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January 27, 2014

New York State Education Department  
Board of Regents, Room 110 EB  
John King, Commissioner of Education, Room 111  
89 Washington Avenue  
Albany, NY 12344

Re: Public Comment on Amendment 1 (Regarding Testing Requirements for Students with Disabilities) to New York State's ESEA Flexibility Waiver for 2014–2015

Dear Members of the Board of Regents and Commissioner King:

Everyone Reading, Inc. writes to express its strong opposition to the New York State Education Department's (NYSED) proposed Amendment 1 to its Early and Secondary Education Act (ESEA) Flexibility Waiver. We request that NYSED consider our comments and strongly urge it to strike Amendment 1 from its Renewal application.<sup>1</sup>

Everyone Reading, Inc. is a not-for-profit organization that advances the lives of children and adults with dyslexia and related learning disabilities. For more than forty years, Everyone Reading has provided quality professional development to educators and administrators to help them implement research-based interventions to address the needs of students who face moderate through significant difficulties mastering the basic and higher-level literacy skills that are critical to academic success. To that end, Everyone Reading advocates to improve educational systems and outcomes for the one in six people with average to above-average intelligence that have dyslexia and related learning disabilities. Everyone Reading is a recognized resource for parents, adults, and professionals seeking guidance and supports in connection with dyslexia and related learning disabilities.

Everyone Reading stands with our colleagues, such as the Advocacy Institute, the Council of Parent Attorneys and Advocates, and the National Center for Learning Disabilities, in opposing Amendment 1. While Everyone Reading acknowledges the anxiety and difficulties that students experience studying for and taking the tests mandated by the ESEA, as well as their

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<sup>1</sup> We take no position as to Amendments 2 through 6; no endorsements of these Amendments is implied.

inappropriateness for many students with disabilities, we oppose the proposed amendment for the following reasons:

### **I. The Proposed Waiver Does Not Comply with Federally Mandated Requirements.**

Last year, the U.S. Department of Education (USED) agreed to give the New York State Education Department (NYSED) the ability to waive some provisions of the ESEA due to the inaction of Congress to update the law, and because NYSED had previously given assurances to the USED that it would “develop and administer no later than the 2014–2015 school year 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 . . . and are aligned with the State’s college- and career-ready standards.” NYSED received its initial ESEA Flexibility approval based at least in part on this representation. We believe that NYSED should not renege on this commitment and must comply with these federally mandated testing obligations.

### **II. The Proposed Amendment Violates the Rights that Various Federal, State, and Local Laws Guarantee Students with Disabilities.**

This proposal violates the rights that students with disabilities are guaranteed under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act of 1990 (ADA), as well as the New York State Human Rights Law and the New York City Human Rights Law. These laws mandate that students with disabilities have an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as other students. By denying “students with significant cognitive disabilities” the equal opportunity to achieve on the general grade level assessments and gain the benefit of doing so, NYSED would be denying the students their guaranteed rights.

### **III. The Proposed Amendment Singles Out Students with Disabilities for Unequal Treatment.**

There may be many students *without* “significant cognitive disabilities who cannot demonstrate what they know and can do on the general grade level assessments.” NYSED however is not proposing to apply for a waiver to administer “out-of-grade” assessments to these many other students. The proposed amendment singles out students with disabilities for unequal treatment. Furthermore, NYSED knows that its proposal will disproportionately affect black and Latino children, especially boys, in New York’s urban districts. This unequal treatment would further compound any negative effects that race and socioeconomic status have on these students’ educational outcomes. This proposal is also reminiscent of the out-of-level testing that was used in the South during the Jim Crow era to depress the opportunities of black children. It has no place in 21st century New York.

#### **IV. The Proposed Amendment Lowers Standards and Expectations for Students with Disabilities.**

NYSED's proposal fuels the stereotype that students with disabilities cannot achieve. By allowing administrators, teachers, other school staff, other students, and the affected students themselves to lower their standards and expect less, such students will be denied the supports and services to which they are entitled and an equal opportunity to access the curriculum and to learn. *In addition, students who take such out-of-grade (a/k/a "alternative") assessments would be ineligible to graduate with a high school diploma.*

#### **V. The Proposed Amendment Creates a New Category of Students that Is Not Defined in Any Law.**

NYSED proposes to "assess students with significant cognitive disabilities (who are ineligible for the New York State Alternate Assessment) based on their instructional level rather than their chronological age" starting in the 2014-2015 school year. This is not a term or category of students that is defined by any federal, state, or local law.<sup>2</sup> Furthermore, NYSED has not indicated what criteria, if any, it would use to identify these children. It has indicated vaguely that these are students who "cannot demonstrate what they know and can do on the general grade assessments, even with accommodations . . . and are not likely to reach grade-level achievement in the time frame covered by their individualized education programs (IEPs)." Although NYSED proposes to create a student profile that identifies a student as having "autism, intellectual disability, traumatic brain injuries, neurodegenerative diseases or severe learning disabilities," it does not indicate by what criteria it will have determined them to fit into this newly fashioned and highly idiosyncratic category.

#### **VI. The Proposed Amendment Would Allow New York's School Districts to Report Inaccurate Data.**

By "allow[ing] the proficient and advanced scores of those students assessed in accordance with their instructional grade levels [to] be used for accountability purposes," NYSED would be inaccurately representing students' proficiency and falsely making "Adequate Yearly Progress." For example, a sixth grade student with such disabilities could be given the much easier fourth grade test. The proficient and advanced score of such a student would be counted towards the fourth grade "Performance Index." This would render the data for both fourth and sixth grades inaccurate and inflated — the fourth grade data because sixth graders are also taking the test, and the sixth grade data because such assertedly underachieving students are no longer taking the sixth grade test. This data impacts the manner in which educational resources are allocated, furthering the harm to these students by denying them ongoing supports and services to which they are entitled and with which many can achieve grade level work.

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<sup>2</sup> ESEA distinctly prohibits the use of "out-of-level" testing as part of state assessments. 34 CFR Part 200, Final Regulations for Standards and Assessments.

## **VII. The New York State Education Department's Consultation with Stakeholders Was Inadequate.**

NYSED's consultation with stakeholders in drafting its Waiver Renewal Application and the related amendments, including Amendment 1, was inadequate because of its failure to truly consult with the disability advocacy community. By reaching out to stakeholders who are not representative of the community and who did not give voice to community members' concerns, NYSED's drafting of Amendment 1 occurred without the public's or the disability advocacy community's awareness and feedback.

Further compounding the lack of transparency and integrity around NYSED's drafting of this amendment, NYSED gave the public insufficient time to comment on it. NYSED issued its draft Renewal Application for public comment from January 16 to January 27, 2014. Because January 16 was a Thursday and January 27 a Monday, two weekends fell in between this period, including a long weekend for Martin Luther King's birthday. The public therefore only had seven business days to comment. Practically, the public's time to comment was further limited to five days by the winter storm that swept the East Coast from Tuesday, January 20 through Wednesday, January 21.

Everyone Reading therefore strongly urges the Board of Regents to strike NYSED's proposed Amendment 1 from its ESEA Flexibility Waiver Renewal application. Instead of amending the federal testing requirements for students with disabilities, NYSED should instead strengthen the supports and services to which students with disabilities are entitled and which allow them to "demonstrate what they know and can do on the general grade level assessments."

Sincerely,

Lavinia Mancuso  
Administrative Director