

February 28, 2006

Jacquelyn C. Jackson, Ed.D.
Director, Student Achievement and School Accountability Programs
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW., Room 3C156, FB-6
Washington, DC 20202-6132

Dear Ms. Jackson:

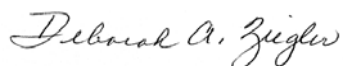
This document is in response to the December 15, 2005 *Federal Register* announcement on regulations to allow two percent of IDEA-eligible students to participate in modified academic achievement standards for the purposes of AYP. These comments are on behalf of the Council for Exceptional Children, the largest professional organization committed to improving educational outcomes for individuals with exceptionalities.

CEC is encouraged that the Department of Education has recognized that the current accountability framework does not accurately or fairly assess student or school performance and has developed this flexibility. Although this flexibility is far short of what is needed, it is an important step by the Department of Education to recognize that we need to examine alternative ways of measuring student progress. CEC will continue to urge the Department to move toward a longitudinal growth model. The new approach is better for children with disabilities because it allows educators to align curriculum and instruction with standards and assessment to better meet the needs of individual children.

CEC is committed to the achievement of successful outcomes for children and youth with disabilities, through the promotion of professional excellence in special education and the provision of high quality professional supports and quality conditions for teaching and learning. CEC sought and received input on these "2 percent" proposed regulations from its Units and individual members. That input has been incorporated into this document.

Thank you for considering CEC's recommendations. If you need any additional information please contact Deborah Ziegler, Associate Executive Director for Policy and Communication Services at debz@cec.sped.org or 703-264-9406 or Dan Blair, Senior Director for Public Policy at danb@cec.sped.org or 703-264-9403.

Sincerely,



Deborah A. Ziegler, Ed.D
Associate Executive Director
Policy and Communication Services

COUNCIL FOR EXCEPTIONAL CHILDREN GENERAL COMMENTS

CEC recognizes that there is a small group of students with disabilities, in addition to those students identified under NCLB as having the most significant cognitive disabilities (1% of all students), who should be assessed by an alternate measure that is different from what currently exists today under the NCLB requirements. These students can make progress toward but may not reach grade-level achievement standards.

CEC has advocated for a longitudinal growth model to be included in the accountability system to allow more focus on individual student achievement. CEC recommends replacing the law's arbitrary proficiency targets with ambitious achievement targets based on rates of success actually achieved by the most effective public schools. In addition, we recommend allowing states to measure progress by using students' growth in achievement as well as their performance in relation to pre-determined levels of academic proficiency.

CEC is encouraged that the Department of Education has recognized that the current accountability framework does not accurately or fairly assess student or school performance and has developed this flexibility. Although this flexibility is far short of what is needed, it is an important step by the Department of Education to recognize that we need to examine alternative ways of measuring student progress. CEC will continue to urge the Department to move toward a longitudinal growth model. The new approach is better for children with disabilities because it allows educators to align curriculum and instruction with standards and assessment to better meet the needs of individual children.

While CEC supports this flexibility with conditions, we remain cautious until we see issues raised in its implementation. The research on which the NPRM was written is flawed and does not include studies that included students with IEPs. CEC worries about those who will view the proposed 2% cap as an invitation to fill that cap with as many students with disabilities as possible to shield school authorities and schools from any negative impact brought forward by AYP.

Different standards for a "new category" would modify the number of students eligible for alternate assessments and has the potential to take large numbers of students out of the mainstream curriculum – forcing them into an instructional category that won't allow them direct access to grade level content and eventual graduation from high school with a regular diploma. Therefore, CEC offers support of this flexibility with the following conditions:

- Students with disabilities have access to grade-level content;
- Students with disabilities have access to early and effective scientifically-based interventions to remediate academic skill deficits;
- Students with disabilities have access to highly qualified teachers qualified to teach core academic subjects;
- Educators embrace high expectations for students with disabilities;
- IEP team members, including families, receive intense training to make appropriate and responsible decisions about identifying children in this subgroup and what type of assessment is appropriate;
- Appropriate stakeholders receive intense training on the development of modified achievement standards and alternate assessments;

- SEAs and LEAs are provided additional federal funds to develop and implement a system of modified standards and assessments;
- Research and development of more effective universally designed accountability and assessment systems that better meet the goal of high academic achievement for all children is funded by the Department of Education; and
- Involving the special education, general education, disability and family community in the development of the growth model.

We need concrete system-wide reforms necessary to ensure all students learn to high levels. What do educational systems where all children learn to high levels look like? What requirements are needed at the governance, administrative, curriculum, instruction, classroom, community, and support services levels to make this happen? We know that many districts and schools have not implemented standards-based reform in a meaningful way for any of their students. We know that aligned, coherent systems of educational standards, assessments, curriculum and instruction are necessary for this approach to school reform to be successful.

This is more than training on differentiated instruction or technology-based texts or standards-based IEPs. It is a focus on the system-wide reform of educational organizations that in the past were organized to "sort" children into varying achievement levels. It is redesigning our educational system to ensure that all of our decisions, all of our resources are focused on successful learning outcomes for every single child we serve.

There must be a firm commitment to the continuing improvement of the assessment and accountability system in the challenging years ahead, through the process of structured monitoring, intensive ongoing evaluation, and systemic professional training based on emerging research, and stakeholder input.

We have to expect much of our educational systems and do nothing that sends a message that it is okay to lower expectations for some students. For these students, we must expect states and districts to grapple with defining high expectations for these students and then carry out policies and practices that ensure high expectations.

§200.1 – STATE RESPONSIBILITIES FOR DEVELOPING CHALLENGING ACADEMIC STANDARDS

- 1. Recommendation: Modify § 200.1** - State responsibilities for developing challenging academic standards to include new language requiring states to clearly define the degree to which their general education grade-level content standards have been altered in defining Modified Achievement Standards for the 2% group and require an explicit side-by-side comparison table in the state plan to demonstrate the nature and degree of change.

Rationale: A key issue here is whether there is a mechanism that keeps states focused on meaningful assessments that help maximize these students' learning. This side-by-side tabular presentation will help ensure accountability in explaining the appropriateness of the modified "breadth and depth" of the grade-level content standards.

- 2. Recommendation: Modify §200.1(e) and §200.6** to permit out-of-level assessments.

Rationale: Out of level assessments are a well understood aspect of assessment that does the following: permits on-going assessment of the scope and sequence of skills to be taught and leaned; directly addresses assessments of specific skills pupils are being taught; permits comparison of an individual pupil's performance with that of other pupils learning the same material; allows for the ability to track an individual pupil's performance on the scope and sequence of the curriculum.

- 3. Recommendation: Modify § 200.1(e)(1)(i)** to include the following bolded text:
(i) Are aligned with the state's academic content standards for the grade in which the student is enrolled, although the modified academic achievement standards may reflect reduced breadth or depth of grade level content **or a lower point on the sequence of skills to be taught.**

In addition, more guidance should be included in the final regulations on the terms 'breadth' and 'depth'.

Rationale: The term "reduced breadth or depth of grade level content" is not all-inclusive and this added language allows for an additional criteria to be included. In addition, more guidance is needed within the regulations so that states can develop more meaningful guidance and IEP teams can fully understand the decisions they are called upon to make.

- 4. Recommendation: Modify §200.1(e)(2)(i)** to change the word between (A) and (B) from "or" to "and."

Rationale: It is not appropriate to use the State's assessments under Section 200.2 as the sole basis for a determination that the student's disability has precluded grade-level proficiency. Therefore, the proposed regulations should require that the student's score from the assessment *and* other assessment data be considered together. If the State's assessment on the grade-level academic achievement standard is not universally designed, the design of the test, rather than the student's disability, may be precluding demonstration of grade-level proficiency. A student who is not permitted to use necessary accommodations on this assessment should not be characterized as unable to demonstrate grade-level proficiency for purposes of determining eligibility for modified academic achievement

standards. There will be very little incentive to universally design assessments if all students with certain accommodation needs are just pushed out of the grade-level academic achievement standard.

5. **Support §200.1(e)(2)(iii)(4)** and clarify that that states should allow students to be assessed based on modified academic achievement standards in one or more subjects. The regulation should clarify that states must remedy this situation and provide technical assistance to ensure that a student who needs to take the assessment based on modified academic achievement standards in math only is afforded that opportunity. States need to design assessments that support this practice.

Rationale: Some students may have difficulty in only one content area. As a result, they should have access to the assessment in the content area for which that assessment is most appropriate for the student.

6. **Support §200.1(e)(3)** that students who are eligible to take assessments based on modified achievement standards may be in any of the 13 disability categories listed in IDEA.

Rationale: Based on recent data from the Special Education Elementary Longitudinal Study (SEELS) it is anticipated that students from each of the 13 disability categories listed in the IDEA will be among those who are assessed based on modified achievement standards.

7. **Support §200.1(e)(5)** the decision to assess a student based on modified achievement standards would not be a permanent one, and would be reviewed on a yearly basis as part of the IEP process.

Rationale: The annual review would ensure that the modified achievement standards remain appropriate.

8. **General comments on 200.1:**

- “The ‘2 percent flexibility’ is addressed in a proposed regulation covering students with disabilities who can make significant progress but may not reach grade-level achievement standards within the same time frame as other students.”

This statement sets up a condition that is logically inconsistent with requirements such as teaching grade-level curriculum identified later in the NPRM. Presumably there are some pupils with disabilities who do “not reach grade-level achievement standards within the same time frame as other students”. After several years of learning at a slower rate as described above, they are likely not to be achieving on grade level. However, the regulations require that pupils be taught grade-level curriculum (whether or not it is appropriate to the pupil’s current level of performance) and be assessed on grade-level material, albeit with modified tests. The unintended consequence here may be to retain pupils with disabilities until they have mastered grade-level material. Given the evidence regarding efficacy of retention as an intervention, this violates NCLB’s requirements for “empirically supported instruction”.

- (1) When pupils are identified with high incidence disabilities, they may lack important foundation skills. We should teach these specific skills and assess pupil progress on them, regardless of where pupils are in the K-12 curriculum.
 - (2) Pupils may exhibit processing problems that mediate speed of progress. Even when such individuals receive effective instruction, their learning trajectories will deviate from those of their non-disabled peers. Assessing them in regard to the grade-level curriculum will show increasing differences between their performance and that of their peers and will be of little utility to their teachers in planning instruction.
 - (3) We have evidence that even with intensive well-designed instruction, about 20% of pupils at the 25th percentile and below will exhibit significant continuing problems (e.g. work by Torgesen, Mathis) in reading and language arts. These pupils, representing as much as five percent of the school age population, will require some alternative assessment if it is to be meaningful, that is, if it documents pupil performance, is sensitive to change, and can be used to guide academic intervention.
- The 2% option requires that pupils must receive grade-level instruction, however grade level instruction may be inappropriate when:
- (1) Pupils have not developed (or may not have been taught) the foundational skills necessary to learn the content taught in grade-level instruction as when 4th grade pupils who cannot decode reliably or fluently are being taught comprehension strategies based on 4th grade material.
 - (2) If, in fact, we have a sequential and hierarchical curriculum that is supported by empirical evidence, teaching higher level skills before previous or foundation skills have been established will likely be ineffective and may have a negative impact on the pupil's enthusiasm for and commitment to academic achievement.
 - (3) When pupils with disabilities are functioning several years below grade level, we should not assume that we can skip teaching skills that represent curriculum goals between the pupil's present level of functioning and his or her grade level.
 - (4) In summary, this statement supposes that pupils with disabilities are placed at the grade level where they are functioning, a proposition not supported by reality.

§200.6 - INCLUSION OF ALL STUDENTS

1. **Recommendation: Modify § 200.6 (a)(4)** to require states to report the number of students who participate in assessments in each of these categories who also receive accommodations. The NPRM requires states to report a number of statistics, including the number and percentage of students taking assessments based on modified academic achievement standards, alternate assessments based on grade-level academic achievement and alternate assessments based on alternate academic achievement.

Rationale: The NPRM already requires States to report the number of students who take regular assessments with accommodations but does not have a similar reporting requirement for any other assessment being taken with accommodations. This data is necessary to measure whether students are receiving appropriate accommodations and whether these accommodations are helping the student achieve.

§200.7 DISAGGREGATION OF DATA

1. **Recommendation: Modify § 200.7(a)(2)** that proposes that states establish uniform subgroup sizes, to add that states use established subgroup sizes that are consistent with the smallest of its existing subgroups. In addition, states must not be afforded the opportunity to have their subgroup size so large as to render the opportunity to be included in adequate yearly progress meaningless.

Rationale: Including uniform subgroup sizes that are appropriately sized to provide statistically reliable and valid calculations for purposes of determining Adequate Yearly Progress (AYP) was the original goal and requirement in NCLB. However, according to the Center for Assessment, ‘...states have not attended to the validity requirements to the same extent as they have for reliability issues (Marion & Gong, 2003). Separating reliability and validity, as many measurement professionals have been telling us for a long time, is a false distinction. Many of the so-called reliability solutions such as raising the minimum-n have considerable validity implications. In general, accountability system validity focuses on the accuracy of the identification of schools (i.e., are the “right” schools being labeled as passing or failing?), the consequences—both positive and unintended negative—of the accountability system, and the subsequent interventions as a result of identifying schools (Marion & Gong, 2003).’ The conclusion of the Center’s study found that ‘...If the implicit theory of action guiding NCLB accountability requirements is to improve instruction and thus outcomes for all students, schools and districts must be accountable for all subgroups in order to ensure that these students are appropriately served. Therefore, tinkering with the minimum-n to exclude substantial portions of special education students must be considered a threat to the validity of the accountability system. Source: Simpson, Gong & Marion (2005). *Effect of Minimum Cell Sizes and Confidence Intervals Sizes for Special Education Subgroups on School-Level AYP Determinations*. Center for Assessment

2. **Recommendation:** The Department of Education should provide an annual report to Congress on the implementation of this regulation that also contains state data on the number of students (by disability category) participating in the alternate assessments for students with the most significant cognitive disabilities (1%) and the number of student participating in assessments based on modified academic achievement standards (2%).

Rationale: The Department has included this requirement in the 1% regulation and therefore, should follow suit with this new regulation. Data on the implementation of the regulation that includes state specific data on participating students is central to understanding how the assessment option is being used and what the impact is on student performance and achievement.

§200.13 - ADEQUATE YEARLY PROGRESS IN GENERAL

- 1. Recommendation: Support § 200.13** that determines when a state or LEA can exceed the 1 percent and 2 percent caps.

Rationale: Determination of when a state or LEA can exceed the one percent and 2 percent caps on proficient and advanced scores that may be included in AYP determinations is necessary to ensure that modified and alternate achievement standards are used appropriately.

§200.20 - MAKING ADEQUATE YEARLY PROGRESS

- 1. Recommendation: Modify § 200.20(c)(3)** to clearly state a limit of one test and one re-test per year in the same subject area.

Rationale: Modifying this section allows states to engage in multiple testing and counting of a student's highest score towards AYP. This change could allow schools to continue to work with students to foster improvement through targeted testing, or it could result in a less complete and less balanced education with too much time devoted to excessive testing on a very narrowed curriculum. To balance these factors it is recommended that there be a limit of one test and one re-test per year in the same subject area.

- 2. Recommendation: Support §200.20(f)** that allows a state to include, for a period of up to two years, the scores of students who were previously identified with a disability under section 602(3) of the IDEA, but who have exited from special education services.

Rationale: Because students with disabilities exit this subgroup once special education services are no longer needed, school assessments results for that subgroup do not reflect the gains that these students with disabilities have made in academic achievement or the work that schools and teachers have done to achieve this success.

ADDITIONAL COMMENTS

- 1. Recommendation:** CEC recommends that the Secretary task IES with reviewing current applicable research and undertaking new research to determine the appropriate percentage of students who should be included in a category of special education students who are not likely to be achieving on grade level in particular subjects.

Rationale: The proposed new assessment option would allow for roughly 20 percent of IDEA-eligible students to be assessed against modified achievement standards — standards that are aligned with the academic content standards for the grade in which a student is enrolled but reflect reduced breadth or depth of grade-level content.

While the proposed regulation requires states to ensure that a student participating in this assessment is not precluded from earning a regular diploma, there is no guarantee that students assessed in this manner would have acquired sufficient academic skills and knowledge to meet the requirements for a regular diploma. In states that require students to pass a rigorous test in order to earn a regular diploma, these students would almost certainly be unprepared and unable to pass such a high-stakes test.

The U.S. Department of Education (ED) has not provided evidence, resulting from either data or research, indicating the need to adjust the 1% Regulation. In fact, ED has based the need for this new assessment option on research focused on effective reading interventions for students in primary grades, who did not have IEPs. While such research has helped shape new federal education policies — both in NCLB, such as Reading First which focuses largely on improving early reading for all students, and in IDEA 2004, such as offering early assistance for struggling students through Early Intervening Services and improving the outdated procedures for LD identification, this research does not provide findings that support the dramatic federal policy change proposed in this change.

Formulating a policy that allows states to assess approximately 1/3 of IDEA students — roughly 2 million students — without strong and compelling research compromises the opportunity of students with disabilities to benefit from the strong accountability system established by NCLB.