



January 20, 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

Transmitted via email.

Re: Public Comments on the New York State Department of Education ESEA Flexibility
renewal proposal Amendment #1

Dear Commissioner King and Members of the Board of Regents:

We write to express our strong opposition to Amendment #1 of the NYSED ESEA Flexibility
Renewal Request.

In general, this proposal violates the rights of students with disabilities, conflicts with the
principles established by the U.S. Dept. of Education (USED) regarding waiving some provisions
of the Elementary and Secondary Education Act (ESEA) due to the inaction of Congress to
update the law as well as the assurances that NYSED provided to USED as a condition of its
initial ESEA Flexibility application. The proposal also violates the rights that students with
disabilities are guaranteed under both the Individuals with Disabilities Education Act (IDEA) and
Section 504 of the Rehabilitation Act of 1973 (Section 504).

According to USED, the one-year extension it has made available to states with approved ESEA
Flexibility is intended to provide additional time for states to gather additional information on
successes and challenges in the implementation of the reform efforts described in their initial
flexibility request, in order to improve current systems and better support students and
teachers.

In a November 14, 2013 letter to Chief State School Officers from Deborah S. Delisle, USED also stated that “Additionally, an SEA may wish to make additional amendments to its request to support its continuous improvement efforts. Consistent with the existing amendment process, an SEA will need to consult with stakeholders in the State regarding any changes to its approved ESEA flexibility request. This extension process, in combination with our monitoring and technical assistance, will help ED continue to ensure that SEAs are implementing their plans and meeting their commitments to educators, students, parents, and the community in accordance with the principles of ESEA flexibility.” (see <http://www2.ed.gov/policy/eseaflex/secretary-letters/flexextensionltr111413.pdf>)

The amendment proposed by NYSED regarding testing requirements for students with disabilities cannot be characterized as supporting the state’s “continuous improvement efforts.” In fact, it can only be characterized as an attempt to marginalize a significant portion of the state’s 385,000 students receiving special education services by inappropriately inflating their performance so that NYSED may appear to be doing better for these students.

NYSED states that “Originally, the State did not propose a waiver for the assessment of students with disabilities.” This statement is correct but fails to point out that states were *not permitted* to request a waiver for the assessment of students with disabilities in the initial ESEA Flexibility application. Rather, states were required to provide a set of assurances to USED, including an assurance that “It will 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 that are consistent with 34 C.F.R. § 200.6(a)(2) and are aligned with the State’s college- and career-ready standards. (Principle 1)” (ESEA Flexibility Request form, September 23, 2011)

New York is currently complying with this assurance by providing its Alternate Assessment on Alternate Academic Achievement Standards (AA-AAS), known as the NYSAA.

However, despite this assurance, NYSED now asks the Board of Regents to approve a proposal that directly conflicts with the assurance and violates current ESEA federal regulations regarding the assessment of students with disabilities for purposes of system accountability.

As the current ESEA regulations recognize, the vast majority of students with disabilities should be assessed via a state’s general assessment (with or without the necessary accommodations).

While use of IDEA’s 12 disability categories is a crude way to validate this, the table below shows New York’s population of students with disabilities in each of IDEA’s disability categories. Note that there is not a category called “significant cognitive disabilities.”

Students who should be expected to perform at grade level make up 87 percent of all students in the state (specific learning disabilities, speech/language impairments, other health

impairments, emotional disturbance, hearing impairments, orthopedic impairments, visual impairments, traumatic brain injury, and deaf/blindness). Students in the remaining three categories (autism, multiple disabilities, and intellectual disabilities) could be those who may not be expected to perform at grade level due to severe/significant cognitive disabilities account for just 13 percent, and not all of these students would be assigned to an alternate assessment.

Based on these data, NYSED currently has ample flexibility to assess its students with disabilities via the two allowable options: the general assessment with or without accommodations and the alternate assessment on alternate achievement standards.

DISABILITY CATEGORY	2012 CHILD COUNT	PERCENT OF TOTAL
Specific Learning Disabilities	149,694	39
Speech/Language Impairments	87,445	23
Other Health Impairments	59,616	15
Emotional Disturbance	27,566	7
Hearing Impairments	4,225	1
Orthopedic Impairments	1,720	< 1
Visual Impairments	1,259	< 1
Traumatic Brain Injury	1,081	< 1
Deaf/Blind	14	< 1
SUBTOTAL	332,620	87
Autism	24,439	6
Multiple Disabilities	16,959	4
Intellectual Disabilities	11,745	3
SUBTOTAL	53,143	13
TOTAL AGES 6-21	385,763	

We provide additional comments regarding each aspect of proposed Amendment #1 below, excerpted from the full proposal at http://www.p12.nysed.gov/accountability/documents/ESEAFlexibilityRenewalforPublicComment011614_1.pdf.

PROPOSAL: “There is a group of students with significant cognitive disabilities who cannot demonstrate what they know and can do on the general grade level assessments, even with accommodations. These are students who are not eligible for the State’s alternate assessment based on alternate academic achievement standards. This subgroup of students can make significant progress, but are not likely to reach grade-level achievement in the time frame covered by their individualized education programs (IEP).”

COMMENTS: Current ESEA regulations recognize that there are a small number of students who are unable to participate in the regular State assessment, even with appropriate accommodations. To ensure that these students are fully included in State accountability systems, ESEA regulations issued in 2005 allowed States to develop and administer an alternate assessment based on alternate academic achievement standards (AA-AAS). The ESEA regulation (known as the “One Percent Rule”) also provides safeguards to mitigate improper identification and overuse by limiting the number of proficient and advanced scores that may be counted for accountability purposes to no more than one percent of all students assessed.

These regulations were the result of extensive collaborative efforts involving experts in the field of disability and important stakeholders including parents.

In 2007 USED issued regulations allowing States to develop an additional alternate assessment for a “group of students whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level proficiency in the same time frame as other students.” Known as an alternate assessment based on modified academic achievement standards (AA-MAS), this assessment was not intended for students with the most significant cognitive disabilities. This regulation also carried limitations to prevent overuse. Known as the “Two Percent Rule,” it limited the number of proficient and advanced scores that may be counted for accountability purposes to no more than two percent of all students assessed.

However, NYSED chose not to develop an AA-MAS, presumably because it did not feel that the expense was warranted given the population involved and the instructional relevance to be gained. A paper was commissioned by the New York Comprehensive Center in collaboration with the New York State Education Department. The paper involved convening national research experts to provide guidance to NYSED regarding the feasibility of developing an alternate assessment based on modified achievement standards and advice on how to design standards and assessments for students with disabilities who are part of the “2%” population. (See <http://www.cehd.umn.edu/nceo/AAMAS/AAMASExecutiveSummary.pdf>).

Earlier this year USED announced its intention to eliminate the AA-MAS as an allowable assessment option under the ESEA, stating that “since the Department amended the Title I regulations in April 2007, many States have been working collaboratively to develop and implement general assessments aligned with college- and career-ready standards that will be more accessible to students with disabilities than those in place at the time States began developing alternate assessments based on modified academic achievement standards. These new general assessments will facilitate the valid, reliable, and fair assessment of most students with disabilities, including those for whom alternate assessments based on modified academic achievement standards were intended.” [Federal Register, Vol. 78, No. 164, Page 52468, August 23, 2013]

So, while USED is eliminating an assessment option under the ESEA due in large part to the new assessments being developed by the PARCC (of which NYSED is a participant) and Smarter Balanced assessment consortia funded by USED, NYSED proposes to expand assessment options.

Admittedly, simply giving a student a test designed for students in a lower grade (rather than an alternate assessment designed to measure the student's grade-level knowledge and skills as the AA-MAS was required to do) is very economical as the state incurs no additional costs for test development. It is just such fiscally attractive abuses that the ESEA regulations are designed to prevent.

PROPOSAL: "NYSED is applying for a waiver to allow school districts to administer the general State assessments to these students with disabilities, but at their appropriate instructional grade levels, provided that (1) the State assessment administered to the student is not more than two grade levels below the student's chronological grade level; and (2) the student is assessed at a higher grade level for each subsequent year. The student's instructional grade level would be calculated annually and separately for English Language Arts (ELA) and math."

COMMENTS: In clear violation of current ESEA regulations and exceeding the conditions established by USED for requests for ESEA Flexibility extensions, NYSED proposes to create an additional assessment option for students with disabilities - one that allows giving some students with disabilities the general state assessment designed to measure the performance of students in lower grades.

This practice is called "out-of-level" testing or "off-grade level" testing. Its drawbacks were articulated by USED in 2002 when USED issued the final ESEA regulations governing standards and assessment.

In response to comments suggesting out-of-level testing should be allowed under ESEA, USED responded:

"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, Federal Register: July 5, 2002 (Volume 67, Number 129)

PROPOSAL: “Allow the proficient and advanced scores of those students assessed in accordance with their instructional grade levels be used for accountability purposes, provided that the number of those scores at the LEA and at the State levels, separately, does not exceed the .93 percent of all students in the grades assessed in ELA and 2.37 percent of all students in grades 3-8 assessed in Math.”

COMMENTS: As clearly articulated by USED in the comment above, the use of out-of-level testing results for accountability purposes is not allowable.

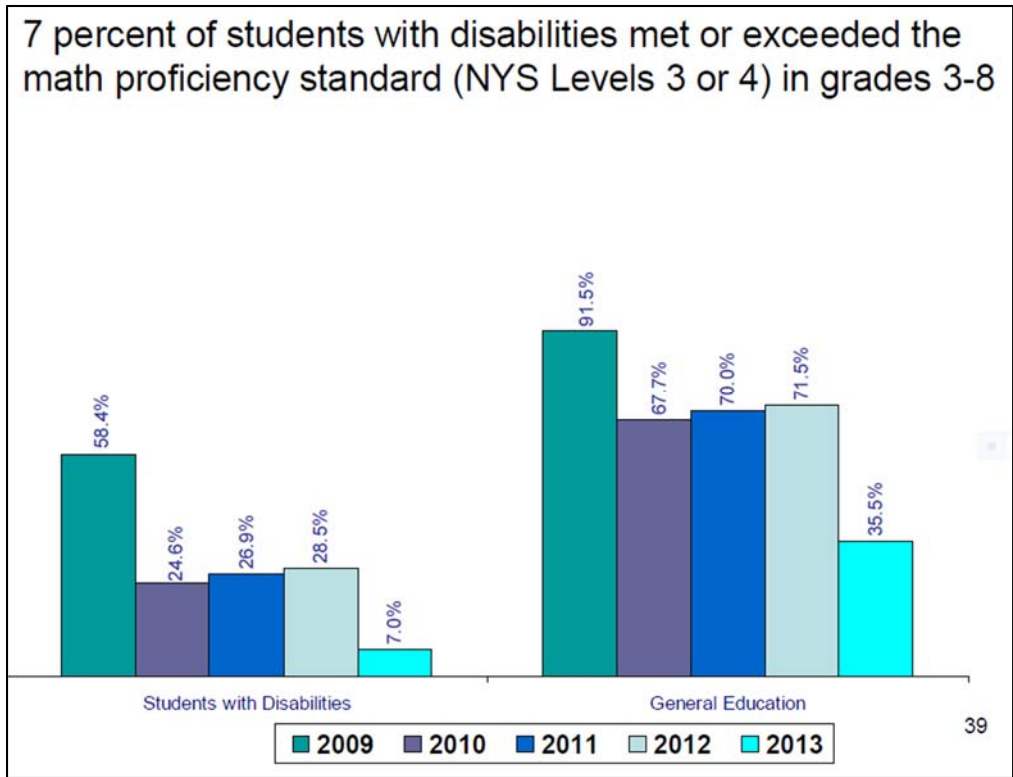
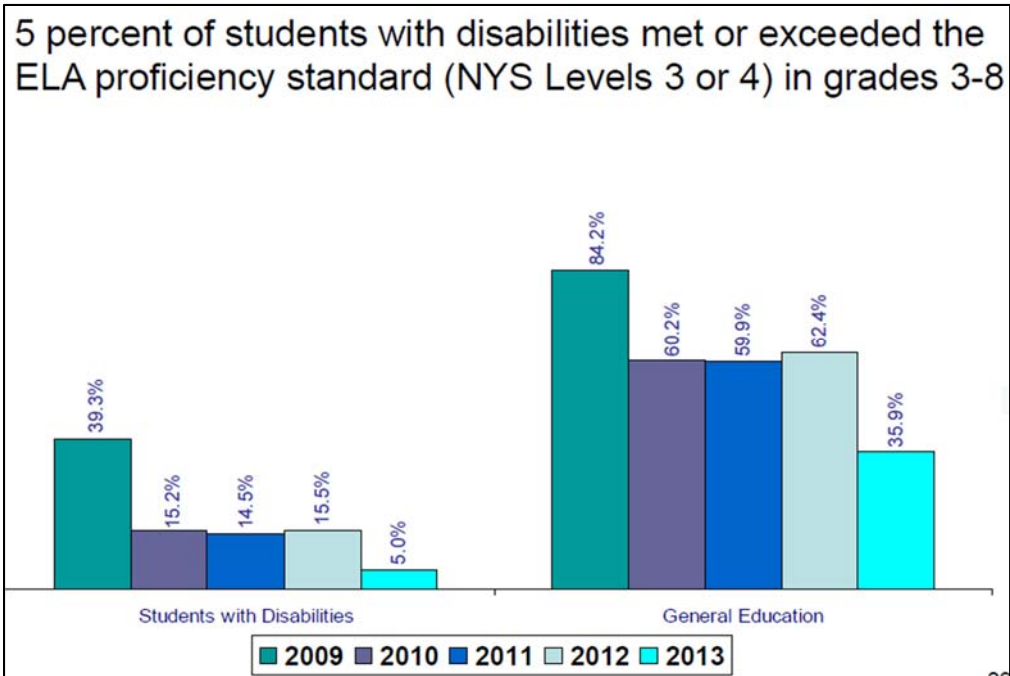
Additionally, the limitations on the number of proficient and advanced scores that may be used for accountability purposes does NOT limit the numbers of students with disabilities who could be given an assessment below their assigned grade.

In fact, limitations placed on the use of scores on the AA-MAS did not impede its overuse. Several states that implemented an AA-MAS dramatically overused the assessment as shown in the analysis at <http://www.advocacyinstitute.org/ESEA/StateAA-MAS.pdf>.

Some states have placed more than 50 percent of its students with disabilities into the AA-MAS. A study of the Houston (TX) Independent School District also found that African American students with learning disabilities were much more likely to be placed in the AA-MAS than their White counterparts (see http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/Domain/7946/HISD_Special_Education_Report_2011_Final.pdf)

It is important to note that in Amendment #4 of the ESEA Flexibility extension proposal, NYSED proposes to revise the AMOs for Grades 3-8 English language arts and Mathematics using the 2012-2013 assessment results as the baseline year. According to the proposal, this amendment is needed because the “percentage of students deemed proficient is significantly lower than in prior years. This change in scores — which will effectively create a new baseline of student learning — is largely the result of the shift in the assessments to measure the Common Core Standards, which more accurately reflect students' progress toward college and career readiness.”

In fact, few students with disabilities scored at the proficient level in 2012-2013. See the charts below for performance information.



Source: A New Baseline: Measuring Student Progress on the Common Core Learning Standards at http://www.p12.nysed.gov/irs/ela-math/2013/2013-08-06FINALELAandMathPRESENTATIONDECK_v2.pdf

The revision proposed in Amendment #4 would allow NYSED to incorporate this poor performance of students with disabilities into the performance targets of its ESEA Flexibility accountability plan.

ESEA Flexibility allowed NY to establish new “annual measurable objectives” or “AMOs” – the percentage of students who must score at proficient or above in order for a school or district to make “Adequate Yearly Progress” or AYP. Using this flexibility New York created a “Performance Index” to replace the AMOs required in ESEA.

This “differentiated” approach allowed the Performance Index for students with disabilities to be set much lower than other groups of students. Allowing different targets for student subgroups based on recent performance was intended to provide schools and districts more attainable performance goals over the course of six years. As shown by the tables below, New York’s expectations for its students with disabilities are already the lowest of any student subgroup.

Allowing some students with disabilities to be assessed below their enrolled grade level and then use that data to measure the school/district/state against these differentiated (lower) targets flies in the face of the intention of school accountability. In essence, it allows New York to “double down” on its expectations for students with disabilities.

Excerpted from the approved ESEA Flexibility Request available at <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/map/ny.html>

Grade 3 - 8 English Language Arts		Targets by Year						
Measure	Group	2010 - 2011 Baseline	2011 - 2012	2012 - 2013	2013 - 2014	2014 - 2015	2015 - 2016	2016 - 2017
Subject and Grade Level	Accountable Group							
Grade 3-8 ELA	All Students	145.98	150	155	159	164	168	173
Grade 3-8 ELA	Students with Disabilities	92.32	101	110	119	128	137	146
Grade 3-8 ELA	American Indian/Native American	131.72	137	143	149	154	160	166
Grade 3-8 ELA	Asian or Pacific Islander	162.25	165	169	172	175	178	181
Grade 3-8 ELA	Black (not Hispanic)	123.45	130	136	143	149	155	162
Grade 3-8 ELA	Hispanic	125.94	132	138	144	151	157	163
Grade 3-8 ELA	White	160.39	164	167	170	174	177	180
Grade 3-8 ELA	English Language Learners	101.67	110	118	126	134	143	151
Grade 3-8 ELA	Economically Disadvantaged	128.26	134	140	146	152	158	164
Grade 3-8 ELA	Mixed Race	154.36	158	162	166	170	173	177

Grade 3 - 8 Math								
		<i>Targets by Year</i>						
Measure	Group	2010 - 2011 Baseline	2011 - 2012	2012 - 2013	2013 - 2014	2014 - 2015	2015 - 2016	2016 - 2017
Subject and Grade Level	Accountable Group							
Grade 3-8 Math	All Students	160.26	164	167	170	174	177	180
Grade 3-8 Math	Students with Disabilities	114.96	122	129	136	143	150	157
Grade 3-8 Math	American Indian/Native American	147.57	152	156	161	165	169	174
Grade 3-8 Math	Asian or Pacific Islander	183.17	185	186	187	189	190	192
Grade 3-8 Math	Black (not Hispanic)	136.36	142	147	152	158	163	168
Grade 3-8 Math	Hispanic	145.21	150	154	159	163	168	173
Grade 3-8 Math	White	172.02	174	177	179	181	184	186
Grade 3-8 Math	English Language Learners	134.45	140	145	151	156	162	167
Grade 3-8 Math	Economically Disadvantaged	146.27	151	155	160	164	169	173
Grade 3-8 Math	Mixed Race	162.72	166	169	172	175	178	181

It should be further noted that use of below-grade level testing for accountability purposes will also compromise student performance data that is used in other monitoring and compliance systems. Student performance on state assessments is a key component of the State Performance Plan (SPP) required by IDEA. The assessment results reported as part of New York's SPP must align with the assessment requirements of ESEA. Thus, by implementing below-grade testing for some students with disabilities New York's assessment data would not be compliant with the requirements of the SPP. The state's performance against targets articulated in the SPP is used to determine the state's level of compliance with the IDEA.

As reported in USED's determination table, New York failed to achieve its targets in both Reading and Math in Grades 3-8. See

<http://www2.ed.gov/fund/data/report/idea/partbspap/2013/ny-response-2013b.pdf>

NYSED has failed to explain how it would continue to report on student proficiency rates as required by USED for purposes of the SPP.

Additionally, as states move toward implementation of the Common Core State Standards and the new assessments aligned with those standards, one anticipated outcome is more comparability across states. This improved comparability will provide greatly expanded information on how students are performing. It will give parents vital information for making choices on where to live. Use of below-grade testing will compromise this comparability and render New York's performance data for students with disabilities (and all students) unreliable.

PROPOSAL: “To ensure appropriate time for dissemination of guidance to Committees on Special Education who would make IEP recommendations for student participation in the instructional level State assessment, this waiver would go into effect during the 2014-15 school year.”

COMMENTS: Implementation of New York’s new general assessment (being developed by PARCC) is scheduled for the 2014-2015 school year. Therefore, implementing the below-grade assessment option in that year would appear to be completely at odds with the administration of the PARCC assessment implementation schedule.

PROPOSAL: “Rationale. Until the State can develop and implement adaptive assessments, NYSED requests to more appropriately assess, for instructional and State accountability purposes, the performance of students with significant cognitive disabilities who cannot, because of the severity of their disabilities, participate in chronological grade level instruction.”

COMMENTS: The PARCC assessments are not “adaptive assessments” so it is unclear what NYSED is referring to in this statement.

PROPOSAL: “These students, while they do not meet the State’s definition of a student with a significant cognitive disability appropriate for the State’s alternate assessment, may be able to meet the State’s learning standards over time. However, these students need to be provided with instruction with special education supports and services at a pace and level commensurate with their needs and abilities and their individual rates of learning.”

COMMENTS: Earlier in the proposal NYSED states that *“There is a group of students with significant cognitive disabilities who cannot demonstrate what they know and can do on the general grade level assessments, even with accommodations.”* Yet here it states that these students do not meet the State’s definition of a students with a significant cognitive disability.

PROPOSAL: When students with disabilities are required to participate in an assessment at their chronological age significantly misaligned with content learned at their instructional level, the assessment may not provide as much instructionally actionable information on student performance or foster the most prudent instructional decisions. For these students, State

assessments do not provide meaningful measures of growth for purposes of teacher and leader evaluations.”

COMMENTS: The purpose of state assessments is to provide an objective measure of student performance for purposes of system accountability (school/district ratings, need for school improvement, etc.) and to ascertain if schools are effectively teaching all students, including struggling learners who are currently functioning below grade level.

Performance on state assessments should not be used to make high-stakes decisions for students, such as grade advancement.

PROPOSAL: “NYSED holds all schools and students to high expectations and believes this waiver will lead to more appropriate instruction and assessment of students, while ensuring that students with disabilities participate in the general curriculum and the same State assessments, but closer to their instructional levels in order to obtain instructionally relevant information from the assessments.”

COMMENTS: Current ESEA regulations do not allow testing any student below their enrolled grade, regardless of their “instructional levels.”

The primary purpose of these assessments is to **hold schools accountable**, not to provide “instructionally relevant information.” In fact, PARCC is developing *formative* assessments that are intended for this purpose. From the PARCC website: “To help teachers assess the extent to which students are on track to mastering the CCSS at their grade levels, PARCC will develop diagnostic and mid-year assessments in reading, writing and mathematics, in addition to K-1 formative tools and speaking and listening assessments.”

(see <http://www.parcconline.org/non-summative-assessments>)

New York schools are not barred from administering below-grade state assessments to students with disabilities (or any students) for purposes of obtaining “instructionally relevant information.” Of course, this type of administration would be *in addition to* the student’s participation in the state assessment for his enrolled grade for accountability.

Furthermore, the proposed “below-grade” testing option directly conflicts with NYSED’s guidance on Individualized Education Programs. (See <http://www.p12.nysed.gov/specialed/publications/iepguidance/intro.htm>)

The use of below-grade level testing is not among the listing of what “research and experience” have shown to improve results for students with disabilities.

Furthermore, the guidance states that:

“In developing a student's IEP, it is the responsibility of the Committee to recommend goals and services that will assist the student to be involved and progress in the general education curriculum (or for preschool students, in appropriate activities). This means that members of a Committee will need to consider both the State's learning standards as well as the school-based instructional curriculum, which should be aligned to the State’s learning standards. They will need to know the expectations of the general education classroom for the **corresponding age of the student both in terms of what learning is expected (general curriculum) as well as how the students are expected to access/demonstrate that learning.**” (Emphasis added)

How would the IEP team align the expectations of students who are tested below their age grade? How would the IEP team know how the student is performing against the standards for his age grade? How would the student’s parents understand where their child performs on the standards as compared to the student’s grade/age peers without disabilities? How would below-grade testing result in a student’s ability to earn a regular high school diploma?

These questions make it clear that use of below-grade testing would inevitably result in lower expectations for students with disabilities. Those expectations will be baked into the IEPs of students – the document designed to enable students with disabilities to benefit from their educational program – because there will not be any available information regarding the student’s performance against his age grade standards.

This violates the IDEA, which expressly states that one purpose of “specially designed instruction” is to “ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” This purpose is not *qualified* with any language allowing the lowering of the educational standards students with disabilities are expected to meet based on their “instructional level.”

It also violates Section 504 of the Rehabilitation Act of 1973 and its long-standing regulations which require that students with disabilities not be discriminated against or denied comparable aids, benefits or services (34 C.F.R. §104.4(b)). The setting of lower standards for certain students with disabilities will inevitably mean that most of those students will not be taught those skills and bodies of knowledge expected for all students, at the levels expected for all students.

These clear violations are likely to lead to complaints of noncompliance under both the IDEA and Section 504.

PROPOSAL: “The State has calculated the percentage of students who have participated in the chronological age assessments and found that in school year 2012-13, .93 percent perform at

chance level on the ELA exams and approximately 2.37 percent of students score at chance on the Math exams.”

COMMENTS: Use of this methodology to determine the percentage of students with disabilities who might be expected to be proficient (or advanced) on assessments one or two grades below their enrolled grade results is nonsensical.

NYSED fails to reveal how many of those students performing at chance level are students with disabilities.

As NYSED recognizes, scores of all subgroups of students declined significantly on the first assessments aligned to the Common Core Learning Standards in 2012-2013. There are many reasons for this decline. Thus, using this year as a basis for determining new assessment policy is statistically invalid.

Studies have shown that students with disabilities are not necessarily the students who persistently fail state assessments. See, for example, a report from the National Center on Educational Outcomes, The Characteristics of Low Performing Students on Large-Scale Assessments at <http://www.cehd.umn.edu/NCEO/OnlinePubs/briefs/BriefJan2010/default.htm>

PROPOSAL: “The State would establish criteria, based on objective and valid data, for demonstrating that the student’s current level of performance is two or more years below his/her chronological grade level and demonstrating the student’s progress (or lack of progress) over a sufficient period of time. The state would also create a profile of a student who, based on individual evaluation information identifies the student as having intellectual or cognitive deficits, such as autism, intellectual disability, traumatic brain injuries, neurodegenerative diseases or severe learning disabilities.”

COMMENTS: Here again NYSED contradicts its earlier statement regarding the specific group of students this proposal is aimed at: “a group of students with significant cognitive disabilities.” The disabilities listed here (autism, intellectual disability, traumatic brain injuries, neurodegenerative diseases or severe learning disabilities) are not considered to be “significant cognitive disabilities.” These conflicting statements cast doubt on NYSED’s ability to develop criteria for the identification of students who would need to be tested at lower grades.

NYSED also fails to address how a student with a disability in 3rd or 4th grade who is found to need a below-grade assessment would be included in the assessment system. Since state assessments begin at 3rd grade this could lead to significant numbers of students in the lower grades being excluded from state assessments.

PROPOSAL: “To provide further safeguards, the State would require:

- A determination by CSE that the student does not meet the State’s definition of a student with disabilities who is eligible for the State’s Alternate Assessment; and
- Documentation that shows that the student would need extensive modifications and accommodations to curriculum, instruction and assignments to access the curriculum and that even with such services, the CSE is reasonably certain that the student would fail to achieve chronological age-level proficiency; and
- Documentation of notices to the student’s parent of the recommendation and the reasons for the recommendation; and
- Assurances that the student will not be removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum and that the student will be provided instruction in in the general curriculum with his/her chronological age peers by a highly qualified teacher.”

COMMENTS: These safeguards raise significant questions and concerns.

- A finding that a student is reasonably certain to fail to achieve chronological age-level proficiency is not a sufficient reason to take the student out of the assessment for his enrolled grade. Rather, it is a basis for providing additional instructional services through more intensive interventions and extended learning time.
- In fact, many students without disabilities fail to achieve proficiency for their chronological age-level. However, NYSED is not proposing to identify any low-performing student for below-grade testing other than those with disabilities. This constitutes a significant violation of Section 504.
- Parents are full and equal participants in decisions made by the CSE. Providing parents with “documentation” and “reasons for the recommendation” violates their rights under IDEA.

PROPOSAL: “The waiver will support continued focus on ensuring students with disabilities graduate college- and career-ready by ensuring more meaningful State assessment results; support efforts to improve all schools in the State; and support closing of achievement gaps between student subgroups by better identifying the subgroups of students with disabilities and their performance levels.”

COMMENTS: This proposal will have a negative impact on students with disabilities.

According to research on the issue, “out-of-level testing reflects low expectations for students and negatively affects their instruction. Too often, expectations for students who have not performed well in the past are below what they should be, creating a never-ending cycle of low expectations resulting in lower performance, which in turn results in even lower expectations. There are many instances of teachers being surprised by how well students performed when they were tested at grade level. There are related concerns about what happens in instruction when out-of-level approaches are used. It may be assumed that what the student is being tested on is all that the student needs to learn, with the resulting instruction focusing on lower-level standards than those toward which the student should be striving.” (see <http://www.cehd.umn.edu/NCEO/OnlinePubs/Policy9.htm>)

It would be inappropriate to use the performance information that would result from below-grade testing to determine if schools/districts are “closing the achievement gap.”

PROPOSAL: “Process for Consulting with Stakeholders and Summary of Comments on the Students with Disabilities Assessment Waiver Request

Stakeholders from across the State, representing teachers, administrators, parents, and community based organizations have assisted the Department in responding to the requirements of the Renewal application. During the first week of November, an external “Think Tank” was convened, and members were asked to be thought partners with the Department as it drafted its response to the renewal requirements. A large portion of the members of the ESEA Renewal Think Tank also participated in the original ESEA Waiver Think Tank that guided the creation of New York State’s approved ESEA Waiver application. To date, The ESEA Waiver Renewal Think Tank has met five times since convening in November, with various related work groups meeting at least twice additionally during that time period.

In addition to the Think Tank, the Commissioner, Deputy Commissioner and Department staff have solicited feedback on the waiver through meetings with a wide variety of organizations, including the Commissioner’s Advisory Panel for Special Education (of which the majority of members are parents of students with disabilities), representatives of each of the State’s 13 Special Education Parent Centers and federal Parent and Training Information Centers (PTIs), Title I Committee of Practitioners, the English Language Learners Leadership Group, the DTSDE Training Group, and the District Superintendents.

Throughout this process, Department staff evolved the proposed waiver to address stakeholder concerns and recommendations, which were primarily to develop objective criteria to identify the subgroup of students with disabilities who would be eligible for this waiver and to ensure that students with disabilities would continue to have access to the general curriculum in the

least restrictive environment. This waiver request has been strongly supported by both parent and advocacy organizations and school personnel throughout the State.”

COMMENTS: NYSED has failed to adequately involve stakeholders in the development of this proposal.

Furthermore, it now attempts to limit public comment by restricting the comment period to a ten day period that includes a national holiday.

NYSED should be required to make public all comments submitted on this proposal.

Furthermore, NYSED should be required to make public all documentation that supports its claim that “This waiver request has been strongly supported by both parent and advocacy organizations and school personnel throughout the State.”

That said, even with widespread support, the fact remains that this proposal violates current ESEA regulations, exceeds the ESEA Flexibility program put in place by USED, and violates the assurances NYSED gave to USED as part of its initial ESEA Flexibility application.

In closing, through this examination we hope to have shown that NYSED’s proposed Amendment #1 raises more questions than it answers. It creates many additional problems and unintended consequences. It sells New York’s students with disabilities short and allows schools to mask low performance. It deprives the public the right to know how all students are performing against grade/age standards.

We strongly urge the New York Board of Regents to direct NYSED to withdrawn Amendment #1 from its ESEA Flexibility extension proposal. Further, we urge the Regents to require that NYSED recommit to a fair and equitable assessment policy for students with disabilities that adheres to current ESEA regulations

Sincerely,



Candace Cortiella
Director

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

**P.O. Box 565 ♦ Marshall, Virginia 20116 ♦ Phone 540.364.0051
www.AdvocacyInstitute.org ♦ Email: info@AdvocacyInstitute.org**