act also provides (through the transition provisions) for making AYP determinations each year, based on determinations under the old Act if necessary. This exception that the regulations would carve would appear to swallow the rule for a significant period of time.

§200.20(e) – students enrolled in the LEA for a full academic year, but in more than one school

The language of the Act has been modified and rearranged in ways that inadvertently risk significant confusion and misapplication. The AYP portion of this provision in the Act, Sec. 1111(b)(3)(xi), is solely about mobile students – students who have attended schools in the LEA for a full academic year but have attended more than one school:

> "include [in the assessments] students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency."

This focus gets lost in the proposed regulation by the particular way it is split into two entirely separate provisions and by various other changes, including the omission of the language focusing it on students attending more than one school in the LEA. One very troubling misapplication that this language would appear to allow, for example, is that students who drop out of school during the year would not be included – either in graduation rates or even in counting results of assessments they took before dropping out (such as a student who became "disenrolled" by failing to attend school some time in the spring after the

assessments). This is clearly and explicitly not what Congress had in mind in its paragraph (3)(xi). To remedy this, the language should be realigned more closely with the Act. One possible formulation would be:

> "(e) The performance of students who have attended more than one school in an LEA in any academic year;
> "(1) shall be included in determining the adequate yearly progress of the LEA; but
> "(2) shall not be included in determining the adequate yearly progress of the school."

[If the regulation were to go beyond this to speak in terms of including/excluding performance of students who have/have not been enrolled in the school/LEA for an entire year, we believe the regulation must then explicitly address the problems and potential misapplications noted above concerning non-attendance and dropping out (versus attending more than one school).]

§200.21 Adequate yearly progress of the State

The regulation needs to indicate that mobile students who have attended schools entirely within the State but in more than one LEA and therefore are not included in determining an LEA's AYP must nevertheless be included in determining the State's progress.

Schoolwide Programs

§200.25 Schoolwide program purpose and eligibility

§200.25(b)(1)(ii) – Schoolwide program eligibility – based on initial year's count of low-income children

The phrase "For the initial year of the schoolwide program" in the proposed regulation does not appear in the Act, and we recommend that the Department consider deleting or substantially revising it. It would allow a school to remain eligible for schoolwide program status once it became a schoolwide program, regardless of whether in subsequent years its low-income count drops below the required percentage. We have some concerns about including it in the final regulations. For example, suppose a school does not merely have a minor change in its population but, because of some district reorganization, change in the focus of the school, changes in student assignment policies, or other reason, becomes a school with a very different – and much less low-income – population?

§200.25(b)(2) – measures of poverty for determining percentage of children from low-income families

The proposed regulation adds language that would permit the LEA to choose one measure of poverty for rank-ordering and allocating funds to schools and then adopt a different measure of poverty for determining whether the schools are eligible for schoolwide programs. We are not clear on the rationale for allowing this inconsistency. There are indeed problems with certain poverty measures – for example free/reduced lunch counts particularly tend to underestimate low-income percentages in high schools. But we are not sure how the proposed language would help remedy those problems.

§200.26 Development and evaluation of program plan

§200.26(a) – Development of plan
§200.26(c) – Comprehensive schoolwide program plan
§200.26(d) – Schoolwide program planning process

The proposed regulation concerning development of the plan is more complex and confusing than it needs to be because of the way it is organized. Significant parts of the planning and development of the plan appear in subsection (a) (before the comprehensive needs assessment that must precede it is introduced). Then, following the needs assessment, in subsection (c), the regulation again states that the school must develop a plan. Finally, in subsection (d), additional requirements are set out for how the plan shall be developed. Further, while there are some cross-references among these overlapping provisions, they are not entirely consistent; for example, (a)(2)(iii) says the planning process must involve the individuals who will carry out the plan in accordance with (d)(2), but (d)(2) requires involving not only those individuals but also parents, who are omitted from (a)(2)(iii). We suggest that some reorganization – more along the lines of the statute – would be helpful here in simplifying, clarifying, and avoiding unnecessary duplication.

§200.26(a)(2)(ii) – process for plan development – focus on scientifically based research

The Act makes reference to scientifically based research in other parts of the law. It does not do so here, as part of the schoolwide planning process. It is not clear what the additional requirement here added by the proposed regulation – that the school's process for developing its schoolwide plan must focus on scientifically based research – would mean. We believe that placing that language here would needlessly produce confusion.

§200.26(a)(3) – process for plan development – a process that occurs over time

We support this provision in helping to get across that this is a real, schoolwide planning process that takes time, not simply a form to be filled out by someone.

In support of this, we also suggest the following *addition* to make the language clearer: first, before the word "process" insert "schoolwide planning"; and second, change "Reflect" to "Be". This will help indicate both that the process in this phrase is the "process" referred to in paragraph (a)(2) and that it is to be a schoolwide planning process, not a bureaucratic form.

Finally, we believe that paragraph (3) and (4) have been misnumbered and should be "(iv)" and "(v)" of paragraph (2). They are written as clauses, rather than sentences, and as such properly seem to be modifying paragraph (2).

§200.26(b) – Comprehensive needs assessment

A comprehensive needs assessment of the *school* requires more than looking at achievement data, although that is an essential starting point. It requires looking at the school's instruction and operation in relation to the achievement data and the mastery of standards. Translating that into the specific Title I requirements for schoolwide programs, it should mean that in developing a plan for providing the required program components – such as aligned, enriched, and accelerated curriculum, effective instructional methods, timely and effective individual assistance, etc. – the school uses the needs assessment to look at how (and how well) it is currently providing each of those components . That is the basis for a plan that will be effective. This critical aspect of planning is often overlooked and not understood. The regulations should be explicit on this.

§200.26(b)(3) – needs assessment – based on student information

A comma is missing after "Act". This is needed to make it clear that the provision is asking for information about students in the school in relation to the standards.

§200.26(b)(5)(ii) – needs assessment – data that will identify the specific academic needs of students

We support this provision.

§200.26(c)(3)(i) – Comprehensive schoolwide program plan – description

The plan needs to be a comprehensive, real, and specific plan for *how* it will provide *each* of the required program components – enriched and accelerated curriculum, effective instructional methods, timely and effective individual assistance, etc. – components that must be well planned if a school is to succeed in enabling all students to reach proficient levels. We are very concerned that under the prior law this same requirement for a plan which describes these components has not been well understood and that the "plans" often amount to little more than reiterations that the school will do what the law says.

In light of this, the proposed language "Describe how the school will carry out the implementation components described in §200.27" is if anything less satisfactory than the Act {"describes how the school will implement the components described in paragraph (1)". For example, some may think that a general description that says that the school has an implementation team (e.g., consisting of the principal and certain other staff members) who will oversee the implementation meets this requirement, obviating the need for any real description of its substantive program plan. Beyond at least returning to the language of the Act, though, we urge the Department to make this provision clearer by requiring a *specific, detailed* programmatic description of how *each* of the program components will be provided. This is inherent in the basic requirement to develop a comprehensive schoolwide *program plan*that must include each of the required program components.

§200.26(c)(3)( ) – new paragraph needed

In order to be consistent with the Act, the comprehensive schoolwide plan must include a description of the comprehensive needs assessment. The Act includes the needs assessment as one of the components of the schoolwide program [Sec. 1114(b)(1)(A)] and then requires that how these components will be implemented be described [Sec. 1114(b)(2)(A)(i)]. The proposed regulations move the comprehensive needs assessment out of the listing of the components – in order, we assume, to make it clear that the development of the program plan must follow and be based on the results of the assessment, which we certainly support – but doing so will eliminate the requirement to describe that assessment, unless a provision for doing so is added here. To address this requirement, add a new paragraph to subsection (c)(3):

> "( ) describe how the comprehensive needs assessment in subsection (b) was conducted and its results and conclusions;"

§200.26(d)(2) – schoolwide program planning process – involvement of parents

After "involvement of parents" insert ", consistent with the requirements of section 1118 of the Act,". It is important for readers to understand that there are important requirements in section 1118 for how parents are to be involved in the schoolwide program planning, and thus this regulation needs to be connected by at least a cross-reference with that section.

§200.26(d)(5) – review and revise the schoolwide plan

We support this provision.

§200.26(e) – evaluation of implementation and results achieved by the schoolwide program

Because evaluation of the implementation and its effectiveness is important, we support this subsection, with the following two changes:

1. §200.26(e)(1) – evaluating implementation. Paragraph (1) properly calls for evaluating the "implementation" of the schoolwide program, as well as its results. However, the elaboration of this requirement in the remainder of paragraph (1) includes only achievement data and not data about the nature and extent of implementation of the program components. Without this implementation data, evaluations will not and cannot be expected to result in the necessary improvement. For example, when a program plan has not achieved the expected results, it is critical to know whether that is because the program components described in the plan turned out to be insufficient to achieve the results *or* because some of the program components were not actually implemented consistent with that plan. Thus, the provisions should be amended to include data about the nature and extent of implementation of each of the program components in the plan under §200.27

2. §200.26(e)(1) – frequency of evaluation. At the beginning of paragraph (1), insert "Regularly" or "Annually". Without such language, there is no indication in this subsection of when such evaluation should be occurring and it could be deferred to a one-shot effort after many years. Instead, it needs to be an ongoing effort, related to the "continuous improvement" that is rightly called for in paragraph (3). Consistent with our concern, §200.26(a)(4) includes a requirement for "regular evaluation," but language of the kind we propose needs to appear here, where the requirements for evaluation are set forth.

§200.27 Schoolwide program implementation components

§200.27(a)(1) – schoolwide reform strategies – opportunities for all children to meet the State's proficient and advanced levels [missing]

Sec. 1114(b)(1)(B)(i) requires:

> "(B) Schoolwide reform strategies that–
>
> "(i) provide opportunities for all children to meet the State's proficient and advanced levels of student academic achievement described in section 1111(b)(1)(D);"

This provision has been omitted from the proposed regulations and should be restored. While the proposed regulation states that schoolwide reform strategies should "Address the needs of all children in the school," it does not require opportunities for all student to meet proficient and advanced levels. The opportunity to achieve at the highest levels is important and is not captured by "address the needs".

§200.27(a)(2) – effective methods and instructional strategies

Change "Reflect" to "Use". This change is necessary to be consistent with the Act, which requires that the program "*use*" effective methods, not merely "reflect" them. Sec. 1114(b)(1)(B)(i). The programs must provide the participating students with effective instructional methods. The regulations, by departing from the law, change this.

§200.27(a)(2)(i) – improve teaching of reading/language arts, mathematics, and science

Delete or modify this sub-paragraph. It does *not* appear in the Act, is unnecessary, and detracts from the next sub-paragraph of the proposed regulation, which *does* appear in the Act: "(ii) Strengthen the core academic program." [§200.27(a)(2)(ii) of the proposed regulations; Sec. 1114(b)(1)(B)(ii)(I) of the Act.]

Core academic subjects is defined more broadly, but that broader definition, which is in the Act, will get overshadowed by, and ignored in favor of sub-paragraph (i), which is not in the Act, particularly since the identification of "core academic subjects" appears not here but in a different part of the Act.

**§200.27(a)(2)(iii) – accelerated and enriched curriculum [missing]

The Act requires that the effective methods and instructional strategies must "help provide and accelerated and enriched curriculum". [Sec. 1114(b)(1)(B)(ii)(II).] This provision is critical and must be retained in the regulations.

It appears that this requirement may have been dropped as a misapplied part of a decision not to include some of the "such as" language which appears in the Act. The full sub-paragraph reads:

> "(II) increase the amount and quality of learning time, such as providing an extended school year and before- and after-school and summer programs and opportunities, and help provide an accelerated and enriched curriculum;"

While we question the wisdom of deleting examples that appear in the Act, in any event in this case the "accelerated and enriched curriculum" phrase is *not* part of the "such as" example, but instead is a distinct requirement. A careful look at the syntax of the sub-paragraph makes that clear. (To be part of the example, the phrase would have to say "helping provide . . .", not "help provide".) Thus, even if the "such as" phrase (referring to extended school and before/after-school and summer programs and opportunities) is to be deleted, the requirement to help provide and accelerated and enriched curriculum must be retained.

This omission of the Act's requirement concerning curriculum is not a trivial matter. If what is being taught is itself low-level – i.e., if students are placed in watered-down curriculum that is not accelerated and enriched – then otherwise effective ways of teaching that curriculum will not achieve the objectives of the Act.

§200.27(a)(2) – strategies for meeting the educational needs of historically underserved populations [missing]

Sec. 1114(b)(1)(B)(ii)(III) requires that the effective methods and instructional strategies:

> "(III) include strategies for meeting the educational needs of historically underserved populations;"

This requirement does not appear in the proposed regulations and should be restored. (An earlier provision of the proposed regulations calls for addressing the needs of all children, particularly those furthest away from demonstrating proficiency related to the State standards [§200.27(a)(1)], but this is different from specific strategies for meeting the needs of historically underserved populations.)

§200.27(a)(2) – strategies for addressing the needs of low-achieving students and students who are members of target populations and who are at risk of not meeting State standards, and addressing how the school will determine if those needs have been met [missing]

Sec. 1114(b)(1)(B)(iii) of the Act requires that the effective methods and instructional strategies:

> "(iii)(I) include strategies to address the needs of all children in the school, but particularly the needs of low achieving children and those at risk of not meeting the State student academic

achievement standards who are members of the target population of any program that is included in the schoolwide program, which may include–

"(aa) counseling, pupil services, and mentoring services;

"(bb) college and career awareness and preparation, such as college and career guidance, personal finance education, and innovative teaching methods, which may include applied learning and team-teaching strategies; and

"(cc) the integration of vocational and technical education programs; and

"(II) address how the school will determine if such needs have been met."

This provision has been omitted from the proposed regulations and should be restored. While, again, the proposed regulations add a different phrase earlier requiring reform strategies to "Address the needs of all children in the school, particularly the needs of students furthest away from demonstrating proficiency" [§200.27(a)(1)], there are significant portions of the statutory provision here that are not covered by that proposed paragraph, including:

1. "those at risk of not meeting the . . . standards who are members of the target population of any program that is included in the schoolwide program" – in that:
   a. Those at risk of not meeting the standards includes, but goes beyond those furthest away from proficiency; and
   b. There are a wide variety of target populations identified in the programs that are or may be included in the schoolwide program, that are not targeted by the proposed regulation;
2. The helpful examples of such strategies in (aa), (bb), and (cc) are omitted; and
3. The requirement for the plan to address how the school will determine if the needs of such students have been met is omitted. (We recognize that there is some overlap with the needs assessment provisions of the Act and the proposed regulations [§200.26(b)], but the overlap is not complete, and the relationship between the two pieces is not identified in the proposed regulations.)

<u>§200.27(a)(2) – consistency with State and local improvement plans [missing]</u>

Sec. 1114(b)((1)(B)(iv) of the Act requires that the effective methods and instructional strategies:

"(iv) are consistent with, and are designed to implement, the State and local improvement plans, if any."

This provision has been omitted from the proposed regulations and should be restored. The connection between the schoolwide program plans and the State and local improvement plans is important.

<u>§200.27(b) – Instruction by highly qualified teachers (structure of the provisions)</u>

While we do not object to the significant reorganizing of the Act that has been done here, we are concerned about a possible change in the meaning resulting from one aspect of that reorganization. The Act is very clear: a required component of schoolwide programs is "Instruction by highly qualified teachers." Sec. 1114(b)(1)(C). This subsection of the proposed regulations combine this provision and the provision concerning professional development and provides:

"A schoolwide program must ensure instruction by highly qualified teachers and ongoing professional development by–

"(1) Including strategies to ensure instruction in the schoolwide program by highly qualified teachers, as defined in §200.56;"

[(2)-(4) then deal with professional development]

We are concerned that, because of the "by," the provision could be read to mean that if a schoolwide program has included strategies for ensuring highly qualified personnel, then it has met the requirement to ensure such instruction. But under the Act, having strategies is not enough; there must actually be instruction by highly qualified teachers. To eliminate this problem we propose:

> At the end of the lead paragraph for subsection (b), delete "by–" and insert ". The schoolwide program must–". Then, in paragraph (1), change "Including" to "Include" and make conforming changes in paragraphs (2)-(4).

This will allow the basic requirement from the Act, in the lead paragraph, to stand on its own as a separate sentence, parallel to the provisions of the Act.

**§200.27(b)(1) – Instruction by highly qualified teachers (school-level flexibility)

Under the Act and the proposed regulations [§200.56], "highly qualified teachers" are defined primarily in terms of State-awarded or -regulated credentials. This is important for purposes of State and LEA actions to ensure the development, supply, and hiring of teachers with proper qualifications and credentials. However, people at the school level and school-community level (including parents as well as school personnel) will often find that State certification or a college major, for example, does not answer the question of whether the school's teachers are in fact highly qualified to enable all the children they teach to attain proficiency in the skills and knowledge in the State's standards. While the Department is not free to change the definition of "highly qualified" in the Act, the regulations can and should make it clear that, in developing the school's comprehensive schoolwide program plan for enabling all to attain proficiency, the plan may also address the need to ensure that the school's teachers are highly qualified to enable all their students to attain those standards – and what kinds of assistance teachers may need to become so. Participants in the planning process, including the needs assessment process, should be free to ask whether the teachers are highly qualified in this broader sense, and how the school can plan to address that need, without running the risk that this important school/community-level inquiry is halted by someone saying "all we can look at is credentials – end of discussion."

Thus, to encourage this flexibility, add language to the end of paragraph (1) that states ", provided that nothing herein prohibits inclusion in the schoolwide program plan of the school community's own definition of a 'highly qualified teacher' for that school in terms that incorporate but goes beyond §200.56 to identify other teacher skills and knowledge which the school community determines are needed to enable all the teachers' students to attain proficiency in relation to the State's academic content a student academic achievement standards."

(Note: The same flexibility should also be made explicit for the parallel required high-quality teachers component in targeted assistance schools, under Sec. 1115 of the Act.)

§200.27(b)(2)(i) – high-quality and ongoing professional development

In order to conform to the Act, at the end of subparagraph (i), insert "to enable all children in the school to meet the State's student academic achievement standards". This language appears in the same provision of the Act [Sec. 1114(b)(1)(D)], but it has been omitted from the proposed regulation. It should be restored, both because it is necessary to conform to the Act and because it clearly states the core criterion for the professional development.

§200.27(b)(2) – strategies to attract high-quality highly qualified teachers to high-need schools [missing]

Sec. 1114(b)(1)(E) of the Act requires that the schoolwide program components include "Strategies to attract high-quality highly qualified teachers to high-need schools." This requirement appears to be

omitted from the proposed regulations and needs to be restored here. Such recruitment is one key part of any successful strategy for having such schools meet the requirements for highly qualified teachers.

§200.27(c)(2) – Parental involvement – policy

The requirement for a parent involvement policy here creates potential confusion in relation to the requirements in section 1118 for a school-level parent involvement policy, which has more extensive provisions concerning both how such policy is to be developed and its contents. Presumably these are one and the same policy, so the potential confusion can be remedied by clearly indicating that fact and the fact that the policy here must conform to the requirements of that section. (There is a reference to that section in subparagraph (i), but this is not adequate to deal with the point raised here, since that reference concerns strategies to increase parental involvement and is thus not explicitly about the parental involvement policy itself.) To do so: In paragraph (2), after "policy" insert "that meets the requirements of section 1118 of the Act and that".

§200.27(c)(2)(ii) – how the school will provide parents with individual assessment results

In order to conform to the Act, a missing phrase from the Act must be added. After "assessment results" insert "in a language the parents can understand". This language is explicit in the parallel section of the Act, Sec. 1114(b)(2)(A)(iv), but has been omitted from the proposed regulation and needs to be restored. (Paragraph (iv) of the proposed regulation deals with making the information in the schoolwide program plan understandable, but that is a different requirement from the provision for making the individual assessment results understandable. Note also that the specific missing language of the understandability clause concerning individual assessment results (quoted above) is different from, and more direct and less qualified than, the language of the understandability clause for the program plan information.)

§200.27(d) – Additional support for students experiencing difficulties attaining proficient and advanced levels

Parallel provisions in the 1994 Act have often not been well understood and implemented. Because of that experience, we have two concerns and suggestions.

First, it would be very helpful for the Department to clarify these provisions by pointing out the range of their meaning. At one end, in the context of schoolwide programs, these provisions are designed to ensure that rather than waiting for a formal process for planning for those students determined have fallen far behind based on formal assessments at the end of a year, it is designed to create systems for timely and informal intervention by teachers whenever students are experiencing difficulty with the material. This can, for example, be through on the spot in-class attention to a student having difficulty with a particular type of math problem or helping the student informally after class. The point of these requirements for timely and effective identification of the problem and intervention is to try not to allow the student to get lost over a particular, discrete difficulty in one area and then start falling further behind to the point where more extensive and difficult catching up becomes necessary. (This is quite different from the old Title I requirements, and from the requirements for targeted assistance schools, which require the formal identification, for the year, of those students furthest behind who are then placed in a year-long program of intervention. Under this provision, a student might get five minutes of individual assistance on a particular problem area.) At the other end, there are of course students who have fallen behind more globally and require more focused and extensive identification, planning, and intervention. These provisions cover both ends, but the range and distinction is quite important. (This is particularly for, but not just for, those who, steeped in the pre-1994 Title I program provisions for identifying "Title I children.")

Second, we are troubled by the way the proposed regulations attach the individual attention requirements of paragraphs (1)-(3), which are found in the Act, to the lead paragraph in proposed subsection (d), which is not, at least in that form and place. By linking the two, it might appear that the

individual attention provisions of paragraphs (1)-(3) apply only to those students "who are furthest away from demonstrating proficiency." The Act makes no such link and indeed requires that such timely and effective identification and assistance be provided whenever students experiencing difficulty mastering the proficient or advanced levels. The point is not to wait until the student has fallen far behind and becomes one of the students furthest away from demonstrating proficiency. We therefore strongly recommend deleting the lead paragraph from this provision. It is already stated clearly elsewhere more than once in other places – see §200.25(a)(1), §200.26(a)(1), and §200.27(a)(1) – and should not be restated at this particular point where it creates confusion about the full scope of the statutory requirement.

Third, where students have actually fallen behind, at the more extensive end of the range of identifying problems and intervening, there are related obligations under other provisions of the Act that involve parents – for example, reporting the individual assessment results [§200.27(c)(2)]; and school parent compacts addressing ongoing teacher-parent communication, including requirements for elementary school parent-teacher conferences which discuss the child's achievement and frequent reports to parents on their children's progress [Sec. 1118(d)(2) of the Act]. It would be very helpful to refer to these provisions in order to highlight parent involvement as a key resource in addressing these more extensive student difficulties.

Fourth, the process of identifying the difficulty and figuring out how to assist in a timely and effective way is an area in which teachers often need better training and support. Thus, there should be some referencing, either here and/or in the professional development provisions, for connecting the two.

§200.27(d)(3) – information on which to base assistance to students experiencing difficulties

The proposed regulations add one phrase to this paragraph that warrants reconsideration and possible amendment. The Act, Sec. 1114(b)(1)(I) requires measures that students' difficulties are identified on a timely basis and "to provide sufficient information on which to base effective assistance." The proposed regulation says "Provide sufficient information *to teachers* on which to base effective assistance. . ." (emphasis added). We are concerned, however, that this language makes it likely to sound as if the information were coming solely or primarily from sources other than the teachers – i.e., through the formal assessment process. As noted above, however, for the day-to-day, informal interventions needed to assist students in a timely and effective way whenever they are having difficulty, much of the information should be coming from the teacher's own observation of the student and the student's work and performance in class, rather than waiting until an annual assessment by which time the student is likely to fall much further behind. While one approach would be to delete the extra words, another perhaps better approach would be to clarify the meaning here to avoid this misinterpretation.

§200.27 – schoolwide program components – including teachers in decisions regarding use of academic assessments [missing]

Sec. 1114(b)(1)(H) of the Act requires, as a component of the schoolwide program:

> "(H) Measures to include teachers in the decisions regarding the use of academic assessments described in section 1111(b)(3) in order to provide information on, and to improve, the achievement of individual students in the overall instructional program."

This requirement has been omitted from the proposed regulations and must be restored. Connecting assessments to teacher practice, and engaging teachers in determining their use, is important.

§200.27 – schoolwide program components – coordination and integration of Federal, State, and local services and programs

Sec. 1114(b)(1)(J) of the Act requires, as a component of the schoolwide program:

> "(J) Coordination and integration of Federal, State, and local services and programs, including programs supported under this Act, violence prevention programs, nutrition education programs, housing programs, Head Start, adult education, vocational and technical education, and job training."

This requirement appears to have been omitted from the proposed regulations and should be restored.

§200.28 Use of funds in a schoolwide program

§200.28(c)(3)(iii) – Availability of other Federal funds – IDEA

This provision allowing consolidation of IDEA funds for purposes of carrying out the schoolwide program does not appear in the Act. This section has specific terms for which programs may be included; IDEA is not among them. It must be deleted here.

§200.28(c)(4)(A) – exemption of schoolwide programs from statutory or regulatory requirements of other, consolidated programs

The proposed regulation under which a school that consolidates and uses in a schoolwide program funds from certain other Federal programs is exempt from statutory or regulatory provisions of other programs is missing an important qualification found in the Act. Under Sec. 1114(a)(3)(A), this exemption is allowed only "if the intent and purposes of such other programs are met." This omission must be restored in order to conform to the Act. (Paragraph (D) of the proposed regulations provides that the school is required to ensure that the needs of these intended beneficiaries of those other programs are addressed, a provision to which we certainly do not object, but it does not obviate the need for the statutory language. The intent and purposes of such other programs can extend beyond a determination of whether the needs of those programs' beneficiaries have been met. Likewise, the determination of whether the educational needs of those children have been met could, in the absence of the statutory language, be made in a general way, without regard to the particular intent and purposes of those programs. The language needs to be restored.)

LEA and School Improvement

§200.30 Local review

§200.31(d) – publicize and disseminate the results of the annual progress review

Sec. 1116(a)(1)(C) of the Act, which contains this statutory requirement on which the Act is based, has language identifying the purpose and uses of this dissemination.

> ''(C) publicize and disseminate the results of the local annual review described in paragraph (1) to parents, teachers, principals, schools, and the community *so that the teachers, principals, other staff, and schools can continually refine, in an instructionally useful manner, the program of*

instruction to help all children served under this part meet the challenging State student academic achievement standards established under section 1111(b)(1);" (emphasis added)

This italicized language has been omitted from the proposed regulations and needs to be restored in order to conform to the Act. The emphasis on the *use* of this data to continually refine the program of instruction is significant and should not be omitted.

§200.32 Identification for school improvement

§200.32(d) and (e) – use of 2001-2002 assessment data in identifying schools in need of improvement
§200.50(d)(3) and (4) – use of 2001-2002 assessment data in identifying LEAs in need of improvement

The proposed regulations in subsection §§200.32(e) would allow, *but not require*, LEAs to use 2001-2002 assessment data to identify (in combination with other years' data) schools in need of improvement. Similarly, §200.50(d)(4) would allow, *but not require*, SEAs to use 2001-2002 assessment data to identify (in combination with other years' data) LEAs in need of improvement or corrective action. We question the discretionary nature of this provision and believe that LEAs and SEAs are not free to ignore this data – because nothing in the Act appears to provide for such exemption and it would further appear to create a major hiatus (perhaps for more than one year) during which no other schools or LEAs, regardless of performance, would be identified as need of improvement.

Sec. 1116(f) of the Act does contain provisions under which schools and LEAs identified before the date of enactment as being in the first year of improvement, in the second or additional year of improvement, or in corrective action shall be treated as being in that status under the new law. Those provisions are properly captured by §§200.32(b)(1) and (c)(1), 200.33(b)(1), and 200.50(d)(2) and (e)(2). The regulations also recognize the need to deal with assessment data for the 2001-2002 school year. However, why the use of that year's data should be discretionary is not clear and its implications are troubling. It would appear to mean that, if an LEA or SEA chose to do so, it could ignore that data and not determine whether any additional schools or LEAs are in need of improvement. Further, if the 2001-2002 school year data need not be used this year in combination with prior years' data to make these determinations, does that also mean that it need not be used in combination with 2002-2003 data to make such determinations next year? And in the subsequent years, given that up to three years of data may properly be averaged in making these determinations? (See also comment to §200.20(d)(1)(ii)(B).

Further, we believe that the "transition provisions" in Sec. 1111(f)(2)(D) of the Act support our position that the 2001-2002 data must be used (subject to the same conditions as other assessment data). That paragraph of the Act provides that determinations that an LEA has failed to make adequate yearly progress for 2 consecutive years (the basis for determining the need for improvement), "shall include in such 2-year period any continuous period of time immediately preceding the date of enactment the Act during which the agency has failed to make progress." It would make little sense to require inclusion of data from years prior to enactment but not more up-to-date data from after the date of enactment.

Finally, we would note that *if* our view that the data must not be ignored in identifying schools and LEAs not making adequate yearly progress is adopted, then we would also agree that it should not be ignored in identifying schools and LEAs that should be removed from the lists because they have now started making adequate yearly progress (again assuming that the data meets the applicable assessment requirements of the Act). Thus, we would agree that if "may" is changed to "must" in §§200.32(e), and 200.50(d) (3) [and (e)] in identifying schools/LEAs failing to make adequate progress, then it should also be changed to "must" in §§200.32(d) and 200.54(d)(4), in removing schools/LEAs that have now made adequate progress.

§200.33 Identification for corrective action

§200.33(c) – use of 2001-02 data in identifying schools for corrective action
§200.50(e)(3) – use of 2001-02 data in identifying LEAs for corrective action

§200.33(c) would allow, but not require, LEAs to use 2001-2002 assessment data in *removing* schools from corrective action, *but not to identify schools* for corrective action. Similarly, §200.50(d)(3) would allow, but not require, SEAs to use 2001-2002 assessment data in *removing* LEAs from corrective action, *but not for identifying LEAS* for corrective action. We have two concerns. This is different from the proposed treatment of the issue for school and LEA improvement under §200.32 and §200.50(d).

1. We do not understand why such data may not be used for identifying schools and LEAs for corrective action, if they may be used for identifying schools and LEAs for improvement.

2. Assuming, as we believe, that it is appropriate to use the data for corrective action determinations as well as improvement determinations, we again also believe that such data *should* be used for that purpose, assuming that the assessment data meets the applicable requirements of the Act. (If this is included as a requirement, then we would also support changing the "may" to "must" for purposes of removing schools and LEAs from corrective action.)

On both these points, see our commentary to the previous section as to why we believe that the data should be used, and the problems that would appear to arise from not using it.

§200.36 Communication with parents

1. We support these provisions.

2. Various other provisions in the Act concerning parent information and notices have similar, specific requirements for making the information accessible and understandable to parents. It appears that §200.36 has been designed to create one section that contains a basic set of criteria for how such information and notices are to be provided, applicable throughout the improvement process, rather than (as in the Act) including those criteria in the same sections where the notices and information are described. For example, in the Act, there are information accessibility provisions attached to the notice to parents that their school has been identified for improvement [Sec. 1116(b)(6)] and to the notice to parents about the availability of supplemental services [Sec. 1116(e)(2)(A)]. Both of these notices are addressed in §200.37 of the regulations, but without reference to the language about format and language for parents. It may not be obvious to significant numbers of readers – both parents and school officials – that the provisions of §200.36 are to apply to these notices. This could and should be dealt with either by making the scope of §200.36's applicability to these and other notice and information requirements more explicit and specific and/or by including references in each of those other provisions – i.e., "this information/notice shall be provided in accordance with §200.36".

§200.37 Notice of identification for improvement, corrective action, or restructuring.

§200.37(b)(4) – explanation of parents' option to transfer

Section 1116(b)(6)(F) of the Act requires that this explanation include reference to provision of *transportation*, where applicable. Parallel language should be added to the proposed regulation in order to conform to the Act.

In addition, the Department should consider *requiring* additional information – including the discretionary information in paragraph (b)(4)(iii), which seems basic – in order to ensure that parents have sufficient information to make informed and considered choices here.

§200.40 Technical assistance

§200.40(c)(1)(i) – technical assistance on problems in implementing school and LEA responsibilities under the school plan

The words of the Act have been inadvertently misconstrued by moving one significant part of this section. Sec. 1116(b)(4)(B)(i) of the Act requires the provision of technical assistance to:

> ". . . to identify and address problems in instruction, and *problems if any, in implementing* the parental involvement requirements described in section 1118, the professional development requirements described in section 1119, and *the responsibilities of the school and local educational agency under the school plan,* and to identify and address solutions to such problems;"

Thus, the Act calls for technical assistance in identifying problems in implementing various requirements, including school and LEA requirements under the school plan, and then in identifying and addressing solutions to such problems. In contrast, the proposed regulations would provide for technical assistance to:

> "(i) Identify and address problems in instruction and problems in implementing requirements for parental involvement and professional development under subpart A of this part; and
> "(ii) Identify the responsibilities of the school and LEA in developing solutions to these problems."

The concern with transposing the Act in this way is twofold. First, it does not result in technical assistance in identifying problems in implementing the school plan. Second, instead of requiring *technical assistance in identifying and addressing solutions to the problems* (in instruction, and in implementing requirements for parent involvement, professional development, and school plan implementation), it only requires technical assistance in identifying the responsibilities of the school and LEA in developing the solutions.

§200.40(c)(1)(i) – technical assistance on problems in implementing parent involvement

As quoted in the previous comment, the Act provides that the technical assistance identify and address problems in implementing the parent involvement requirements "described in section 1118." Inclusion of that cross-reference in the regulations would be helpful, particularly because the specifics of section 1118 are often not well understood.

§200.40(c)(2) – technical assistance on instructional issues

The regulations should return to the word order in Sec. 1116(b)(4)(B)(ii) of the Act, in order to correctly convey the Act "scientifically based research" requirement for this provision.

§200.41 School improvement plan

§200.41(a)(2) – consultation with parents, school staff, LEA, and outside experts in developing the plan

To conform to Sec. 1116(b)(3)(A) of the Act, change "consult with parents, school staff, the LEA, and outside experts in developing or revising its school improvement plan" to "develop or revise the school plan in consultation with parents, school staff, the LEA, and outside experts". While this change does not appear to be major, we believe that the language in the Act conveys a more active partnership in developing the plan, whereas the proposed regulation language is inadvertently at least somewhat more likely to result in more passive, one-shot consultations, which have been all too frequent in some venues in the past.

§200.41(a)(2) – consultation with parents – reference needed

After "parents" insert "(consistent with the LEA's parent involvement policy under section 1118(a)(2) of the Act)". This reference will be very helpful because Sec. 1118(a)(2) requires that the LEA parent involvement policy, jointly developed with parents of participating children, describe *how* the LEA will (A) involve parents the school review and improvement process under section 1116. Once again, these connections are often not well understood and should be highlighted.

§200.41(c)(2)(i) – strategies to strengthen instruction

To conform to Sec. 1116(b)(3) (A)(i) of the Act, change "drawn from scientifically based research" to "based on scientifically based research".

§200.41(c)(3) – selection of policies and practices concerning core academic subjects

To conform to Sec. 1116(b)(3)(A)(ii) of the Act, change policies and practices "most likely to ensure" that all groups of students will attain proficiency to policies and practices . . . "that have the greatest likelihood of ensuring" such outcomes. While similar, we believe the words of the Act more clearly convey the obligation to seek out the strategies with the greatest likelihood and that there will be some greater tendency to read "most likely to ensure" as some version of likely to ensure, a somewhat less rigorous task. (Compare §200.52(a)(3)(ii), on school improvement, where the proposed regulation does retain the Act's provision for actions "that have the greatest likelihood" of improving achievement of students in meeting the standards.)

§200.41(c)(4) and (c)(4)(ii) – measurable goals

We ask the Department to compare this language with, and return to, the language of Sec. 1116(b)(5) of the Act – words and phrases have been moved in ways which seem to change the meaning to some degree.

§200.41(c)(5) – spending at least 10% of its allocation on professional development

Sec. 1116(b)(3)(A)(iii)(II) requires that this professional development "(II) meets the requirement for professional development activities under section 1119." This provision has been omitted from paragraph (5) and should be added as an additional subparagraph in order to conform to the Act.

§200.41(c)(5) – how the professional development funds will be used to remove the school from improvement status

Sec. 1116(b)(3)((A)(iv) requires that the school plan "(iv) *specify* how the funds described in clause (iii) [the funds to be spent on high-quality professional development] will used to remove the school from school improvement status" (emphasis added). This thus requires a specific description of how such funds will be used – in contrast to the remainder of the provisions concerning this fund, which are in the form of assurances.

The proposed regulations, however, eliminate the requirement to specify how these funds will be so used. Instead, the assurance concerning the professional development includes a clause that it "will contribute to removing the school from school improvement status." It is not permissible for a regulation to change a required description in an Act into solely an assurance. The language of the Act on specifying how the funds will be used must be incorporated.

§200.41(c) – description of how the school will notify parents [missing]

Sec. 1116(b)(3)(A)(vi) of the Act requires that the school plan "(vi) describe how the school will provide written notice about the identification to parents of each student enrolled in such school, in a format and, to the extent practicable, in a language that the parents can understand". This required description does not appear in the regulations and needs to be included in order to conform to the Act. The requirement to provide such notice does appear elsewhere – see §200.37(a). However, this does not take care of the obligation to *describe* in the plan how this notice will be provided. Further, placing this description in the plan, as required by the Act, ensures that parents will be involved in developing it as part of the plan – which will increase the likelihood that the notice will effectively reach parents and be understood.

§200.42 Corrective action

§200.42(b)(ii)(A) – scientifically based research

To conform to the Act, change "grounded in" to "based on". See comment to §200.41(c)(2).

§200.42(b)(4)(iv)(A) – possible corrective actions – appointing an outside expert(s)

(We note that the role of the outside expert(s) is stated differently from the Act. Please explain the basis for this change.)

Sec. 1116(b)(7)(iv)(IV) of the Act provides that the expert is "to advise the school on its progress toward making adequate yearly progress, based on its school plan under paragraph (3)."

Subparagraph (iv) of the regulation provides that the expert is to "advise the school on--

"(A) Revising the school improvement plan developed under § 200.41 to address the specific issues underlying the school's continued failure to make adequate yearly progress and resulting in identification for corrective action; and

"(B) Implementing the revised improvement plan."

Again, we note the difference and ask for an explanation of the rationale.

§200.44 Public school choice

§200.44(c) – Desegregation plans

We believe that the regulation is written overbroadly in relation to the language and intent of the Act and needs to be revised. Compare the Secretary's letter on the subject this past June.

§200.44(g)(1) – No eligible schools within an LEA – collaborative agreements with other LEAs

In addition to this statutory requirement, we recommend that the Department address the State role in this situation. By State law, LEAs are the creation of the State and the State is responsible for establishing a thorough and efficient education for all children. LEAs seeking, as the law requires, such collaborative agreements will often be at a disadvantage in obtaining agreement from other LEAs over which they have no control. The State can and should play a role in helping to ensure that these agreements occur to the greatest extent practicable.

§200.44(g)(2) – No eligible schools within an LEA – option to offer supplemental services in the first year of improvement

We support this provision for allowing the LEA also to provide supplemental services in this situation.

§200.44(i) – Choice option for students with disabilities under IDEA or Sec. 504

We support the provision stating that the choice option must provide both IDEA and Section 504 students with FAPE as defined under IDEA section 602(8) and 34 CFR 104.33, respectively. Clarification is needed, however, to reflect what we take to be the Department's intent that it is the LEA that has an affirmative obligation to ensure that each child covered by IDEA or Section 504 is offered a choice option that will provide a free appropriate public education. This will safeguard against schools attempting to thwart a parent's exercise of choice by claiming that the choice option will not afford a free appropriate public education, and so is precluded under IDEA and/or the Section 504 regulation.

§200.45 Supplemental educational services

§200.45(4)(iii) – annual renewal of request for waiver of supplemental services provisions

We support this provision.

§200.46 LEA responsibilities for supplemental educational services

§200.46(a)(1) – notice to parents concerning supplemental services

For consistency with the relevant provision of the Act, Sec. 1116(e)(2)(A), and for clarity, insert "annual" before "notice".

§200.46(a)(4) – ensuring that students with disabilities and students covered by section 504 receive appropriate supplemental services and accommodations in the provision of those services

We support this provision, including the language that brings the requirements of section 504 in line with the requirements of NCLBA.

§200.46(b)(2)(C) – timetable for improving achievement – in the case of students covered by IDEA and section 504

We support this provision, including the language that brings the requirements of section 504 in line with the requirements of NCLBA.

§200.47 SEA responsibilities for supplemental educational services

§200.47(a)(1)(i) — promoting participation by providers

We believe the words of the Act [Sec. 1116(e)(4)(A) are helpful and somewhat clearer and should be used here:

> ". . . promote maximum participation by providers to ensure, to the extent practicable, that parents have as many choices as possible."

§200.47(a)(5) – ensure that students covered by IDEA or Section 504 receive appropriate supplemental educational services and accommodations in the provision of those services

We support this provision, and the clarification of rights it includes regarding students covered by Section 504.

§200.47(b)(1) – definition of "provider"

Under Sec. 1116(e)(12)(B) of the Act, "provider" means mans a non-profit entity, for-profit entity or local educational agency with the requisite characteristics. We note that the proposed regulations go beyond this also to include a public school, public charter school, or private school.

§200.47(b)(2)(i)(B) – providers' provision of information to parents on the student's academic progress – format

We support the provision for including alternative formats, in order to make the information accessible and understandable by the full range of parents.

§200.47(b)(3) – limits on private providers' excluding students with disabilities

We support the inclusion of language prohibiting private providers from discriminating against both IDEA- and Section 504-protected students with disabilities. As currently drafted, however, this provision contains an erroneous legal standard, prohibiting exclusion if the student can, "*with minor adjustments*," be provided supplemental educational services designed to meet the educational needs of the student.

As an initial matter, private providers of supplemental educational services are "places of public accommodation" for purposes of Title III of the Americans with Disabilities Act. Under the Title III regulations, a public accommodation "shall make reasonable modifications in policies, practices or procedures, when...necessary to afford...services...to individuals with disabilities, unless the public accommodation can demonstrate that the modification would *fundamentally alter the nature of the...services*...." Further, a public accommodation "shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities...unless such criteria can be shown to be*necessary* for the provision of the...services being offered."

Further, under both Title II of the ADA and Section 504, SEAs and LEAs will have an obligation to ensure that any decisions private providers may make to exclude a student covered by IDEA, Section 504 or the ADA comport with the obligations of public entities under Title II of the ADA, and the obligations of "recipients" of federal funds under Section 504 (regardless of whether the private provider itself is a recipient) – or terminate the relationship with the provider. Under NCLBA, private providers of supplemental educational services will be doing so at the behest of, and on behalf of, LEAs and SEAs – themselves "recipients" for purposes of Section 504, and "public entities" for purposes of Title II of the ADA – in furtherance of those public entities' obligation to offer those services. Under both the Section 504 regulations and the Title II regulations, SEAs and LEAs may not "directly or through contractual, licensing, or other arrangements" engage in any of the discriminatory practices banned by 34 C.F.R. 104.4(b) (Section 504) or 28 C.F.R. 35.130(b) (Title II of ADA). SEAs and LEAs will therefore need to make sure that the admission/retention/exclusion practices of the private providers with which they deal meet these regulatory standards.

§200.48 Funding for choice-related transportation and supplemental educational services

We had difficulty interpreting the subparagraphs under proposed subsection (2) and understanding how they compare with, or differ from, the relatively straightforward relevant provisions of the Act, Sec. 1116(b)(10)(A), which states that from the amount equal to 20% of its allocation, the LEA shall spend 5%

for transportation, 5% for supplemental services, and the remaining 10% for either or both, as the agency determines.

§200.50 SEA review of LEA progress

§200.50(a)(1)(ii)(B) – review of whether the LEA is carrying out its responsibilities for technical assistance, parent involvement, and professional development

The parallel provision of the Act [Sec. 1116(c)(1)(A)] requires review "to determine if each local educational agency is carrying out its responsibilities *under this section [Sec. 1116] and sections 1117, 1118, and 1119*." The regulation should more closely conform to the Act in two respects.

1. First, the proposed regulation's reference to "technical assistance" does not adequately cover the range of LEA responsibilities in sections 1116 of the Act and therefore needs to be modified to language that does cover the full extent of responsibilities under both of those sections. (For section 1116, the proposed regulations use the umbrella term of "LEA and School Improvement," which captures a good deal more, as the heading for all the proposed regulations under section 1116. We are, however, somewhat concerned that while "improvement" is sometimes viewed as the entire set of activities under section 1116, the Act and regulations in some portions also draw a distinction between "improvement" and "corrective action" and "restructuring," and that using the term LEA and School Improvement might, in the absence of clear direction otherwise, be thought not to refer to LEA responsibilities related to corrective action and restructuring.)

2. Second, for purposes of clarity and conformity with the Act, as quoted above, at the end of the subparagraph insert "under sections 1116, 1117, 1118, and 1119." The concrete reference to these sections would be helpful in properly understanding what responsibilities are being referred to.

§200.50(d)(3) and (4) – using 2001-2002 assessment data for identifying/removing LEAs in need of improvement

For the reasons discussed in our comment to §200.32, we believe that "may" in paragraph (4) should be changed to "must" so that SEAs may not ignore the 2001-2002 data in identifying LEAs in need of improvement. If that change is made, we would then also support changing "may" to "must" in paragraph (3), so that SEAs would also be required to use the data as the basis for removing schools from improvement status – again, in both cases assuming that the data meets the applicable assessment requirements of the Act.

§200.50(e)(3) – using 2001-2002 assessment data for identifying/removing LEAs in need of corrective action

For the reasons discussed in our comment to §200.33, we believe that:

1. If the 2001-2002 data may be used for removing LEAs from corrective action, it may also be used for identifying LEAs in need of corrective action, just as it may be used for identifying LEAs in need of improvement.

2. Assuming, as we believe, that use of the 2001-2002 data for identifying LEAs in need of corrective action should be addressed, it should be required, as a "must," rather than a discretionary "may," so that SEAs may not ignore the 2001-2002 data in identifying LEAs for corrective action. If that change is made, we would then also support changing "may" to "must" in paragraph (e)(3), so that SEAs would also be required to use the data as the basis for removing schools from corrective action status – again, in both cases assuming that the data meets the applicable assessment requirements of the Act.

§200.51 Notice of SEA action

We support these provisions.

§200.51(a)(2) – communicate with parents throughout the review of an LEA

Change "parents" to "the parents of the children enrolled in each school served by the LEA". Otherwise, the provision may be interpreted merely to require communication with some (or even a few) parents somewhere.

§200.51(b) – publicize and disseminate the results of the review

For the reasons noted in the previous comment and as required by Sec. 1116(c)(6) of the Act, the SEA must "promptly" provide the results of the review to the parents "of each child enrolled in" the schools served by the LEA. These words from the Act are omitted from the proposed regulation and need to be restored. (They do appear in §200.51(c), regarding the notice of the reasons for the identification and how parents can participate; but the Act requires that they apply to notice of the results of the review.)

§200.51(d)(1) – information about action taken

For the reasons noted under the comment to paragraph (a)(1) above, change "parents" to "the parents of the children enrolled in each school served by the LEA". Otherwise, the provision may be interpreted merely to require communication with some (or even a few) parents somewhere.

§200.52 LEA improvement

§200.52(a)(2) – improvement plan – consultation with parents – reference needed

After "parents" insert "(consistent with the requirements of section 1118 of the Act)". It is important for readers to understand that there are important requirements in section 1118 for *how* parents are to be consulted and involved, and frequently neither these connections nor the specifics of the provisions of section 1118 are well understood.

§200.52(a)(3)(viii) – improvement plan – strategies to promote parent involvement

At the end of the subparagraph, insert "consistent with the provisions of section 1118 of the Act." Again, it is important for readers to understand that school-level parent involvement strategies must meet the requirements of section 1118, requirements too often neglected.

§200.52(b)(3)(i) – technical assistance – supported by effective methods and instructional strategies

To conform to Sec. 1116(c)(9)(B) of the Act, change "drawn from scientifically based research" to "based on scientifically based research". "Based on" is not only the language of the Act; it fits better with the definition of scientifically based research in the definitions section.

§200.53 LEA corrective action

§200.53(2) – Definition

To conform to the Act, change "designed to increase the likelihood" to "designed to meet the goal" – the formulation used in Section 1116(c)(10)(A)(ii) of the Act. The criterion in the Act – designing to meet the achievement goals – is, we believe, higher than designing to substantially increase the likelihood that those goals will be achieved.

Qualifications of Teachers and Paraprofessionals

§200.55 Qualifications of teachers

**<u>§200.55(a)(2)(i) – teachers in targeted assistance schools</u>

There is a *major* problem with the proposed subparagraph. The Act and paragraphs (a)(1) and (2) properly apply the new hiring qualifications to teachers "teaching in a program supported with funds under subpart A." See Sec. 1119(a)(1) of the Act, which uses the same formulation. However, for targeted assistance programs, subparagraph (i) would define a teacher teaching in a program supported with subpart A funds as a teacher in a targeted assistance school "who is paid with funds under subpart A." This is contrary to the Act – a teacher who is teaching in a targeted assistance program (not a targeted assistance school) is "teaching in a *program supported* with funds under subpart A," regardless of whether those funds are used to pay that particular teacher. And teaching in the targeted assistance program in turn means teaching those students who are participating in the program (again regardless of whether your salary is paid with the subpart A funds).

To conclude otherwise would not only run counter to the clear language of this provision of the Act. It would undermine the core assumptions of targeted assistance programs under section 1115 of the Act. Targeted assistance programs are the academic programs for providing all participating students with the opportunity to meet the State's challenging academic standards. Starting with the changes in the 1994 law, the program now involves setting high academic standards for these students as the goal of the program, focusing on the core academic components of their program (accelerated and enriched curriculum, effective instructional methods, etc.), and providing more flexibility for how Title I funds are used within that program. The ambitious goals and program component requirements can be met only through the entire core academic program for the participating students , not through some add-on services paid with Title I funds alone. Indeed, the program components for targeted assistance programs in section 1115 are in most respects virtually the same as for schoolwide programs under section 1114, except that these components are required to be provided only to the participating students.

Further, given that Title I funds necessarily pay for only a portion of the core academic program provided to participating students (whether in a schoolwide program or a targeted assistance program), applying the teacher qualification provisions to only those teachers paid with Title I funds would quickly make those provisions relatively meaningless in many places, since the Title I funds could simply be allocated to those teachers who do meet the requirements while allowing the continued hiring of non-qualified teachers for the program with other funds. This too is clearly contrary to the intent of the Act in ensuring that participating students receive their instruction from highly qualified teachers.

To correct this problem and conform to the Act, paragraph (i) should thus be rewritten to read: "A teacher in a targeted assistance school who is teaching students participating in the targeted assistance program."

<u>§200.55(b)(2) – teachers not teaching core academic subjects</u>

We are pleased that the example indicates that only "some" vocational education teachers are not teaching core academic subjects and thus not required to meet the requirements in §200.56, rather than making a blanket assumption about such teachers. However, we are also concerned that without some additional guidance, in some places "some" will be treated as all or virtually all. The Perkins Act requires that vocational programs supported with Perkins funds integrate academic and vocational education so that students meet the same high academic standards applicable to all students. Thus, the role of vocational teachers in teaching core academic subjects calls for careful attention.

§200.56 Definition of "highly qualified teachers"

§200.56(a)(1)(iii) – additional interpretation of the general requirement

This subparagraph does not appear in the Act. It sets out two ways of "meeting" the general requirements for "highly qualified teachers" (of full certification or passing the State licensing exam and holding a State teaching license) which in fact allow those general requirements to be ignored, thereby creating an inconsistency with the Act and weakening the Act's definition of "highly qualified teachers."

§200.56(a)(1)(iii)(A)

This subparagraph defines as "highly qualified" a teacher who has met "the State's certification and licensure requirements applicable to the years of experience the teacher possesses." This provision would appear to create a loophole for defining teachers with considerably less than full certification to be "highly qualified," contrary to the explicit requirement in paragraph (a)(1)(i) that it says it is interpreting.

§200.56(a)(1)(iii)(B)

This provision says that a teacher meets the general requirements above (for full certification or passing the licensing exam and holding a license) if the teacher is *participating* in an alternative certification program, is permitted by the State to assume teaching functions, and is making *progress toward* full certification. This is clearly someone who is not yet fully certified and yet would be deemed to meet the requirements for full certification, contrary to the Act. (Note that paragraph (a)(1)(i) already explicitly includes someone who has obtained full certification "through alternative routes to certification." The problem with (a)(1)(iii)(B) is that it would include a person who has not completed that route and obtained the full certification.)

§200.56(b)(2) – new elementary school teachers – State test

Section 9101(23)(B)(i)(II) of the Act provides for "highly qualified" new elementary school teachers to have:

> "demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum (which may consist of passing a State-required certification or licensing test or tests in reading, writing, mathematics, and other areas of the basic elementary school curriculum)"

The proposed regulation departs from the Act in two ways that should be corrected:

1. It omits the term "rigorous."

2. It omits the language permitting a State-required certification or licensing test or tests to serve this purpose.

§200.56(b)(3) – new secondary school teachers – State test

Section 9101(23)(B)(ii) of the Act provides for "highly qualified" new secondary school teachers to demonstrate a high level of competency in each of the academic subjects they teach by either (II) successful completion of an academic major or equivalent in each such subject or:

> "(I) passing a rigorous State academic subject test in each of the academic subjects in which the teacher teaches (which may consist of a passing level of performance on a State-required certification or licensing test or tests in each of the academic subjects in which the teacher teaches)"

As with paragraph (b)(2), the proposed regulation departs from the Act in two ways that should be corrected:

1. It omits the term "rigorous."

2. It omits the language permitting a State-required certification or licensing test or tests to serve this purpose.

§200.56(c) – Teachers not new to the profession

The "and" at the end of paragraph (2) must be changed to "or" to conform to the Act (with some conforming changes to the structure). The difference is major. Sec. 9101(23)(C) requires that "highly qualified" teachers not new to the profession *either* meet the applicable requirements for new teachers *or* demonstrate competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation that meets certain criteria set out in section 9101(23)(C)(ii). By changing the "or" to "and" the proposed regulations would require both, contrary to the Act.

To restore the original meaning, however, it will also be necessary to revise the structure by:

1. Inserting "and" at the end of paragraph (1) of the proposed regulation;
2. Changing "(2)" to "(2)(A)" and changing the "and" to "or";
3. Changing "(3)" to "(B)".

Without these conforming changes, the necessary "or" at the end of paragraph (2) would mean that a teacher could meet the definition by holding a bachelor's degree *or* meeting the requirements for new teachers *or* meeting the evaluation standard in paragraph (C)(ii) of the Act – so a bachelor's degree alone would be enough.

§200.57 Plans to increase teacher quality.

§200.57(a) – State plan to increase teacher quality

Sec. 1119(a)(2) of the Act provides that this plan is to be "part of the plan described in section 1111" – the overall State plan for Title I. This connection is omitted from the proposed regulation here and should be restored.

§200.57(b) – Local plan to increase teacher quality

Sec. 1119(a)(3) of the Act provides that this plan is to be "part of the plan described in section 1112" – the overall LEA plan for Title I. This connection is omitted from the proposed regulation here and should be restored.

§200.58 Qualifications of paraprofessionals

**§200.58(a)(3)(i) – paraprofessionals in targeted assistance schools

Similarly to §200.55(a)(2)(i) regarding teachers in targeted assistance schools, there is a *major* problem with the proposed subparagraph. The Act and paragraphs (a)(1) properly apply the hiring qualifications to "paraprofessionals working in a program supported with funds under subpart A." See Sec. 1119(c)(1) of the Act, which uses the same formulation. However, for targeted assistance programs, subparagraph (3)(i) would define a paraprofessional working in a program supported with subpart A funds as a paraprofessional in a targeted assistance school "who is paid with funds under subpart A." This is contrary to the Act – a paraprofessional who is working in a targeted assistance program (not a targeted assistance school) is "working in a *program supported* with funds under subpart A," regardless of whether those funds are used to pay that particular paraprofessional. And working in the targeted assistance program in turn means working with those students who are participating in the program (again regardless of whether your salary is paid with the subpart A funds).

To correct this problem and conform to the Act, paragraph (i) should thus be rewritten to read: "A paraprofessional in a targeted assistance school who is working with students participating in the targeted assistance program."

For additional discussion of this issue, see our comments to §200.55(a)(2)(i) above.