



A not-for-profit organization dedicated to services and projects that work to improve the lives of children, youth and adults with disabilities

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September 6, 2017

Ira Schwartz
Assistant Commissioner
Office of Accountability
55 Hanson Place, Room 400
Brooklyn, NY 11217

Transmitted via email to ESSAComments@nysed.gov

RE: NYSED request for a waiver of Statutory Requirements of the Elementary and Secondary Education Act.

The Advocacy Institute appreciates the opportunity to submit comments regarding the draft NYSED waiver request for off grade testing of students with disabilities.

The New York State Dept. of Education (NYSED) waiver request undermines the purpose of the Every Student Succeeds Act (ESSA) which is intended “to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”

The New York State Board of Regents should reject this proposal and direct NYSED to adhere to the statutory and regulatory provisions of ESSA regarding the assessment of students with disabilities. The Board of Regents should also recognize that a similar request was made under NYSED’s ESEA Flexibility waiver and rejected by the U.S. Dept. of Education (ED) in 2015 (see [June 2015 - New York Waiver Request Response](#)). The reasons for that rejection remain unchanged.

This request is without merit for a number of reasons. Among these are:

VIOLATION OF ESEA ASSESSMENT REGULATIONS.

ESSA and its [federal assessment regulations](#) effective January 9, 2017 have not altered the requirement under the No Child Left Behind Act (NCLB) that all students are to be instructed and assessed on the grade level academic standards. Under ESSA, there are only two possible state assessments—the general assessment and the alternate assessment aligned with the challenging State academic standards. Although the alternate assessment is based on alternate academic achievement standards, these achievement standards must be based on the grade level academic content standards. In other words, although the expectations for achievement are different, the content is still from the grade in which the student is enrolled. Since below grade level assessments are not permitted for students who take an alternate assessment, there is no valid rationale for offering below grade level assessments to students with disabilities who take the general assessment. The federal assessment regulations clearly express the importance of aligning assessment and instruction to the grade in which the student is enrolled:

§ 200.6 Inclusion of all students.

(a) Students with disabilities in general.

(1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

(i) All children with disabilities as defined under section 602(3) of the IDEA;

(ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and

(iii) Students with disabilities covered under other acts, including—

(A) Section 504 of the Rehabilitation Act of 1973, as amended; and

(B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—

(A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

This federal regulation was the product of a negotiated rule-making process. There was consensus among the stakeholders that this language, which is consistent with the statutory language enacted by Congress, further clarifies that no assessment may be based on below grade level content, was important enough to be included.

DISCRIMINATION

Other student subgroups include high percentages of students who are performing poorly (Level I), but NYSED is not requesting a waiver to assess these students with “instructional” level assessments. For example, while 61% of students with disabilities scored at Level 1 in ELA in 2016-2017, 68% of English Learners, 35% of Black students and 34% of Hispanic students scored at that level. In Math, while 65% of students with disabilities scored at Level 1, 62% of English Learners, 46% of Black students, 41% of Hispanic students, and 40% of Economically Disadvantaged Students scored at Level 1 (Source: <https://data.nysed.gov/>.)

What is to be learned from assessments based on below grade than on current grade level? There is nothing to prevent teachers from assessing student learning in multiple ways (formative assessments, etc.) throughout the school year. In fact, the draft waiver request’s suggested guideline #5 for determining a student’s eligibility for the off grade testing states that the student has “Over an at-least two-year period have received multiple, formal assessments of student progress during instruction (such as benchmark assessments, progress monitoring assessments, and/or standardized norm-referenced tests of achievement) that substantiated the students’ instructional level of performance and that demonstrated that the students’ lags in achievement are not due to lack of appropriate instruction in reading or mathematics.” These types of ongoing assessments provide robust information to accurately measure student achievement for use in making instructional decisions.

Further, informing instruction is not the primary purpose of the assessments required by ESSA. Such assessments are intended to hold schools accountable to the student and his/her parents regarding learning what is expected of all students enrolled in the same grade level.

Focusing only on a subset of students with disabilities unjustly discriminates against this group. It also likely violates these students’ rights under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) since it deprives these students with disabilities equal educational opportunities and benefits as those available to non-disabled students.

SEGREGATION & DISPROPORTIONALITY

NYSED data (see table below) regarding the educational environments of students with disabilities in the state indicate a high degree of segregation compared to the nation. This high level of segregation is particularly prominent among students whose disability category would make them most likely to be affected by the proposed waiver, particularly students with an Intellectual disability and Multiple disabilities. This segregation is likely leading to a lack of access to the general education curriculum and a lack of appropriate instruction which would disqualify a student from meeting the proposed criteria and guidelines for the “instructional level” assessments that NYSED is requesting a waiver to use (e.g., there must be an assurance that “the students are provided instruction with their chronological grade-level peers by appropriately certified teachers”.) Data also indicates disproportionality in the percentage of Black students identified for IDEA services in the Intellectual Disability category (29.3% of ID

students are Black vs. 18.2% of all students in NY). Therefore, these students are likely overrepresented in segregated classrooms and will also likely be overrepresented in the “instructional level” assessments proposed by NYSED.

EDUCATIONAL ENVIRONMENTS, AGES 6 THROUGH 21

Percent of Time Spent Inside the Regular Classroom

Disability Category	≥ 80% of Day State (%)	≥ 80% of Day Nation (%)	40 to 79% of Day State (%)	40 to 79% of Day Nation (%)	< 40% of Day State (%)	< 40% of Day Nation (%)	Separate School or Residential Facility State (%)	Separate School or Residential Facility Nation (%)
All disabilities	57.8	62.6	11.7	18.6	19.8	13.4	5.8	3.2
Autism	25.4	39.9	9.2	18.0	44.0	32.8	19.9	7.8
Deaf-blindness	16.7	23.2	5.6	13.4	27.8	34.4	38.9	25.3
Emotional disturbance	31.1	46.2	11.1	17.6	30.3	18.8	23.4	14.6
Hearing impairment	56.7	60.2	7.7	15.5	11.2	11.6	17.2	10.9
Intellectual disability	6.0	16.9	15.7	26.3	56.1	49.2	21.4	6.6
Multiple disabilities	8.2	13.4	14.0	16.4	45.4	46.0	28.7	20.2
Orthopedic impairment	64.2	54.5	7.0	15.9	11.2	21.8	8.7	4.4
Other health impairment	64.0	65.4	13.1	21.0	14.9	9.3	2.7	1.9
Specific learning disabilities	69.2	69.2	13.7	23.0	11.9	5.8	0.8	0.5
Speech or language impairment	65.7	86.8	7.5	5.1	18.4	4.3	1.2	0.3
Traumatic brain injury	39.5	49.9	21.0	22.2	24.0	19.6	9.6	5.6
Visual impairment	57.1	66.3	9.0	12.3	9.4	10.3	19.6	8.9

Source: New York Part B 2017 Data Display retrieved from osep.grads360.org

LACK OF TRANSPARENCY

The NYSED testing proposal will result in masking the students who would be assessed in this below-grade manner. Both ESSA and IDEA require states to report on the number and percentage of students with disabilities who are assessed on the general state assessment (with or without accommodations) and the alternate assessment on alternate achievement standards. There is no reporting requirement for students with disabilities tested on an assessment for a lower grade. Thus, NYSED will not “maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 1111(b)(2)(B)(xi)” as required by ESSA section 8401 (b)(1)(F).

We urge NYSED to invest in robust, high-quality teacher professional learning, in technical assistance to school teams on moving toward including more students with disabilities in the regular education classroom and providing the specialized instruction, intervention and support that students need to achieve with their peers.

Sincerely,

A handwritten signature in black ink that reads "Candace Cortiella". The script is fluid and cursive, with the first letters of each word being capitalized and larger than the rest of the letters.

Candace Cortiella

Director

candace@advocacyinstitute.org