



The Council of Parent Attorneys and Advocates, Inc.
Protecting the Civil Rights of Students with Disabilities and their Families

January 23, 2014

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

RE: Comments to Elementary and Secondary Education Act (ESEA) Waiver Renewal Amendment
Via email (RegentsOffice@mail.nysed.gov)

Dear Members of the Board of Regents and Commissioner King:

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit organization of attorneys, advocates, parents and related professionals. COPAA members in New York and nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.5 million children with disabilities in America – including the 385,763 students with disabilities in New York. COPAA’s mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community.

COPAA is writing to oppose the New York Department of Education (NYSED) proposed amendment contained in its application for renewal of its flexibility waiver under the Elementary and Secondary Education Act (ESEA) because it seeks to directly alter how students eligible under the Individuals with Disabilities Education Act (IDEA) will participate in annual state assessments. While the U.S. Department of Education (ED) has provided state eligible for ESEA waivers the ability to request amendments as part of the renewal process, COPAA urges NYSED to reconsider its plan for the following reasons:

- **The proposal directly conflicts with federal law and damages the civil rights of children eligible under IDEA by:**
 - proposing to “allow districts to administer the state assessments at the students’ instructional grade levels as opposed to their chronological grade levels”; and,
 - creating an arbitrary category of students...“students with significant cognitive disabilities that are ineligible for the state’s alternate assessment.”

COPAA contends that NYSED should not seriously consider implementing an assessment that seeks to test students below grade level (or give out of level tests) because:

- ESEA Flexibility requires states to assure ED 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)
- Section 504 of the Rehabilitation Act and its implementing regulations also protect a student’s right to participate in state assessments and prohibits 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, NYSED already implements an alternate assessment on alternate achievement standards for students with the most significant cognitive disabilities as allowed under ESEA and IDEA which assures compliance with ESEA flexibility requirements. There is absolutely no need to create an arbitrary and indefinable category of IDEA-eligible students – as the proposal recommends – especially when 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)

- **The proposal promotes abuse and overuse of lowered standards and expectations by allowing any student with a disability to be tested in ‘out of level tests’ and incorrectly supports the myth that most students with disabilities can’t learn or achieve with their peers.**
 - The vast majority of students identified with disabilities in New York have disabilities that should not impede their ability to perform with their same age peers. In fact, the 2012 Child Count Data as reported by NYSED to the U.S. Department of Education shows that 87 percent of IDEA students should be expected to perform at grade level due to their qualifying disability (e.g. learning disability, speech/language impairment, other health impairment etc.). NYSED’s complete disregard for how ‘out-of-level testing’ directly affects the expectations teachers and administrators have for students as well as the provision of instructional support and access to assessments and general education altogether is alarming.
 - To the extent that New York’s students with disabilities are performing below a proficient level in Reading and Mathematics, rather than implement ‘out of level testing’, NYSED should embrace the opportunity during the transition to the Common Core State Standards and assessments for schools and districts to robustly implement more intensive instructional support, interventions, services and accommodations as appropriate to assure students are meeting their full academic potential and passing state assessments.
- **The proposal recommends a flawed methodology to set lower achievement goals for IDEA students by allowing further adjustments to the Annual Measurable Objectives (AMOs)**
 - While ESEA Flexibility currently allows NYSED to set AMOs in Reading and Math for each subgroup of students, including students with disabilities, this flexibility is only

intended to provide schools and districts more attainable goals for students over the next six years. NYSED cannot exploit this flex opportunity and further reduce expectations for IDEA eligible students by allowing them to be assessed below their enrolled grade and then measure their annual performance in subsequent years against the lower AMO. The result of this faulty methodology and practice will not only lead to flawed and indecipherable data, but also to faulty referrals to special education and intractable damage to student achievement and morale.

NYSED's proposal shows a complete disregard for every student's inherent potential to achieve meaningful academic success – by allowing schools to take IDEA eligible students off track for a regular high school diploma as early as third grade and relegating them to lower career and college expectations—simply because they receive special education services. COPAA also supports the comment submitted by The Advocacy Institute on this matter.

In conclusion, COPAA strongly opposes any state level proposal that leaves students with disabilities behind by lowering expectations and using less challenging systems of standards and assessments. We urge the NYSED to reconsider the proposal.

Sincerely,

A handwritten signature in cursive script that reads "Denise Marshall". The signature is written in dark ink and includes a large, stylized loop at the end.

Denise Marshall
Executive Director