

# CENTER FOR LAW AND EDUCATION

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September 27, 2012

The Honorable Arne Duncan, Secretary, U.S. Department of Education  
The Honorable Deborah S. DeLisle, Assistant Secretary, Office of Elementary and Secondary Education  
The Honorable David Foster, President, and Other Members of the Virginia Board of Education  
The Honorable Patricia I. Wright, Superintendent of Instruction, Virginia Department of Education

Dear Secretary Duncan, Assistant Secretary DeLisle, President Foster and Board Members, and Superintendent Wright:

The Center for Law and Education has, for more than forty years, worked to advance the rights of every student to a high-quality education, particularly in low-income communities – through helping to shape education policies toward that end and through working collaboratively with educators and educational officials, as well as with parents, students, community and civil rights organizations and their advocates, to implement those policies to effectuate those rights, including extensive work on Title I. It is in that collaborative spirit that we provide these comments to both the U.S. Department of Education and the Virginia Board and Department of Education – in hopes of better accomplishing our shared goals for all students.

**Underlying Principles.** While these comments are focused on Virginia’s revised waiver proposal for modified annual measurable objectives (AMOs) under Title I, the underlying principles are applicable more generally, and we share many of the concerns raised by other groups about waiver proposals from a variety of states.

In considering the implications of our urging more rigorous targets for student achievement, it is first important to note our understanding of what these targets do and do not represent. Contrary to the common conception of NCLB, we view them not as a means for blaming or stigmatizing schools or teachers but as a means of identifying when students are not on a sufficiently expeditious path to actual attainment of proficiency in the skills and knowledge we say all students should master. Those students, and their educational programs, clearly need attention if we are to turn the rhetoric of leaving no child behind into reality. As such, when we adopt high standards for what all children should learn, it is a matter of course, not a matter of blame or failure, that there will be large numbers of students who are not currently on that path and most schools will need improvement of one kind or another to enable them to do so. Having such students not currently on that path does not put a school in violation of Title I. It creates a demand for attention and improvement. From that perspective, having a set of targets tied to identifying when any child is on a path that will not result in him/her actually learning the things every child should is not, when devoid of blame and shame, “unrealistic.” To the contrary, it is essential to making our rhetorical goals real. And so we approach the need for very rigorous targets tied to that goal, and our concern about waivers that appear to depart from it, from that perspective.<sup>1</sup>

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<sup>1</sup> Indeed from that perspective, we were pleased when USED’s initial policy, several years ago on alternative approaches for AYP, incorporated a required measure of whether individual students were progressing at a rate sufficient for them to become proficient within a short number of years. We have been concerned that under the current structure waivers are now being proposed and approved that do not seem to have that same result.

**Overall Impact of the Revised Virginia Proposal.** We are pleased that Virginia has revised its proposed AMOs upward and narrows the gaps between groups in comparison to the original. This does not negate the fact, however, that as a matter of law and policy in our view the proposed starting points are too low and that the narrowing of gaps between groups is based on progress from that starting point toward end goals that are also too low to close the most important gap – between current levels of achievement and proficiency -- to the detriment of both lower achieving and higher achieving groups.

While several specific problems are discussed below, the combined outcome of these problems is that the proposed alternate methodology does not meet USED’s basic requirement that any alternate approach must provide for AMOs that are “similarly ambitious” to the AMOs that would result from using **Option A** (equal annual increments toward a goal cutting the percentage of students not proficient in half by 2016-2017 for the all-student group and each subgroup) or **Option B** (equal annual increments toward a goal of having all students proficient by 2019-2020 for the all-student group and all subgroups). The following table should help illustrate our concerns.

<b>Virginia Annual Measurable Objectives for Mathematics<sup>2</sup></b>										
<b>Student Group</b>	<b>Actual</b>	<b>Virginia Proposed AMOs Based on Alternate Methodology</b>					<b>Option A</b>	<b>Option B</b>		
Assessment Year ->	<b>2011-2012</b>	<b>2011-2012</b>	2012-2013	2013-2014	2014-2015	2015-2016	<b>2016-2017</b>	<b>2016-2017</b>	<b>2016-2017</b>	
All Students	<b>68</b>	<b>61</b>	64	66	68	70	<b>73</b>	<b>84</b>	<b>88</b>	
Gap Group 1		<b>47</b>	52	57	63	68	<b>73</b>			
Black	<b>52</b>	<b>45</b>	51	56	62	67	<b>73</b>	<b>76</b>	<b>82</b>	
Hispanic	<b>61</b>	<b>52</b>	56	60	65	69	<b>73</b>	<b>81</b>	<b>85</b>	
Stu. w Disabilities	<b>40</b>	<b>33</b>	41	49	57	65	<b>73</b>	<b>70</b>	<b>78</b>	
ELL	<b>59</b>	<b>39</b>	46	53	59	66	<b>73</b>	<b>80</b>	<b>85</b>	
Econ. Disadvantaged	<b>54</b>	<b>47</b>	52	57	63	68	<b>73</b>	<b>77</b>	<b>83</b>	
White	<b>75</b>	<b>68</b>	69	70	71	72	<b>73</b>	<b>88</b>	<b>91</b>	
Asian	<b>87</b>	<b>82</b>	Continuous progress toward reducing proficiency gap by half					<b>94</b>	<b>95</b>	

Most obvious from this table are two things -- (1) that the proposed starting points in 2011-2012 are a good deal lower than the actual results, and (2) that comparing the 73% alternate methodology targets for 2016-2017 with what the targets would be under Options A and B points to a conflict with the claim that that the proposed alternate methodology, as revised, “will continue to address USED’s flexibility application requirement of cutting in half within six years the failure rate of the all students

<sup>2</sup>See notes about this table at the end of this document.

group and every student subgroup,”<sup>3</sup> i.e., the requirement that the alternative be “similarly rigorous to Options A or B”.<sup>4</sup>

When Option A is itself significantly less rigorous than Option B, and when both those options extend the goal for having every student proficient many years beyond the 2014 target goal requirement of NCLB that would be waived (to 2023 for Option A, to 2020 for Option B), surely anything less rigorous than Option A should not be countenanced. We also note that others have pointed to the typical phenomenon of very large jumps in performance in the second year that a new test is administered, which further suggests that expected progress rates can and should be more rigorous than proposed.

There are two, related central methodological problems underlying this falling short of the required similar rigor to Options A or B – (1) in determining the start point and (2) in then determining the annual increases in goals.

**Starting Points.** The proposed methodology does not start with the actual results for 2011-2012. Instead it starts with AMOs for 2011-2012 that are far below the actual performance of students (see the first two columns of the table) and then projects annual gains from there. According to the proposed amendment the proposed start point is set by rank ordering all schools in the state based on percent of students that passed and then selecting as the start point the proficiency rate for the school at the 20<sup>th</sup> percentile of all assessed students in state as the AMO for the start point; the proposed amendment states that “[t]his procedure for calculating a starting point is consistent with the methodology in the NCLB Act of 2001.” Aside from our noting that this procedure does not in fact seem to be consistent with that used in NCLB<sup>5</sup>, the more important point is that we are looking at two entirely different uses. The methodology used to determine start points in 2002 towards aiming to bring all students to proficiency in 2014 does not provide a sensible rationale in 2012 for starting over with lower rates than the actual 2012 rates under a plan extending that deadline but designed to close the remaining the gaps from where we now are. Toward that end, options A and B clearly require that actual performance levels be the start point for an acceptable waiver, and a proposed alternate methodology under option C is clearly not of comparable rigor when it uses much lower start points.

**Annual Improvement Targets.** Instead of basing annual goals of closing half the gap toward all students (both as a whole and in each subgroup) becoming proficient in six years under Option A (or nine under option B), the proposed alternate methodology seeks only to close half the gap between the 20<sup>th</sup> percentile ranking start point and the schools at the 90<sup>th</sup> percentile ranking. To the extent that the school at the 90<sup>th</sup> percentile ranking among all schools is still significantly far from having all students proficient (particularly when the 90<sup>th</sup> percentile ranking is done for each subgroup), seeking to eliminate

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<sup>3</sup> Virginia Board of Education agenda memo for 9/27/20120, Appendix C (the proposed amendment).

<sup>4</sup> Virginia Board of Education agenda memo for 9/27/20120, page 2. This mirrors USED’s *ESEA Flexibility Review Guidance*, page 12 (June 7, 2012), calling for AMOs under Option C that are “similarly ambitious to the AMOs that would result from using Option A or B.”

<sup>5</sup> Under NCLB, the starting point selected by the State had to be, at a minimum, the higher of the percentage of students at the proficient level who are in (i) the State's lowest achieving subgroup or (ii) the school at the 20th percentile in the State, based on enrollment, among all schools ranked by the percentage of proficient students. Section 1112(b)(2)(E). Virginia may possibly have conflated the two, by looking at the school at the 20<sup>th</sup> percentile ranking separately for each group.

half of the gap toward that level is of course significantly far short of seeking to eliminating half the gap toward *all* students becoming proficient (the Option A target).

Related Issues:

**Students in Schools Above the AMOs.** Given the lowered starting points, based on schools at the 20<sup>th</sup> percentile ranking for each group, along with the lowered annual targets from there, there will not be effective expectations for improving the proficiency of students in a large majority of schools in the State for the next few years, and for a large number of schools even after that. Perhaps to address that fact, the proposed amendment states that schools meeting the AMOs will be deemed to be making sufficient progress if they maintain their prior year proficiency rates (up to 90%) for each student group. That standing still, however, does nothing to close the gap toward proficiency for all students in those schools, let alone ensure continuous progress at all. To deal with this issue, in addition to revising the starting points and the annual targeted gains, we agree with others calling for a gap-dosing measure that is set for each school, depending on its own starting points. As we use waivers to move away from the NCLB version of having the same AMO for all groups in all schools to a different model for closing the gap between where groups and schools are and 100%, then different rates of progress for different schools, as well as different student groups, are needed and makes great sense -- those further behind need to make greater progress (and need help in doing so), while improvements are needed in all schools to the extent that not all children are reaching the proficiency expected for all students.

**AMOs for Reading.** The proposed amendment seeks to apply the same methodology – i.e., the 20<sup>th</sup> percentile school rank starting point (rather than actual levels) and the closing half the gap between that 20<sup>th</sup> percentile school and the 90<sup>th</sup> percentile rank school (rather than closing half the gap toward proficiency for all). As such our comments and concerns here are equally applicable to reading.

**Stakeholder Involvement.** As with other issues, our underlying concerns are not exclusive to Virginia, but that is particularly the case with stakeholder involvement. USED’s *ESEA Flexibility Review Guidance*<sup>6</sup> asks (in terms similar to the questions it uses for review of teacher involvement):

Did the SEA meaningfully engage and solicit input on its request from other diverse communities, such as students, parents, community-based organizations, civil rights organizations, organizations representing students with disabilities and English Learners, business organizations, and Indian tribes?

*Is the engagement likely to lead to successful implementation of the SEA’s request due to the input and commitment of relevant stakeholders at the outset of the planning and implementation process?*

*Did the SEA indicate that it modified any aspect of its request based on stakeholder input?*

*Does the input represent feedback from a diverse mix of stakeholders representing various perspectives and interests, including stakeholders from high-need communities?*

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<sup>6</sup> Page 5 (emphasis in original).

These questions reflect a recognition that *meaningful engagement* by these diverse communities requires real involvement *at the outset and throughout*. Asking for input only after a proposed plan has already been developed does not meet the standard. Neither does asking for input only at the beginning before anything has been drafted, without meaningful chance to discuss how well that initial input has been addressed. Rather, real engagement is an iterative process of dialogue, in which ideas about the overall approach and identification and discussion of issues occurs before drafting but then is continued in reaction to initial drafts and changes along the way toward finalization. And it must provide for sufficient time, information, and assistance to enable those communities and their representatives to fully understand the background, issues, and particulars to which insiders have greater access.

It is also worth noting that ESEA Section 1111(a)(1) requires that State plans must be “developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators . . . , other staff, and parents. ” As such, this development of the plan in consultation with those parties is clearly distinct from the single public hearing, open to anyone, on the state plan that has already been developed and is typically held just prior to submission to USED. While in some States the public hearings on State plans have themselves been held with too little advanced notice and too little opportunity for review of the document and relevant background to have full, informed comments – which needs more attention from USED nationally – that does not appear to be the case in regard to notice of Virginia’s 9/27 meeting on the revised AMO proposal.

What we do urge is a full review, both by Virginia and by USED, of the extent of meaningful engagement, from the outset and onward, of the identified diverse communities, in the terms discussed above (distinct from and beyond the public comment for 9/27) – and for similar thorough review in other States. That review should involve direct communication with those communities themselves to present their own perspective on how well and meaningfully they were involved in those terms (as discussed above). While such engagement and commitment is critical for any State plan or amendment, it is all the more so in the case of a waiver proposal, where provisions of law that Congress wrote for the benefit of students will no longer apply. I.e., where the Department has chosen to allow States to deviate from that law, including lowering targets, the importance of public involvement in those State decisions, particularly by the program beneficiaries (students) and their parents and advocates, and the need for the Department to ensure it, is all the greater. Thus, it is critical to look at such involvement in the initial decision to seek a waiver, in the decision to use an alternative methodology to those offered under Options A and B, and in the specific decisions made in constructing the particulars – as well as in planning for the future decisions that are mentioned in the proposed amendments.

We would welcome the opportunity to discuss any of these issues and to work with both USED and Virginia on improvements toward our shared ideals for children and their education, including on the hard work to enable them to reach the properly ambitious goals.

Sincerely,

The image shows two handwritten signatures in black ink. The signature on the left is 'Paul Weckstein' and the signature on the right is 'Kathleen B. Boundy'. Both signatures are written in a cursive, flowing style.

Paul Weckstein and Kathleen B. Boundy, Co-Directors

Notes on the Table:

1. Because whole numbers are used for AMOs, we have rounded off numbers in the two right-hand columns to the nearest whole number.
2. At the time of writing this, we were not in possession of actual results for 2011-2012 for Virginia's combined proficiency gap group 1 (the aggregation of students with disabilities, English-language learners, and economically disadvantaged students). But taking into account the assessment results for each of the three groups, and the relatively large numbers of economically disadvantaged students, it seems unlikely that the results for this combined group would change our overall analysis.
3. We calculated Option A consistent with USED requirements that under it AMOs be set in annual equal increments toward a goal of cutting the percentage of students not proficient by half for all students and each subgroup within six years, starting with *current proficiency rates* in 2010-2011.
4. For Option B, we calculated the targets for 2016-2017 by determining what it would need to be if there were equal annual increments from the 2011-2012 results toward the end goal of 100% in 2019-2020.
5. We are aware that Virginia's reason for starting with 2011-2012 is because the 2010-2011 results were based on a different, less challenging assessment. We have used the 2016-2017 assessments as the end goal – both because it is what the Virginia is proposing (both in describing that assessment year as such and in having all groups converge at the same AMO percent by then – and it is consistent with the USED provisions, which under A require meeting the goal by then (six years after 2010-2011 assessments. But even if the USED requirements for using the 2010-2011 data as the starting point and having similar rigor to Option A for closing half the gap to 100% by 2016-2017 (6 years thereafter) or Option B for closing all the gap by 2019-2020 were weakened to allow Virginia an extra year, the projected average annual rates of gain would not get them to the half-way point for all groups by 2018 (falling far short for the all-students group and for white students, falling short by a lesser amount for Hispanic students).
6. We do not know what the AMOs for Asian students after last year (where they are set at 82, five points below the actual proficiency level for that year), But it may be likely that in providing a narrative standard in the proposal for this group – “continuous progress toward reducing proficiency gap within subgroup by half” -- the “proficiency gap” is intended to mean the same thing as it means for other groups, namely the gap between the proficiency rate in schools at the 20<sup>th</sup> percentile rank and schools at the 90<sup>th</sup> percentile, rather than the more ambitious (and appropriately so in relation to Option A) standard of closing half the gap between the current actual proficiency and 100% proficiency.