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COMMENTS ON PROPOSED TITLE I REGULATIONS (May 19, 2003)

CLE's Responses to Questions 1-4

Question (1) Whether, in proposed Sec. 200.13(c)(1), existing scientific research, State/LEA or national data, and the current state of knowledge support setting the cap at 1.0 percent for students with the most significant cognitive disabilities whose achievement can be measured against alternate achievement standards for determining adequate yearly progress (AYP) at the LEA and State levels?

CLE favors the lower and previously proposed .5% limit but is without sufficient knowledge to assess whether the cap is more appropriately set at .5% versus 1% as set forth in proposed Sec. 200.13(c)(1). The population of students classified under the Individuals with Disabilities Education Act (IDEA) as having retardation and having measurable intellectual functioning and adaptive behavior three standard deviations below the mean is less than .5%. While there are other students with other disabilities, e.g., autism, brain stem, significant traumatic brain injury, who might fall within the limited number of students who have significant cognitive disabilities, the concern is that for many students because of the severity or type of disability, their cognitive functioning cannot be validly measured. Consequently, it is an issue of some concern if this cap is set too high and is inappropriately filled with students who have not been accurately determined to meet the criteria for participation in the alternate assessment using different, i.e., lower achievement standards.

Question (2) What, if any, significant implementation issues pertaining to the definition of ``students with the most significant cognitive disabilities" in proposed Sec. 200.1(d)(2) would arise at the State, LEA, and school levels. Specifically, the Department requests comments on what current record keeping and reporting requirements would States and LEAs use to comply with this provision and whether additional information or data will be necessary for compliance.

As discussed below, the term "significant cognitive disabilities" is not one of the 13 disability categories identified in the statute and regulations which, in addition to being in need of special education, is a prerequisite to a finding of eligibility under the IDEA. Consequently there will be a need for heightened scrutiny in monitoring and ensuring that such determination has properly been made based on valid and reliable evaluation instruments by qualified personnel under IDEA who are knowledgeable in testing and evaluation. While it may be more inclusive to identify students who require the alternate assessment with alternate achievement standards as those who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best education," it is more protective to limit the definition to those who are included based on intellectual functioning and adaptive behavior three standard deviations below the mean.

Question (3) Compliance with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us

know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

Question (4) How the Department should review these regulations once finalized to monitor regulatory compliance and invite more research and analysis to potentially fine-tune program implementation.

CLE encourages the Department to monitor carefully the cap –whether .5% or 1% -to ensure that it is not being used either to restrict eligible persons from participating in the alternate assessment with the same content based, but different achievement based standards or being misused by capturing students whose intellectual cognitive functioning and adaptive behavior are less than three standard deviations from the mean, and thus acting as a shield for schools and districts in implementing the AYP mandate. CLE also urges the Department to examine the AYP evidence, and carefully collect evidence reflecting the process for the IEP team to make determinations about what students should be expected to learn, whether the determinations are individualized, and whether students who are being assessed at the high end of the modified achievement/ performance standards are being held back for purposes of calculating AYP. This is a matter of serious concern, as it is possible that this process creates a disincentive for academically challenging persons who come within the definition of those who take the alternate assessment based on lower achievement standards.

CLE's Comment re: §200.20(c)(3)

CLE appreciates the opportunity to offer the following comment with respect to Sec. 200.20(c)(3) of the Title I regulations published on December 2, 2002 (67 FR 71710, 71717). This regulation provides that, if a student takes a State assessment for a particular subject or grade level more than once, the State must use the student's results from the first administration to determine AYP.

CLE concurs with the Department that though there may be reasons to allow a student to take high-stakes assessments multiple times, given that the purpose of the assessment is as a measure of the performance of the school in preparing the student to take the assessment, and school accountability is the focus of Title I, the first assessment ought to be used for purposes of AYP. This limitation will act as a deterrent to those schools and school districts that seek to modify their aggregate student outcome data by focusing resources and time on inappropriate test and re-test opportunities for the purpose of changing the negative outcome. Furthermore, such a policy decision will eliminate the temptation/incentive to teach to the test, arguably invalidating these tests by the emphasis on testing and retesting students in the name of remediation. By reducing the emphasis on testing, teachers are likely to feel more free and open to improving their teaching practices.

While CLE has some ambivalence about this matter, another reason to support the Department's position is that in any administration of an assessment, there will always be both false negatives and false positives. If subsequent administrations are only done on students who weren't proficient the first time, that may be useful for individual assessment and instruction but it will distort the aggregate assessment. On the other hand, the standard in the law isn't whether a cohort moves over time toward proficiency but whether a certain grade, with changing students, does – which arguably undercuts the rationale for counting students whenever they get there. This reasoning too supports the Department's stated rationale for using the first administration: best reflecting the performance of the school in preparing to take the assessment or, as CLE would prefer, the performance of the school in terms of the preparation its core academic program provides in preparing students to master the standards.

If the Department shifts its position and counts later administrations, there should, in any case, at least be a cut-off limiting what is, in fact, counted to test administrations within the same academic

year. Students who don't acquire proficiencies for seventh grade until after they've finished seventh grade are in a different posture. (Indeed the law emphasizes something akin to this in requiring that AYP take into account graduation rates, defined in terms of graduating with a regular diploma *in the standard number of years*.) Similarly with respect to test administrations at the end of summer school, the cut-off would for consistency need to be by the close of the regular academic year and should explicitly not include summer administrations. Again this would be consistent with the Department's rationale, for the primary purpose is to assess the efficacy of the school's core academic program – not so much to assess the efficacy of summer school remedial programs for students who haven't become proficient in the regular school program.

Proposed Regulations

1. Section 200.1 State Responsibilities for Developing Challenging Academic Standards

Establishing different academic achievement standards for students with the most significant cognitive disabilities who take an alternate assessment

Proposed Sec. 200.1, will if amended, continue to require the State to develop the same academic content standards to all public schools and public school students, but will authorize States to use a *validated* standards-setting process to define different academic achievement standards (formerly known as performance standards) for those students identified as having the most significant cognitive disabilities who take an alternate assessment.

CLE supports the proposed amendment to section 200.1 that will enable students with significant cognitive disabilities to participate in the State assessment based on the same content standards established for all students, but using different academic achievement or performance standards. As CLE stated in its prior comments to the proposed regulations of August 6, 2002, CLE believe that in order to meet the statutory mandate to include all students in the state assessment, each State must be *required* to develop two alternate kinds of assessments.

First, as currently required by Section 200.6, States are required to provide an alternate assessment for students with disabilities who cannot participate in all or part of the State assessment even with appropriate accommodations. Such alternate assessment is based on same content and achievement standards for all students. The second type of alternate assessment [which CLE believes is mandated by law not merely authorized] is an alternate assessment of those limited number of students with the most significant cognitive disabilities. This alternate assessment as described by the proposed revised regulation, is based on the same content standards set for all students, but allows States to measure the academic achievement of this particular group of students against alternate or different achievement standards. The failure to require development of these two different types of alternate assessments has the effect of constructively excluding diverse students from participation in the state assessment. The word "must" should replace "may" at sections 200.1(d)(1) and sec. 200.13(c)(1).

Accordingly CLE supports the proposed amendment to develop the second type of alternate assessment so as to include students with the most significant cognitive disabilities, but urges the Department to require States to comply with the statutory mandate for including all students in the State assessment by eliminating the discretion and requiring development of the alternate assessment with the same content standards but different achievement standards for students with the most significant

cognitive disabilities for the purpose of determining AYP for these students. CLE also encourages the Department through explicit examples and descriptions to underscore the distinction between alternative assessments with alternative standards for academic achievement versus alternative assessments with the same standards expected of all other students.

Validation and Recognizing the Need for Protections

While supporting the proposed regulatory change to include students with the most significant cognitive disabilities in this manner, CLE, nonetheless, has a number of concerns about the language of proposed regulation section 200.1(d). First, CLE suggests that a State "must" [delete "may" at section 200.1(d)(1)] define those achievement standards through a documented and validated standards-setting process so that they are aligned with the State's academic content standards; and at (ii) after "Reflect professional judgment" add "of qualified persons based on clear, valid, documented evidence" "of the highest learning standards possible for those students." With respect to the latter provision, it is especially important that protections exist to ensure that a student's second grade IEP team is not making lasting judgments about what are the "highest learning standards possible" for a student who has been identified as being one of the "students with the most significant cognitive disabilities."

Therefore, it is important to ensure what "validation" means under section 200.1(d)(1). The proposed regulation provides that (1) For students with the most significant cognitive disabilities who take an alternative assessment, a State may [Delete "may" ADD: "must"] *through a documented and validated* standards-setting process, define achievement standards that (i) are aligned with the State's academic content standards; and (ii) Reflect professional judgment of the highest learning standards possible for those students." (emphasis added) In this context, it is worth considering more specifically what needs to be validated, and how – including, e.g., (i) What goes into identifying the various assumptions that form the judgment about what are the highest learning standards "possible" for particular students and indicating the level of evidence needed to support those assumptions?

In determining what is "possible" one needs to consider the assumptions made about the level and nature of special education, related services, and other educational supports that will be provided. The whole purpose of assessment here would be defeated if the standards were lowered because the assumption of what is "the highest learning standards possible" for these students were based on *what is possible given the existing level of educational services*, as opposed to what this very limited number of students with the most significant cognitive disabilities *might achieve if provided the "very best education*." There is no doubt that the latter must be the criterion to justify any students' participation in an alternate assessment that holds them to lesser achievement standards. Furthermore, participation by these particular students in an alternate assessment that measures what they are learning - i.e., standards aligned with the State's content standards, and (as recognized by proposed regulations 200.1(d)(1)(ii), 200.13(c)(1)), performance or achievement standards set at a lower level, is justified on the basis that those standards reflect professional judgment and clear, valid, documented evidence of these particular students' inability even with the best education and learning accommodations to make progress on the standards applicable to all students.

Proposed regulation (d)(1)(ii) should also be amended to ensure that the decision about the achievement standards to be applied to any particular student with the most significant cognitive disabilities is an individualized determination to be made by the members of that student's IEP team (including parent and student) based on the highest learning standards possible for that particular student. Because the judgment here is about setting (individually) the standards for these children that will then drive their IEP and curriculum, it is essential as recognized by proposed regulation section 200.d(1)(ii) that the student's IEP team, having determined that the student is not capable of achieving at least some of the standards set for all, must set the performance standard at the highest level possible for

each particular student within this small subset of students. Language needs to be added to the proposed regulation to clarify this point.

CLE also suggests that additional clarification may be needed with respect to other aspects of the "documented and validated standard-setting process." For example, the question is left unanswered by the proposed regulation as to who needs to be involved in defining achievement standards. These alternate achievement standards must be aligned with the State's academic content standards and, as discussed above, reflect professional development of qualified persons based on valid documented evidence? We suggest that a broadly representative segment of qualified individuals, including, educators, persons and organizations with specialized knowledge of teaching, learning by, and assessment of students with significant disabilities, parents of students with significant disabilities and parent advocacy organizations and representatives of students be involved in this process. The Department may find it useful to define what is meant in section 200.1(d)(1)(i) by the reference to achievement standards being "aligned" with the State's academic content standards. The term "align" is confusing and in the absence of clarity gets interpreted as having some similarity, connection, or overlap. Here, in the context in which it is being used, it might be understood to mean something between completely identity with the standards and any relationship whatsoever. Query whether this vagueness is sufficiently remedied by (ii), on the "highest learning standards possible"?

What about the term "students with the most significant cognitive disabilities?" sec. 200.(d)(2)

CLE supports the amended regulatory provision at section 200.1(d)(2) that includes the definition of "students with the most significant cognitive disabilities" as students who have been identified as students with disabilities under the Individuals with Disabilities Education Act and "whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean. We suggest that the Department clarify that "students with the most severe cognitive disabilities" are the very limited portion of students "who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education and accommodations." Moreover, because the term, "significant cognitive disabilities" is not one of the classifications of disability defined in IDEA, the Department must clarify that for purposes of eligibility for the alternate assessment that uses different achievement standards, "students with the most significant cognitive disabilities" must have been evaluated by qualified personnel under the IDEA and determined through valid and reliable evaluations to have intellectual functioning and adaptive behavior that are three or more standard deviations below the mean. In no case shall IEP teams (absent the participation of a qualified school psychologist or other qualified evaluator) or other school personnel be permitted to make determinations about a student who has not previously been identified as having the requisite level of intellectual functioning or adaptive behavior for purposes of eligibility for participation in the alternate assessment that uses different/lower achievement/performance standards. This is not to suggest that the IEP team, including the parent and student, as appropriate, is not the appropriate body to identify those students with significant cognitive disabilities who qualify for participation in an alternate assessment that is not measuring them based on the same standards set for all other students. Sec. 200.13(c)(1).

2. Section 200.6. Inclusion of All Students

The distinction between alternate assessments based on the same vs different standards

CLE supports the basic approach reflected by the proposed regulations Sec. 200.1 and Sec. 200.6 pertaining to inclusion of all students. The proposed regulations read in conjunction with the recently finalized regulations do distinguish between alternate assessments of mastery of the same standards and alternate assessments of mastery of different standards, and as evidenced above appear to be carefully constraining the latter. Nevertheless, CLE is troubled because in practice States, with few notable

exceptions, are not implementing alternate assessments of the same content and achievement standards in the manner espoused by the Department. Especially in the context of their implementation in the field, CLE believes that the Department's treatment of alternate assessments that measure the same standards is still inadequate given the rampart and non-compliance that is apparent in the field.

As written paragraph (a)(2)(i) of sec. 200.6 of the final regulations promulgated 12/05/02, provides that the State's academic assessment system must provide for one or more alternate assessments for a child with a disability as defined under IDEA whose IEP team determines cannot participate in all or part of the State regular assessments, even with accommodations. As a matter of law under Title I and IDEA, students who need such assessments must be provided valid alternate assessment of the *same* proficiencies applicable to all students.

Alternate assessments encompass those instances where a student with disabilities cannot be validly assessed with the regular State assessments, even with accommodations, but can be meaningfully assessed in relation to the same standards, but with a different, alternative form of assessment – i.e., s/he capable of demonstrating some level of performance in regard to some or all the knowledge and skills in the State's content standards, but requires a different form of assessment to determine that level of performance. While many students with disabilities can be assessed with accommodations using the same assessments, of those who cannot, many can, and therefore must be, assessed with different instruments (for instance more performance-based or open-ended instruments) for validly measuring the same knowledge and skills – even if, in particular schools, such students are, initially at least, disproportionately failing to reach proficient levels.

As is evident from Massachusetts' requirements for participation of students with disabilities in their state assessment system, any number of students [no cap necessary because they are meeting the same standards] with a full range of disabilities from mental health related issues to students with multiple physical disabilities, severe health-related disabilities, severe cerebral palsy or other disability for whom the demands of a prolonged test administration would present a significant challenge, may need to participate through an alternate assessment. These disabilities in and of themselves do not require assessment against different or lower standards – rather, they require alternative ways of assessing them against the same standards.

While the Department has, as noted above, distinguished between the alternate assessment based on the same standards for all students and an alternate for students with the most significant cognitive disabilities, the regulations are virtually silent about using alternate assessments based on the same standards. We suspect this silence may be the source of the poor implementation by States of alternate assessments for students with disabilities that measure the same content and achievement standards. The only explicit reference to alternate assessment of the same standards is in describing the separate reporting of the two types of alternate assessment – which is an important provision but fails to lay enough of a foundation for such assessments in the first place, in terms of: a) providing for their existence, b) indicating when they are required, both in terms of a standard for when they needed (to provide a valid, accurate, etc. measure of the child's ability to demonstrate mastery), and c) setting conditions or criteria for them analogous to those now proposed for alternate assessment of different standards – in terms of how they are developed, validity in relation to determining proficiency in the same standards, etc.

As noted above, however, those students should be only a small minority; the alternate assessment using the same content and achievement standards is intended for students who simply need a different method of assessment of the same knowledge and skills. Accordingly CLE suggests that the regulations expressly reference Section 504 with respect to the alternate assessment based on same standards. As we have noted previously and as the Department concurs, limiting alternate assessment only to students covered by IDEA, as opposed to students covered only under Section 504, might make sense if

alternate assessments were only for students with the most significant cognitive disabilities, but that is clearly not the case. We suggest that the Department underscore this point so as to lend guidance to the states and local school districts. Whereas students with the most significant cognitive disabilities ought to comprise no more than .5% to 1.0% of all students, and virtually 100% of those participating in alternate assessment based on different achievement standards, the alternate assessment based on the same standards ought to be available to substantial percentage of students with disabilities protected under both IDEA and Section 504 who are most capable of attaining mastery of the State goals and objectives. Furthermore, as a matter of law and policy the Department also should encourage participation of non-disabled student who, in order to demonstrate mastery of the desired knowledge and skills, may simply need a different method of assessment of the same knowledge and skills.

Sec. 200.6(a)(2)(iii)(B) the Reporting Requirements

CLE strongly supports the Department's proposed regulation at sec.200.6(a)(2)(iii)(B) that provides for separate reporting regarding the two kinds of alternate assessments. The proposed regulatory provision calls for reporting separately "the percentage of students with disabilities taking" the two kinds of alternate assessments. This is important information and an amendment should be added to require similar reporting of the students' educational outcomes based on their assessments disaggregated by type of alternate assessment and by those receiving accommodations from those who did not on all assessments.

3. Section 200.13 Adequate Yearly Progress in General.

As discussed above, CLE favors the ,5% but has insufficient knowledge at this time to challenge the rationale offered for the 1% cap on participation of students with the most significant cognitive disabilities based in the alternative assessment relying on different standards. CLE supports use by the State and LEA of the alternate achievement standards in the alternate assessment for students with the most significant cognitive disabilities in calculating AYP at the State and LEA level – even assuming the 1% level. CLE supports the exceptions in paragraph (2) subject to the limit and its exceptions. It seems rationale to allow States to count students with alternate standards, under the limit, toward schools', districts', and States' AYP, both for students as a whole and for students with disabilities.

Moreover, CLE once again urges that the provisions of 200.13(c)(1) and (2) be made mandatory on the part of the State. This would require for the very limited population of students with the most significant cognitive disabilities and who are assessed on different/lower standards through an alternate assessment, that the State must through a documented and validated standards-setting process define achievement standards that align with the State's academic content standards; and reflect professional judgment, *based on valid, documented evidence*, of the highest learning standards possible for those students.

Finally CLE questions whether the proposed regulations are sufficiently clear with respect to what happens if the limit is exceeded (assuming no exception is made). These provisions need to be clarified and additional details spelled out.