



January 27, 2014

John King  
Commissioner of Education  
89 Washington Ave., Room 111  
Albany, NY 12344

Members of the Board of Regents  
New York State Education Department  
Board of Regents, Room 110 EB  
89 Washington Ave., Room 111  
Albany, NY 12344

Dear Members of the Board of Regents and Commissioner King:

On behalf of the millions of students with disabilities, low-income students, students of color, English language learners, and the children of migrant workers — all boys and girls who, through education, are working to build bright futures — civil rights, disability, business, and education communities write to express our concerns about the New York State Department of Education’s (NYSED) proposed amendment to its waiver renewal under The Elementary and Secondary Education Act (ESEA). As currently structured, we cannot support the proposal and request a meeting with Commissioner King to discuss our concerns.

The proposal developed by NYSED – to “allow districts to administer the State assessments at the students’ instructional grade levels as opposed to their chronological grade levels” (a practice known as “out of level” testing) – does not comply with ESEA Flexibility or federal law. In fact, the implementing regulations of ESEA, which remain intact under ESEA waivers, state:

“One of the bedrock principles of the NCLB Act is that all students can learn to high standards. As a result, section 1111(b)(1) requires challenging academic content and student achievement standards that a State applies to all schools and students in the State. Similarly, section 1111(b)(3) requires a State to develop aligned assessments that the State uses to measure the achievement of all students. These requirements are accurately implemented in Secs. 200.2(b)(1) and 200.6(a) of the final regulations. Specifically, as Sec. 200.6(a)(1) indicates, a State's assessment system must provide accommodations so that a student with disabilities or a student covered under Section 504 of the Rehabilitation Act of 1973 can be held to the content and achievement standards for the grade in which the student is enrolled. Although "out-of-level"

tests, for example, may provide instructional information about a student's progress, they are not an acceptable means to meet the State's assessment requirements under Secs. 200.2 and 200.6 or the accountability requirements of the NCLB Act.” (34 CFR Part 200, Final Regulations for Standards and Assessments, issued July 2002)

By proposing to test students out of grade level, NYSED not only lowers expectations for students but also creates an untenable and severely flawed data system. Within one year, the grade level data for students at all levels (subgroup, school, district, state) will be so severely compromised and unreliable that the public will never truly know how students with disabilities are performing for accountability purposes. This weakened accountability measurement creates real barriers to accurate data which will lead to flawed decision making impacting instruction, teacher training, IDEA referrals/evaluation and funding. In short, it jeopardizes student success.

Additionally, we are concerned with what appears to be NYSED’s creation of a new category of students with disabilities, “students with significant cognitive disabilities who are not eligible for the alternate assessment.” This term does not exist under state or federal law. It is also not defined in the proposal and what is even more troubling is that the proposal indicates the NYSED will merely issue “guidance” to districts on how to implement this proposal.

In addition, it may permanently condemn these students to underachievement, despite their capabilities. Without stringent accountability structures, under this proposal, any student identified under this new classification is at risk of never being taught to grade level. Thus, significantly threatening their ability to achieve grade level success and graduate with a regular diploma. The students we represent cannot withstand the risk of a return to old habits – through the use of out of level testing. We know that in the past this only led to states lowering standards and abandoning children deemed too difficult or inconsequential to educate. This proposal would invite the same result.

NYSED’s proposal is extremely concerning to us, particularly the proposal’s failure to align with federal law. We would like to meet with Commissioner King to share our concerns and reasons for being unable to support this proposal, and to determine if there might be a way to work together under existing federal and state law.

Thank you for considering our concerns, and we look forward to your response.

Sincerely,

Council of Parent Attorneys and Advocates  
Democrats for Education Reform  
Disability Rights Education and Defense Fund  
National Center for Learning Disabilities  
National Council of La Raza  
National Federation for the Blind