



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

January 24, 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

**Re: Public Comments on the New York State Department of Education waiver renewal amendment under the Elementary and Secondary Education Act**

Dear Commissioner King and Members of the Board of Regents:

As members of the Consortium for Citizens with Disabilities Education Task Force (CCD), a coalition of more than 100 organizations speaking on behalf of our nation's six million students with disabilities, we write today to oppose the New York State Department of Education (NYSED) proposed amendment contained in its application for extension of its waiver under the Elementary and Secondary Education Act (ESEA) regarding the testing requirements for students eligible under the Individuals with Disabilities Education Act (IDEA).

The NYSED proposal regarding students with disabilities (Amendment 1) is extremely troubling and shows a complete lack of regard and understanding for the instructional and assessment needs of the nearly 400,000 IDEA eligible students receiving special education in New York.

CCD has a longstanding history of working with the U.S. Department of Education (USED) to ensure, among other policy priorities, that the ESEA Flexibility process does not weaken ESEA's requirement to include all students in statewide assessment and accountability systems and/or undermine the civil rights afforded IDEA-eligible students. Therefore, on behalf of the students we represent and because of the dangerous implications the NYSED proposal could have [if approved] on including students in both assessments and general education, we oppose the NYSED proposal for the following reasons:

**I. The proposal directly conflicts with federal law**

Students with disabilities are general education students first. Whether they receive special education or related services under IDEA or accommodations under Section 504

of the Rehabilitation Act of 1973, all students are entitled to receive an appropriate education from the public school system. ESEA [and any revisions or updates to it] must continue to work in conjunction with IDEA to promote a learning environment in which all children are given the opportunity to become proficient on grade-level content standards.

As part of the ESEA Flexibility waiver process, states were required to assure USED that they would:

- Include students with disabilities in state assessments (20 U.S.C. § 6311(b)(3)(A), (C)(v)); and,
- Develop and administer alternate assessments based on grade-level academic achievement standards or alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities that are consistent with 34 C.F.R. § 200.6(a)(2) and are aligned with the State's college- and career-ready standards. ( ESEA Flexibility Request form, September 23, 2011)

NYSED is complying with this ESEA flexibility requirement through its commitment to adopt and administer the general assessment via the Partnership for Assessment of Readiness for College and Careers (PARCC) as well as alignment with the National Center and State Collaborative Project to develop the alternate assessment based on alternate academic achievement standards. The assessments being developed by these two consortia provide adequate flexibility for testing students with disabilities and align to current ESEA regulations regarding assessment and accountability.

## **II. The proposal violates the civil rights of students with disabilities and their educational opportunity to achieve meaningful outcomes**

NYSED proposes to “allow districts to administer the state assessments at the students’ instructional grade levels as opposed to their chronological grade levels”; and, the proposal also creates an arbitrary category of students...“students with significant cognitive disabilities that are ineligible for the state’s alternate assessment.”

CCD has consistently supported current ESEA law and implementing regulations, which prohibit the use of ‘out-of-level testing’ for any student for accountability purposes. Out-of-level testing (specifically, as proposed by NYSED, below-grade level testing) sets lower expectations for students and takes them off track to graduate with a regular diploma. It also denies students the ability to learn alongside their peers and achieve meaningful academic outcomes. NYSED’s lack of acknowledgment or understanding of how below-grade level testing directly affects participation of students with disabilities in state assessments and access to general education altogether is troubling.

The right of students with disabilities to participate in state assessments is grounded in the Section 504 of the Rehabilitation Act of 1973 and its implementing regulations, which prohibit discrimination and the denial of comparable aids, benefits, and services (34 C.F.R. §104.4(b)(1)(i)-(iii)). In order for aids, benefits, and services to be “equally effective,” they must provide “an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement” (34 C.F.R. § 104.4(b)(2)).

Additionally, as it states in ESEA regulation "...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).

Consistent with the principles that we advocate for on the federal level, CCD urges NYSED to examine how it identifies and serves struggling learners in schools and districts. These students – who may be performing below proficient levels on state assessments in Reading and Math and who may have a disability – should be identified early and should receive targeted instruction or intervention. Targeted instruction and intervention through a research-based multi-tier system of supports (e.g. response to intervention and positive behavior support) have demonstrated their effectiveness in assisting struggling learners, creating a positive school climate that leads to better outcomes for students. The implementation of universal design for learning (UDL) to address physical and cognitive barriers in instruction and assessment will enhance the benefit of targeted instruction and intervention for all students. Assessments must also be designed and implemented – utilizing the principles of universal design –to ensure that all students can accurately demonstrate their academic knowledge and skills.

In conclusion, CCD urges the Board of Regents to direct NYSED to remove Amendment 1 from its proposal application for an ESEA waiver extension. Furthermore, the Board of Regents should require NYSED to reaffirm its commitment to adhere to existing regulations regarding the testing of students with disabilities.

Sincerely,

Autism National Committee  
Conference of Educational Administrators of Schools and Programs for the Deaf  
Council of Parent Attorneys and Advocates  
Disability Rights Education and Defense Fund  
Easter Seals  
National Center for Learning Disabilities  
National Disability Rights Network  
National Down Syndrome Society  
The Advocacy Institute  
The Arc  
United Cerebral Palsy

The Consortium for Citizens with Disabilities is a coalition national consumer, advocacy, provider and professional organizations headquartered in Washington, D.C. Since 1973, the CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families. CCD has worked to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into the mainstream of society. For additional information, please contact:

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