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### GETTING TO THE CORE: REWRITING THE NO CHILD LEFT BEHIND ACT FOR THE 21<sup>ST</sup> CENTURY

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Any consideration of the next generation of law-based education reform must address the dual goals of insuring public accountability for *all* schools to educate *all* students, as well as insuring every child's individual opportunity to learn meaningful content. The impending re-authorizations of the Elementary and Secondary Education Act (ESEA)<sup>2</sup> and the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> present the opportunity to reassess the role of these laws in the improvement of meaningful opportunity to learn for all students. The current version of the ESEA, as revised by the No Child Left Behind Act (NCLB),<sup>4</sup> has had considerable impact in improving the education of many students, yet it has also raised many concerns and much controversy about both educational and assessment practices; as well as the proper role of federal laws.<sup>5</sup> A major benefit of NCLB has been the attention focused on improving the performance of at-risk subgroups of students.<sup>6</sup> On the other hand, it has caused controversy within the civil rights community<sup>7</sup> as well as widespread scholarly debate within both the legal and social science communities.<sup>8</sup> The education and assessment of students with disabilities (SWD) and other special subgroups of students,

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<sup>2</sup> Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>3</sup> Pub. L. No. 101-476, 104 Stat. 1142 (2004).

<sup>4</sup> Pub. L. No. 107-110 (2002).

<sup>5</sup> See Michael Heise, *The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119 (2007).

<sup>6</sup> See RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK—WHITE ACHIEVEMENT GAP* (2004).

<sup>7</sup> Karla Soon Reid, *Civil Rights Groups Split Over NCLB*, EDUC. WK., Aug. 31, 2005, at 1, available at <http://www.edweek.org/ew/articles/2005/08/31/01civil.h25.html>.

<sup>8</sup> See, e.g., James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION, May 2, 2007, available at <http://www.thenation.com/print/article/evaluating-no-child-left-behind>.

particularly low-income and minority students, also presents an enormous challenge to future educational improvement. Tests generated under the NCLB system provide glaring evidence that there is still much room for improvement in the effective education of all students to high standards to prepare them for higher education and the workplace.

A recent initiative adopted by 48 states to define and implement common core curriculum standards to promote skills appropriate for the twenty-first century<sup>9</sup> heralds a potential opportunity to promote a high quality education for all children throughout the nation.<sup>10</sup> Common core curriculum standards could be a desirable development in the evolution of standards-based education reform. Yet the common core curriculum standards present their own potential challenges.<sup>11</sup> And the impact of content standards cannot be determined without consideration of the assessment systems and performance expectations that each state would use to influence educational practice and determine proficiency.<sup>12</sup> Moreover, law-driven education reform at its core is only meaningful when it significantly improves the instructional environment in classrooms across the nation.<sup>13</sup> While the impact of NCLB on students with disabilities offers a lesson on what is right about NCLB, it also offers a lesson on what is wrong with NCLB. Additionally, an examination of the participation of SWD in education reform initiatives offers useful insight into the education of students who do not have disabilities. In their efforts to improve overall student performance on assessments, U.S. Secretary of Education Arne Duncan and other policymakers have recently been calling for the “personalization” of instruction for all students.<sup>14</sup> This has been the goal of laws on the education of students with disabilities for several decades.<sup>15</sup>

A determination of the impact of the assessment and accountability system in current federal law would not be complete without consideration of the state and local legal requirements that operate in conjunction with NCLB. For example, while not a requirement under the Act, NCLB-mandated tests are often also used in many states as exit exams to meet state statutory requirements for high school graduation and affect over 70% of all high school students.<sup>16</sup> For most students, exit tests tend to encourage more content coverage but may dilute the quality of content covered. Exit

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<sup>9</sup> COUNCIL OF CHIEF STATE SCHOOL OFFICERS & NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES, COMMON CORE STATE STANDARDS INITIATIVE: PREPARING AMERICA'S STUDENTS FOR COLLEGE & CAREER, <http://www.corestandards.org>.

<sup>10</sup> See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, COMMON STANDARDS FOR K-12 EDUCATION?: CONSIDERING THE EVIDENCE (2008).

<sup>11</sup> See NANCY KOBER & DIANE STARK RENTNER, CTR. ON EDUC. POLICY, STATES' PROGRESS AND CHALLENGES IN IMPLEMENTING COMMON CORE STATE STANDARDS (2011).

<sup>12</sup> See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STATE ASSESSMENT SYSTEMS: EXPLORING BEST PRACTICES AND INNOVATIONS (2010).

<sup>13</sup> See DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS? (2009); NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (1999).

<sup>14</sup> Rick Hess, *Bam! Pow! Whomp! Sec. Duncan Knocks It Out of the Park*, ED. WK., Nov. 18, 2010, available at [http://blogs.edweek.org/edweek/rick\\_hess\\_straight\\_up/2010/11/bam\\_pow\\_whomp\\_sec\\_duncan\\_knocks\\_it\\_out\\_of\\_the\\_park.html](http://blogs.edweek.org/edweek/rick_hess_straight_up/2010/11/bam_pow_whomp_sec_duncan_knocks_it_out_of_the_park.html). See also Press Release, U.S. Department of Education, U.S. Department of Education Releases Finalized National Education Technology Plan (Nov. 9, 2010), available at <http://www.ed.gov/news/press-releases/us-department-education-releases-finalized-national-education-technology-plan>. This personalization approach for supporting student achievement has also been embraced by other influential participants in the public policy debate. See THE WALLACE FOUNDATION, EDUCATION LEADERSHIP: A BRIDGE TO SCHOOL REFORM (2007).

<sup>15</sup> See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, EDUCATING ONE AND ALL: STUDENTS WITH DISABILITIES AND STANDARDS-BASED REFORM (1997).

<sup>16</sup> See CENTER ON EDUCATION POLICY, STATE HIGH SCHOOL EXIT EXAMS: A MATURING REFORM (2004); CENTER ON EDUCATION POLICY, STATE HIGH SCHOOL TESTS: EXIT EXAMS AND OTHER ASSESSMENTS (2010).

tests also tend to correlate with higher dropout rates and clearly have an increasing impact for SWD.<sup>17</sup> As of 2004, fourteen states required special education students to pass high-stakes tests in order to earn regular high school diplomas while twenty-four states allowed SWD to earn diplomas even if they did not pass the tests.<sup>18</sup> Many states or local districts award certificates or other types of differential documents to students who participate in alternate tests specifically designed for certain types of disabilities.<sup>19</sup>

Any legally mandated education reform will have both intended and unanticipated consequences and this has certainly been true with NCLB.<sup>20</sup> Considering both varieties is useful for conceptualizing appropriate theories of action for formulating new legislation. Social scientists and policymakers across the ideological spectrum have called for a substantial re-conceptualization of the federal law.<sup>21</sup> For example, historian Diane Ravitch, once a high-ranking education official in the administration of President George W. Bush and a long-time advocate for NCLB, recently took a 180-degree turn of position and called for major changes in the law.<sup>22</sup> Many others are concerned that the rush to show student proficiency on the current assessments has resulted in reducing the attention schools give to critical thinking and deep understanding of subject matter, particularly for subjects other than the math and literacy skills that are the only topics covered on most state NCLB tests.<sup>23</sup> Others have argued that current NCLB initiatives fail to incorporate what social science has demonstrated about the conditions needed for effective teaching and learning.<sup>24</sup>

Only recently has evidence begun to emerge concerning the impact on educational opportunities for SWD as a result of participating in contemporary forms of large-scale assessments. Assessment requirements have expanded teacher perceptions of what SWD can and should learn, increased expectations for SWD, and exposed some special education teachers for students with the most significant disabilities to academic curriculum standards for the first time.<sup>25</sup> Additionally, teachers in non-special education settings seeking to help struggling students who have not been identified with disabilities have begun to turn to strategies for individual instruction utilized in special education.<sup>26</sup>

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<sup>17</sup> *See Id.*

<sup>18</sup> DAVID R. JOHNSON, MARTHA L. THURLOW & KAREN E. STOUT, NAT'L CTR. ON EDUC. OUTCOMES, REVISITING GRADUATION REQUIREMENTS AND DIPLOMA OPTIONS FOR YOUTH WITH DISABILITIES: A NATIONAL STUDY (2007), available at <http://www.cehd.umn.edu/NCEO/OnlinePubs/Tech49/TechReport49.pdf>.

<sup>19</sup> *Id.*; KATHERINE NAGLE, DIANA PULLIN, JOANNE KARGER, & KIMBER MALMGREN, HIGH STAKES: EXIT DOCUMENTS AND STUDENTS WITH DISABILITIES (2002), available at <http://www.education.umd.edu/EDSP/epri/TOC2.html>; JOANNE KARGER AND DIANA PULLIN, EXIT DOCUMENTS AND STUDENTS WITH DISABILITIES: LEGAL ISSUES (2002), available at <http://www.education.umd.edu/EDSP/epri/PDFs/IB2.pdf>.

<sup>20</sup> MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY (2008); Heise, *supra* note 5, at 121.

<sup>21</sup> *See* DIANA RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION (2010).

<sup>22</sup> *Id.*

<sup>23</sup> Nel Noddings, *What Does It Mean to Educate the Whole Child?*, 63 EDUC. LEADERSHIP 8 (2005).

<sup>24</sup> *See* PAMELA A. MOSS, DIANA C. PULLIN, JAMES PAUL GEE, EDWARD H. HAERTEL & LAUREN JONES YOUNG, ASSESSMENT, EQUITY, AND OPPORTUNITY TO LEARN (2008).

<sup>25</sup> Mary C. Zatta & Diana C. Pullin, *Education and Alternate Assessment for Students with Significant Cognitive Disabilities: Implications for Educators*, EDUC. POL'Y ANALYSIS ARCHIVES, April 10, 2004, available at <http://epaa.asu.edu/ojs/article/view/171/297>.

<sup>26</sup> NATIONAL CENTER ON RESPONSE TO INTERVENTION, ESSENTIAL COMPONENTS OF RTI – A CLOSER LOOK AT RESPONSE TO INTERVENTION (2010), [http://www.rti4success.org/pdf/rtiessentialcomponents\\_042710.pdf](http://www.rti4success.org/pdf/rtiessentialcomponents_042710.pdf).

At the same time, there are now increasing reports of some of the unintended negative consequences associated with disaggregated data involving SWD in high-stakes testing. Some otherwise high-performing schools are now identified as low-performing solely on the basis of the scores from their population of students with disabilities.<sup>27</sup> The pressure is increasing to move students to a status where their performance will not pull down the whole school or district in meeting NCLB requirements for attaining adequate yearly progress (AYP) in improving student performance on state assessment tests. Even more pressure can be expected as a result of implementation of the recent “Race to the Top” initiatives<sup>28</sup> implemented under the United States Department of Education's American Recovery and Reinvestment Act,<sup>29</sup> particularly the use of student data to make judgments about educators.<sup>30</sup>

### Federal Laws Governing Students with Disabilities

Typical students without disabilities do not have many statutory protections to insure that they are provided personalized approaches to instruction.<sup>31</sup> In contrast, under federal laws students with disabilities receive procedural and substantive protections that define access to education appropriate for their individual needs.<sup>32</sup> One of the more notable accomplishments of any of the many federal education statutes of the twentieth century was the end of the exclusion of SWD from schools and a dramatic improvement in the programs and services provided to them.<sup>33</sup> The impact of the federal statutes on opportunity to learn for these students offers useful information for thinking about how to re-frame the ESEA to enhance its positive impact for all students.<sup>34</sup> Any consideration of the revision of ESEA/NCLB must take into account the inextricable interrelationship between ESEA and the other relevant federal laws concerning the education of SWD. The Individuals with Disabilities Education Act (IDEA)<sup>35</sup> provides widespread protections for SWD who need special education. In addition, the Americans with Disabilities Act (ADA)<sup>36</sup> and Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>37</sup> protect all students with disabilities.

IDEA requires appropriate education for SWD in need of special education programs and services.<sup>38</sup> The IDEA and NCLB require the participation of SWD in state and district-wide

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<sup>27</sup> Diana Pullin, *Individualizing Assessment and Opportunity to Learn: Lessons from the Education of Students with Disabilities*, in ASSESSMENT, EQUITY, AND OPPORTUNITY TO LEARN 109 (2008); Diana Pullin, *When One Size Does Not Fit All—The Special Challenges of Accountability Testing for Students with Disabilities*, in USES AND MISUSES OF DATA FOR EDUCATIONAL ACCOUNTABILITY AND IMPROVEMENT 199 (E. Haertel and J. Herman, eds. 2005).

<sup>28</sup> Race to the Top Fund, 74 Fed. Reg. 59,688, 59,835 (Nov. 18, 2009).

<sup>29</sup> Pub. L. No. 111-5 (2009).

<sup>30</sup> Race to the Top Fund, 74 Fed. Reg. 59,688, 59,803, 59,809, 59,813 (Nov. 18, 2009).

<sup>31</sup> Diana Pullin, *Individualizing Assessment and Opportunity to Learn: Lessons from the Education of Students with Disabilities*, in ASSESSMENT, EQUITY, AND OPPORTUNITY TO LEARN 109 (2008).

<sup>32</sup> *Id.*

<sup>33</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 15.

<sup>34</sup> Pullin, *supra* note 31; See also, Michael Metz-Topodas, Comment, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 79 TEMP. L. REV. 1387 (2006); Mark Burgreen, *Being Neighborly in Title 20: Using the IDEA to Lend a Helping Hand to NCLB*, 43 COLUM. J.L. & SOC. PROBS. 51 (2009).

<sup>35</sup> 20 U.S.C. § 1400 *et seq.* (2004).

<sup>36</sup> 42 U.S.C. § 12101 *et seq.* (1990).

<sup>37</sup> 29 U.S.C. § 794 (2010).

<sup>38</sup> 20 U.S.C. § 1412(a) (2005). See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982) (holding that the IDEA requirement for a free and appropriate public education obligates states to provide “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must

assessments, with appropriate accommodations where necessary.<sup>39</sup> The cornerstone of the IDEA is the requirement that every student with a disability who needs special education must receive an appropriate education as set forth in a written individualized education program (IEP)<sup>40</sup> formulated in consultation between educators and the student's parents.<sup>41</sup> The IEP sets out diagnostic and performance information on the student and then describes the program, services, settings, goals and regular review plans for the education of the student, including descriptions of how the student will participate in state or local assessment programs.<sup>42</sup>

Section 504 of the Rehabilitation Act (1973) and the Americans with Disabilities Act (ADA) (1990) and their implementing regulations bar discrimination on the basis of disability;<sup>43</sup> Section 504 requires the provision of appropriate education<sup>44</sup> and reasonable accommodations for SWD participating in testing programs.<sup>45</sup> For students who have disabilities that require supportive services or accommodations rather than special education services, the provisions of the implementing regulations under Section 504 and ADA require that they receive an appropriate education.<sup>46</sup> As a result, many school districts write 504 plans for these students, which can be somewhat analogous to the IEP.

### The Identification and Education of Students with Disabilities

There has been almost a doubling of the proportion of U.S. schoolchildren served under IDEA since data collection began in 1976. Indeed, the number and percentage of children served has increased every year up to 2004-5.<sup>47</sup> In 2005-6, fifty-seven percent of these students graduated from high school with a regular diploma.<sup>48</sup> We do not yet have conclusive data on changes in SWD classifications as a result of full implementation of NCLB. But we do know that the vast proportion of students with disabilities participate in NCLB-mandated state assessments and do so successfully.<sup>49</sup>

A student labeled as a SWD could be any student with problems at school. Disability classification may still largely be a social and cultural phenomenon rather than a matter of science. Some social scientists have long argued that schools in the United States rely on disability classifications to identify children who do not perform well in school, particularly on tests or in

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meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act[.]”)

<sup>39</sup> 20 U.S.C. § 1400 (2004); 20 U.S.C. § 6301 (2002).

<sup>40</sup> 20 U.S.C. § 1414 (d) (2011); 34 C.F.R. § 300.320 (2011).

<sup>41</sup> 20 U.S.C. § 1414 (d)(1)(B) (2011).

<sup>42</sup> 20 U.S.C. § 1414 (d) (2011).

<sup>43</sup> 42 U.S.C. § 12132 (2011); 28 C.F.R. § 35.130 (2011); 29 U.S.C. § 794(a) (2011); 34 C.F.R. § 104.4 (2011).

<sup>44</sup> 28 C.F.R. § 35.130 (2011); 28 C.F.R. § 35.130 (2009).

<sup>45</sup> 34 C.F.R. § 104.33 (2011).

<sup>46</sup> 34 C.F.R. § 104.12 (2011).

<sup>47</sup> OFFICE OF SPECIAL EDUCATION PROGRAMS, U.S. DEP'T OF EDUC., TWENTY-EIGHTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, PARTS B AND C (2006), *available at* <http://www2.ed.gov/about/reports/annual/osep/2006/parts-b-c/index.html>.

<sup>48</sup> *Id.*

<sup>49</sup> *See* JOHNSON ET. AL., *supra* note 18.

comportment.<sup>50</sup> There is a significant amount of variation from place to place in classification and its consequences, and often a fine line separates those classified with a disability from other students, particularly when the classification is one as subjective as a specific learning disability (SLD).<sup>51</sup> Referral for SLD evaluation may occur as a result of such factors as teacher incapacity, pressure imposed by external accountability testing, or manipulation by either parents or educators.<sup>52</sup> Over or under-representation of cultural minority and English language learner (EL) students often results.<sup>53</sup> An initiative mandated by the 2004 re-authorization of the IDEA seeks to avoid the need for special education by calling on schools to adopt Response to Intervention (RTI) approaches<sup>54</sup> - individualized efforts to identify low-performing students and give them structured, personalized instructional attention to try to avoid the need for special education classification.<sup>55</sup>

The consequences of the classification practices for SWD are particularly striking given that the overwhelming majority of students served under IDEA (close to 50%) are those labeled with the most subjective of classifications: specific learning disabilities.<sup>56</sup> And, as testimony to either the wide range of capabilities covered by federal laws impacting SWD or the effectiveness of the systems for educating these students (or both), the federal government's National Center for Education Statistics (NCES) reported in 2003-4 that 11.3% of the students in higher education reported they had some type of disability.<sup>57</sup>

#### The Participation of Students with Disabilities in NCLB Assessments

Over time, the participation of SWD in standards-based assessment programs has evolved to include several forms. For each student with a disability, the determination on the nature of a student's participation in a state's assessment system is to be made when drawing up the student's IEP.<sup>58</sup> Many SWD participate fully in assessments, some receive accommodations in the administration or format of an assessment, and some participate in an alternate assessment. As the National Center on Educational Outcomes notes, the alternate assessment approach provides a mechanism for students with the most significant cognitive disabilities, and for other SWD who may need alternate ways to access assessments, to be included in an educational accountability system.<sup>59</sup> There are three variations here: alternate assessments based on alternate achievement standards

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<sup>50</sup> See HUGH MEHAN, ET. AL., *HANDICAPPING THE HANDICAPPED: DECISION MAKING IN STUDENTS' EDUCATIONAL CAREERS* (1986); BETH HARRY & JANETTE K. KLINGER, *WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION?: UNDERSTANDING RACE & DISABILITY IN SCHOOLS* (2006).

<sup>51</sup> NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION* (2002).

<sup>52</sup> *Id.* See also MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997).

<sup>53</sup> NATIONAL RESEARCH COUNCIL, *supra* note 51.

<sup>54</sup> Pub. L. No. 108-446 (2004); 34 C.F.R. § 300.307-309 (2007).

<sup>55</sup> NATIONAL CENTER ON RESPONSE TO INTERVENTION, *ESSENTIAL COMPONENTS OF RTI – A CLOSER LOOK AT RESPONSE TO INTERVENTION* (2010), [http://www.rti4success.org/pdf/rtiessentialcomponents\\_042710.pdf](http://www.rti4success.org/pdf/rtiessentialcomponents_042710.pdf).

<sup>56</sup> NATIONAL RESEARCH COUNCIL, *supra* note 51.

<sup>57</sup> U.S. DEPARTMENT OF EDUCATION & NATIONAL CENTER FOR EDUCATION STATISTICS, *PROFILE OF UNDERGRADUATES IN U.S. POSTSECONDARY EDUCATION INSTITUTIONS: 2003–04* (2006).

<sup>58</sup> 20 U.S.C. § 1414(d) (2011); 34 C.F.R. § 300.347 (2011).

<sup>59</sup> MARTHA THURLOW, MIONG VANG & DAMIEN CORMIER, *NAT'L CENTER ON EDUC. OUTCOMES, EARNING A HIGH SCHOOL DIPLOMA THROUGH ALTERNATIVE ROUTES* (2010).

(AA-AAS); alternate assessment based on modified academic achievement standards (AA-MAS); and alternate assessments based on grade-level achievement standards (AA-GLAS).<sup>60</sup>

Accommodated administrations give most students, parents and educators a sense that testing is more fair and a better indicator of the knowledge and skills of SWD. However, some SWD find accommodations demeaning and some non-accommodated students and their parents feel they afford an unfair advantage to SWD.<sup>61</sup> Evidence is accumulating that the use of accommodations is increasing the participation of SWD in both testing programs and educational experiences that focus on the content covered on tests.<sup>62</sup> SWD who received accommodations in testing are more likely than they were in the past to receive a regular high school diploma as a result of participation in the tests mandated by NCLB.<sup>63</sup>

States vary considerably in their determinations of which accommodations are acceptable, with some allowing considerable local latitude on these decisions. Alternate assessments also vary considerably.<sup>64</sup> For all accommodations, the professional standards of practice (APA Test Standards) require that validity considerations must focus clearly on the content, or constructs, a test seeks to measure.<sup>65</sup> The use of test alterations for SWD should, according to the Test Standards, be subject to empirical study to assess the appropriateness of the changes to the test. To the extent that there is flexibility to determine which accommodations to use, there is a threat to the validity and reliability of scores, as well as the validity of inferences from the scores. There is still limited evidence of the psychometric quality of these alternate approaches (and 1999 APA Test Standards have limited discussion specific to these, although all the other provisions of the Standards are certainly applicable).<sup>66</sup>

The U.S. Department of Education has taken a series of steps to move back from full inclusion of all SWD in NCLB initiatives, granting states the opportunities to limit the impact of the scores of SWD on the calculations of their schools' adequate yearly progress (AYP).<sup>67</sup> The desirable outcome of using alternate assessments for SWD is that they are consistent with the individualization mandated for special education and the alignment of an assessment with the curricular opportunities afforded those students. On the other hand, some advocates for SWD argue that while the NCLB policy goal of educating all students to high standards has not been explicitly renounced, revisions made in 2007 by the U.S. Department of Education to its regulations concerning the role of SWD in calculating AYP should be closely scrutinized for conflicts with the

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<sup>60</sup> *Id.*

<sup>61</sup> PULLIN, *supra* note 24.

<sup>62</sup> See Martha L. Thurlow, Sheryl S. Lazarus, Sandra J. Thompson & Amanda Blount Morse, *State Policies on Assessment Participation and Accommodations for Students with Disabilities*, 38 J. SPECIAL EDUC. 232 (2005).

<sup>63</sup> DAMIEN C. CORMIER, JASON ALTMAN, VITALIY SHYYAN & MARTHA L. THURLOW, NAT'L CENTER ON EDUC. OUTCOMES A SUMMARY OF THE RESEARCH ON THE EFFECTS OF TEST ACCOMMODATIONS: 2007-2008 (2010).

<sup>64</sup> *Id.*

<sup>65</sup> AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, JOINT COMMITTEE ON STANDARDS FOR EDUCATION AND PSYCHOLOGICAL TESTING, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999) (hereinafter, TEST STANDARDS). See also AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AERA POSITION STATEMENT ON HIGH-STAKES TESTING IN PRE-K – 12 EDUCATION (2000), available at <http://www.aera.net/?id=378>.

<sup>66</sup> Mary J. Pitoniak & James M. Royer, *Testing Accommodations for Examinees with Disabilities: A Review of Psychometric, Legal and Social Policy Issues*, 71 REV. EDUC. RES. 53 (2001).

<sup>67</sup> See 72 Fed. Reg. 17747 (2007).

NCLB enabling legislation as well as the nondiscrimination requirements of Section 504 and ADA.<sup>68</sup> The 2007 regulations allow modified achievement standards (for up to 2% of students) and provide a pressure release valve for low performing schools in their quest of AYP (and for high-performing schools for whom only a low-performing subgroup stands between the school and AYP).<sup>69</sup> On the other hand, the “2% Rule” lowers the bar for the expectations on what these students will be expected to know and accomplish. Advocates for SWD are concerned that the rule can lead to potential 504 and ADA violations when students who might be able to succeed are barred from access to full opportunities to achieve. This group is also probably disproportionately composed of racial and ethnic minorities, leading to other potential violations under Title VI of the Civil Rights Act of 1964,<sup>70</sup> the Equal Educational Opportunities Act,<sup>71</sup> and violations of Fourteenth Amendment Equal Protection guarantees.

How to include SWD in testing is often challenging, but these challenges might also sometimes compel us to think about what we were testing for in the first place. For example, the common core standards afford an illustration of the difficulties associated with fair inclusion of students with disabilities in curriculum standards and the assessments used to measure performance on the standards. To further elaborate, the September 2009 draft of the common core standards includes some examples of writing proficiency.<sup>72</sup> Included in the description of college and career readiness are “controlling errors in spelling” and “avoiding wordiness.”<sup>73</sup> At first glance, both seem desirable and essential, although we all have to acknowledge our collective reliance on computer spell-checkers to address many of our spelling errors. It is worth noting, however, that an otherwise successful student with a compulsive disorder could be utterly incapable of “avoiding wordiness.” A student with dyslexia, a language-based reading disorder causing difficulty understanding written words or decoding, might have adequate comprehension of written materials but great difficulty spelling. A student with a physical or developmental disability that affects their ability to hand-write or use a computer keyboard might be unable to perform successfully on a written or computer-administered mathematics or language arts exam.

An unanticipated consequence of the requirement that schools show the AYP of their students under the NCLB and the more recent revisions of the USDOE regulations in 2008 may be the tendency for schools to inappropriately classify students into special education to ease school or educator accountability pressures.<sup>74</sup> This problem relates also to the so-called “N size” issue, in which states have been allowed to exclude many SWD from portions of the accountability system because total SWD in any building are too few to be taken into account accurately and anonymously.<sup>75</sup> There are certainly privacy and statistical challenges associated with such reporting,

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 42 U.S.C. § 2000d (2011).

<sup>71</sup> 20 U.S.C. § 1701 *et seq.* (2011).

<sup>72</sup> COUNCIL OF CHIEF STATE SCHOOL OFFICERS & NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES, COMMON CORE STATE STANDARDS INITIATIVE: PREPARING AMERICA’S STUDENTS FOR COLLEGE & CAREER, THE STANDARDS: ENGLISH LANGUAGE ARTS STANDARDS (2009), *available at* <http://www.corestandards.org/the-standards/English-language-arts-standard>.

<sup>73</sup> *Id.*

<sup>74</sup> See MARY FULTON, EDUC. COMMISSION OF THE STATES, MINIMUM SUBGROUP SIZE FOR ADEQUATE YEARLY PROGRESS (AYP) (2006), *available at* <http://www.ecs.org/html/Document.asp?chouseid=7171>.

<sup>75</sup> *Id.*



but the variability in allowed N size across states undercuts the credibility of AYP in some settings and lessens the incentive to hold these students to higher standards.

There are many problems associated with the special education system and with the inclusion of SWD in high stakes assessments for accountability purposes. The public policy and social science debates associated with these initiatives are considerable. Yet, a consideration of the treatment of SWD in education laws provides valuable and illuminating evidence for the possibilities in the next set of revisions to the federal laws.

### Relevant Technical and Professional Standards

Any revision of ESEA should continue to increase enforcement of the current statutory requirement of adherence to professional and technical standards by states and school districts.<sup>76</sup> There are several sets of professional standards that are applicable concerning testing, program evaluation, personnel evaluation and student evaluation.<sup>77</sup> The most immediately relevant are the Standards on Educational and Psychological Testing<sup>78</sup> that are widely used by courts and administrative agencies, particularly in the employment and educational testing context.<sup>79</sup> Other sets of professional standards are relevant as well, such as the three sets of professional consensus standards on Educational, Personnel, and Student Evaluation.<sup>80</sup> There are several core issues reflected in all of the professional/technical standards: (1) the need to develop multiple measures of key outcomes, ideally using multiple assessment formats (not multiple administrations of the same test); (2) the need to validate these assessments for specific uses; and (3) the need to consider the populations being tested and any associated validity and fairness issues. Current statutory language incorporates many of these principles but more detailed consideration of these technical issues is warranted.

NCLB requires “multiple measures” of student achievement - the importance and meaning of which is a critical issue in the implementation of the act's current version.<sup>81</sup> The Test Standards also call for multiple measures to enhance the technical quests for validity and reliability and to insure fundamental fairness for all students.<sup>82</sup> In addition to being an issue of technical importance, this is also an issue of fairness for students. Moreover, it is an issue of particular concern for SWD given the relatively new practices in accommodations and alternate assessment.

Validity is the most critical technical factor in assessment programs and requires that the inferences drawn from test scores reflect what is truly sought to be measured.<sup>83</sup> The validation of

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<sup>76</sup> 34 C.F.R. § 200.7 (2011).

<sup>77</sup> TEST STANDARDS, *supra* note 65.

<sup>78</sup> *Id.*

<sup>79</sup> See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (TEST STANDARDS used to assess quality of evidence concerning employment test); *Allen v. Alabama State Bd. of Educ.*, 190 F.R.D. 602, 611 (D. Ala. 2000) (TEST STANDARDS used as part of consent decree in teacher licensure testing litigation); *Debra P. v. Turlington*, 644 F.2d 397, 405 (5th Cir. 1981) (TEST STANDARDS used in assessing use of high school graduation test).

<sup>80</sup> JOINT COMMITTEE ON STANDARDS FOR EDUCATIONAL EVALUATION, THE PERSONNEL EVALUATION STANDARDS (1988); JOINT COMMITTEE ON STANDARDS FOR EDUCATIONAL EVALUATION, THE PROGRAM EVALUATION STANDARDS (2d ed. 1994); JOINT COMMITTEE ON STANDARDS FOR EDUCATIONAL EVALUATION, THE STUDENT EVALUATION STANDARDS (2003).

<sup>81</sup> 20 U.S.C. § 6311 (2011).

<sup>82</sup> TEST STANDARDS, *supra* note 65, at standards 13.6, 13.7.

<sup>83</sup> *Id.* at 9.

test use for high-stakes decisions must, according to the Test Standards, include analysis of empirical evidence of the intended and unintended consequences of test use.<sup>84</sup> The validity of inferences from test scores on all versions of tests, accommodated tests and alternate assessments needs more attention as an issue of research and public reporting for policymakers and families. Part of the difficulty in the testing of SWD has been the challenge of understanding the underlying constructs of content and performance standards. This is an issue for all students, not just SWD, and is particularly important in reference to reading and language arts, where there is often a failure to define with clarity the constructs being utilized.

Anecdotal reports indicate that the peer review process reviewing state plans for implementation required to receive funding under NCLB has had a salutary impact on testing practices. However, the “negotiated” understandings between USDOE and individual states before federal funds are awarded to states or schools represent considerable variation.<sup>85</sup> The results of peer reviews of state programs, as well as the final agreements between the USDOE and each state, need to be more transparent and research on the consequences of these actions needs to be ensured.

### State Variations in the Use of Test Results

Until they began to embrace the common core curriculum standards, states have varied in not only the content standards they use, the tests they employ, the scoring criteria and proficiency standards they set for scoring tests, but also in the decision rules they utilize to define participation and to compute AYP data as well as to aggregate and disaggregate data for subgroups like SWD, as required by NCLB.<sup>86</sup> Common core standards are not guaranteed to ameliorate these problems unless state assessment systems are appropriately reformulated.<sup>87</sup>

State and local school districts also vary how they utilized NCLB-required tests for other purposes. Some states use NCLB tests to determine high school exit,<sup>88</sup> others for determining educator quality.<sup>89</sup> Even in the face of significant concern from many social scientists who cite the lack of scientific justification for such approaches,<sup>90</sup> there presently seems to be a groundswell of support for the use of student test scores to make determinations about educator success levels.<sup>91</sup> This might include how to appropriately determine their salaries and bonuses, or, conversely, if their

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<sup>84</sup> *Id.* at standard 1.24.

<sup>85</sup> SUSAN L. DAVIS & CHAD W. BUCKENDAHL, BUROS CENTER FOR TESTING, EVALUATING NCLB'S PEER REVIEW PROCESS: A COMPARISON OF STATE COMPLIANCE DECISIONS (2007).

<sup>86</sup> 20 U.S.C. § 6311(b)(3)(C)(ix)(II) (2011).

<sup>87</sup> NATIONAL RESEARCH COUNCIL, *supra* note 12.

<sup>88</sup> CENTER FOR EDUCATION POLICY (2004), *supra* note 16. The federal courts have established a requirement under the Fourteenth Amendment to ensure that all students are required to receive a fundamentally fair opportunity to be taught what is covered on a test required for exit from high school and the receipt of a high school diploma. *See Debra P. v. Turlington*, 730 F. 2d 1405 (11th Cir. 1984); *Brookhart v. Illinois State Dep't of Educ.* 697 F. 2d 179 (7th Cir. 1983). *See also* NATIONAL RESEARCH COUNCIL, *supra* note 13.

<sup>89</sup> The IDEA has a similar requirement. *See* 20 U.S.C. § 1412(a)(6)(B) (2011).

<sup>90</sup> EVA L. BAKER, PAUL E. BARTON, ET. AL., ECONOMIC POLICY INSTITUTE, PROBLEMS WITH THE USE OF STUDENT TEST SCORES TO EVALUATE TEACHERS, ECONOMIC POLICY INSTITUTE (2010), *available at* <http://www.epi.org/publications/entry/bp278>.

<sup>91</sup> The release of U.S. Department of Education funds through the American Recovery and Reinvestment Act was based upon Race to the Top themes as articulated in regulations for fund awards at 74 Fed. Reg. 59,688, 59,835 (Nov. 18, 2009). Included was a criterion for rating competitive applications that privileges states that use evidence of student attainment in evaluating teacher quality. 74 Fed. Reg. 59,688, 59,821, Criterion (D)(2).

employment should be terminated.<sup>92</sup> The addition of these high stakes consequences to the assessment system creates the need for higher levels of adherence to the Test Standards and more mechanisms for insuring fair treatment for students.

### What the Legal Protections in the Education of SWD Might Suggest for the Rest of the Student Population

In many respects, a number of the issues highlighted above will be the same, whether there are common core standards or not. And, given the very blurry line between classification of SWD and non-SWD, there is much in common here between SWD and more typical students. In some ways, the approaches in the high stakes testing context of NCLB to the education of SWD afford new insights for the education of all children.

More approaches to universal design and accessible testing in the assessment of SWD are currently being developed.<sup>93</sup> These approaches, called for in the 2004 re-authorization of the Individuals with Disabilities Education Act,<sup>94</sup> might encourage efforts such as un-timed testing, which is used in states such as Massachusetts, as well as additional creative approaches. As an example, un-timed testing entirely eliminates the need for one of the most common types of accommodation. In addition, approaches to more accessible testing would aid all students in representing what they know and are able to do.

While there are many, many problems with our system of special education, legal mandates for SWD have created a structure for education that creates a desirable individualization of educational decision making, structuring of learning opportunities, enhancement of parent participation, and sometimes innovative assessment practices. The current special education system has the benefit of attempting to target services and individualized attention to students in need. Under IDEA as well as Section 504 and ADA, there is a structure for individually-targeted education and a set of processes to which other students do not generally have access. Additionally, collaborative approaches to teaching and learning are increasingly seen as fundamental to the delivery of meaningful educational opportunities to SWD. For the student who is not classified with a disability, these approaches are not mandated by federal law. The recent call for “personalization” of instruction for all students<sup>95</sup> is a critical consideration in any revision of NCLB and suggests the need to pay closer attention to how all students might benefit from some of the provisions governing the education of students with disabilities.

Like the procedural protections for SWD in IDEA and Section 504, there is a need for more mechanisms to insure fairness in the treatment of individual students. In Massachusetts, for example, where the NCLB test is also a high school graduation test, for a time the state utilized a mechanism for taking multiple sources of information into account to determine high school graduation in addition to performance on the state test.<sup>96</sup> For the high school graduating classes of 2003 and 2004, about two percent of the students were deemed proficient not on the basis of the

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<sup>92</sup> *Id.*

<sup>93</sup> See generally National Center On Universal Design for Learning, <http://www.udlcenter.org>.

<sup>94</sup> 20 U.S.C. § 1411(e)(2)(C)(v) (2004).

<sup>95</sup> See discussion accompanying note 14, *supra*.

<sup>96</sup> MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, MCAS PERFORMANCE APPEALS (2004).

general assessment test but through “performance appeals.”<sup>97</sup> For students who continued to fail the state graduation test, test scores could be offset with other indicia of student success (portfolios, course completions, cohort comparisons) sufficient to justify the award of a high school diploma.<sup>98</sup>

Some states and local schools are also taking more individualized approaches to addressing the needs of their students, particularly in the context of high school graduation testing.<sup>99</sup> Massachusetts, for example, has utilized “individual student success plans” (ISSP) and “educational proficiency plans” (EPP) for students (with or without disabilities) who are not performing well enough on the state test to qualify for a high school diploma.<sup>100</sup> These plans call on local educators, in consultation with parents and the student, to set forth approaches to attain competence to meet state curriculum standards and the use of assessment data other than the state NCLB/graduation test.<sup>101</sup>

The Massachusetts examples and the recent implementation of response to intervention (RTI) to try to reduce special education placements, as required in IDEA 2004, suggest that schools can be organized to attend to an individualized, context-driven delivery of education; including responses to individual intervention that could keep a child from being labeled with a disability. The disability label has many potential stigmatizing effects associated with it; and many special education programs can be dead ends in which adequate education is far from attainable. Yet the special education system, at its best, the system contemplated by a statute like IDEA, is data-driven, focuses on the specific learning needs of individuals, provides guidance to educators acting collaboratively on the basis of evidence about an individual student to address the individualized needs of learners, and considers the contexts of learning. It provides mechanisms to encourage parent involvement, includes a chance for external scrutiny of the decisions made about a child, and encourages the use of assessment to insure not only individual but institutional accountability. Under appropriate conditions, it is also capability of creating the opportunity for higher standards of learning and attainment.

### Conclusion

The impending re-authorization of the Elementary and Secondary Education Act, as well as that of the Individuals with Disabilities Education Act (whether or not these occur simultaneously, which is a possibility under discussion), will require some difficult choices from Congress and the Obama Administration. Paramount in importance is clear attention to the overriding goal, which is not assessment for accountability, but instead the promotion of better learning and the acquisition of important capabilities for 21<sup>st</sup> century productivity and citizenship. The gathering evidence makes clear that the assessment system embedded in NCLB has allowed the tests to drive what goes on in many classrooms, but that what is going on there is not what many of us would want for our own children.

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<sup>97</sup> *Id.*

<sup>98</sup> MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, INDIVIDUAL STUDENT SUCCESS PLANS (2004).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

What might Congress take into account as it revises ESEA to improve learning opportunities for all students? Recently, an interdisciplinary group of senior social science scholars working under the sponsorship of the Spencer Foundation synthesized the literature and derived a set of principles for meaningful opportunity to learn and assess.<sup>102</sup> They remind us that every student

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<sup>102</sup> MOSS, ET AL., *supra* note 24, at 345-48.

“The goal of schools is to enable every student to develop the capabilities to effectively participate as a life-long learner in the practices of modern society. The goal of assessment is to provide useful information to enhance educational opportunity for each and every student, to inform decisions about what will be needed to optimize the learning trajectories for each and every student. The relationship among assessment, learning, and OTL is far more complex than contemporary educational policy, and much of educational practice, currently acknowledge . . . fundamental principles should drive all considerations of assessment, learning, and the provision of meaningful opportunity to learn for *all* students. Every student has the right to a meaningful opportunity to learn and to be assessed fairly and in a way that supports his/her further accomplishments and development. Students must have effective access to appropriate resources such as well-prepared teachers, well-designed curricula, appropriate class size, sufficient and current lab equipment, books, technology, as well as comfortable and safe facilities. Students should be offered education in schools adhering to high standards and academic rigor with sufficient depth and breadth of coverage of the concepts, content, skills, and understandings in the intended curriculum. Classrooms must offer learners not just the same “content”, but must strive to equalize affordances for action, participation, and learning through adaptive approaches to instruction for each learner. Since comprehension requires the ability to simulate relevant experiences in the mind, in order to receive an adequate education, all learners must be offered the range of necessary experiences with which they can build good and useful simulations to tap what is really necessary for deep understanding in the content areas (e.g., science, math, social studies, history). Learning for humans is mediated by “smart tools”, that is representations, technologies, and other people networked into knowledge systems. Thus, learners must be offered equal access to such smart tools. Learning takes place within activity systems, systems that, in school, should be a form of a community of practice. Thus, we must consider more than the information to which the learner has been exposed. All the other elements in the system need to count, as well, including access to the forms of participations and social interaction that make one an agent and knower in the system. Content learning in school requires learning new forms of language and the identities, values, content, and characteristic activities connected to these forms of language (e.g., the language of literary criticism or of experimental biology). Every learner has the right for these “new cultures” to be introduced in ways that respect and build on the learner’s other cultures and indigenous knowledge, including his or her home-based vernacular culture and peer-based and “popular culture” cultures (“Discourses”). Students should receive academic and social supports differentiated to address their individual strengths and needs as learners. Students should participate in instruction organized in ways that build upon the cultural capital and forms of prior knowledge they construct from their experiences outside of school and across their years of schooling. Students should routinely experience instruction that provides them with opportunities to participate in meaningful activities based upon models of expertise, expert problem solving, and in-time feedback on the progress of their learning in ways that are usable and motivating and empower them to construct identities and skills that allow them to participate effectively in school and across a variety of out-of-school settings. Students should have experience, within disciplines and across their years of schooling, with rigorous instruction that focuses on powerful and generative topics, concepts and problem-solving strategies in ways that help them make sense of how their learning is useful in the world. Parents should have access to timely, useful, and credible information about their children’s education, what is required for their children to successfully participate in school, and what parental supports and forms of participation are required for educational success. Schools should act in a deliberate, intensive, and explicit fashion to generate and socialization process and access to resources, such as digital technology, for students whose

should have the right to a meaningful opportunity to learn and to be assessed fairly and in a way that supports his/her further accomplishments and development. Every student should receive academic and social supports differentiated to address their individual strengths and needs as learners. The goal of assessment in this system should be to provide useful information to aid decisions about how to optimize learning opportunities for each student. Their recommendations reflect the rich and complex findings that the research evidence has provided about how to enhance educational opportunities, particularly for the most vulnerable students. The future versions of the ESEA and the IDEA should take into account these types of research-based findings on how to improve learning opportunities.

As eminent education scholar Lorrie Shepard argues, the current provisions of NCLB are based upon an implicit theory of learning that mandated external accountability and clear expectations for schools that motivates educators and their students to be better will work.<sup>103</sup> However, she and other scholars note that the current law does little to enhance the capacity of schools to improve themselves.<sup>104</sup> Our low levels of performance, particularly in comparison to other nations, and the large gap in attainment among different groups of our students prove that the

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parents are unable to provide these supports. Educators and policy-makers at all levels of the educational system should have access to timely, useful and credible information about learners' and organizations' trajectories of progress. They should use this evidence to guide effective practice and to facilitate learning for their students, for other actors in the educational system, and for themselves. Educators should themselves have meaningful opportunities to learn, to create learning communities and principles of practice to create knowledge for teaching and to facilitate opportunities to learn for all students. Schools, other social organizations, and communities should cultivate relationships to enhance the variety and quality of opportunities for learning outside school and to support the transitions between in-school and less formal learning opportunities. Because assessment practices shape people's understanding about what is important to learn, what learning is and how it occurs, and who learners are, educators, policy-makers, parents, and the public must more explicitly consider the relationships among assessment, learning, and opportunity to learn in making individual and public policy choices about schools and schooling. Assessment practices must be fully and purposefully integrated as formative activities within well-designed learning activity systems to both test conceptual understanding, to inform which steps to take next to enhance the progression of learning, and to allow students to apply their knowledge in meaningful ways. Assessments should provide information to understand the relationship among resources and learning and the interactive processes (among learners, tools, curricula, and other people) through which learning evolved, or failed to evolve, over time. Assessments should illuminate both the depth of a learner's conceptual understanding and the individual's progress in a meaningful trajectory of learning. All assessment practices, including large-scale documentary assessments, need to be interpreted in light of other relevant evidence about a student or group of students. The field of education has far to go to truly provide meaningful opportunity to learn to all students. Education professionals, particularly members of the research community, must play a more successful role in studying these issues and in informing the profession, the policy community and the public about the appropriate relationships between assessment, learning, and opportunity to learn. Education policy-makers should themselves have opportunities to learn about more meaningful and appropriate uses of assessments, how students learn, and the limitations and misuses of current approaches to assessment. These new forms of assessment should be the policy tools of the future to create the educational structures required to facilitate system-wide change. . . ."

<sup>103</sup> NATIONAL RESEARCH COUNCIL, *supra* note 12, at 105-107.

<sup>104</sup> *Id.*

current system is not working well. Our schools will only raise test scores by attending to the needs of every student. What really counts is improving learning.

There is only one way to improve the overall educational attainment of our youth: student by student. Social science tells us more about how to offer effective educational opportunities than the current version of NCLB requires. A revision of the law that pays greater attention to the individual needs of all learners as well as the contexts of schools and the real capacity of educators to teach more effectively would offer better chances to get to the core of the problem of education reform: the need to insure that *every* child has a meaningful opportunity to learn important knowledge and capabilities.