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March 22, 2005

Honorable Margaret Spellings
Secretary
United States Department of Education
400 Maryland Ave., S.W.
Washington, D.C.
20202-7100

Dear Secretary Spellings:

Our organizations consisting of persons with disabilities, parents of students with disabilities, civil rights advocates and professionals fighting for an inclusive society oppose any modification of the existing 1% cap on the number of proficient and advanced scores from alternate assessments based on alternate achievement standards that can be counted in adequate yearly progress decisions. An alternate achievement standard is “an expectation of performance that differs in complexity from a grade-level achievement standard.” As written, the December 9, 2003 regulations protect the vast majority of students with disabilities who may not yet be receiving grade level instruction. These students are not so severely cognitively disabled to fall within that very limited population of students, who, even with the best instruction and accommodations, are incapable of learning relative to the achievement standards set for all other students.

The final regulations promulgated under Title I of the Elementary and Secondary Education Act, as reauthorized and amended, and issued pursuant to the Administrative Procedures Act, make clear that this cap applies only to students with the *most significant cognitive disabilities* who, even with the best instruction and accommodations, are determined by their IEP teams and with informed parental consent as unable to make progress toward the achievement standards set for all other students. The regulations give schools and school districts flexibility in reporting for AYP purposes this very limited number of students (demographically no more than 9% of all students with disabilities), who must still be included in the state accountability system. States may seek a time limited waiver from the Department based on documentation of the need to exceed the 1% cap. The December regulations supplemented existing provisions enabling States to demonstrate adequate yearly progress by showing, in the alternative, 10% growth, and using a three year averaging procedure.

We urge the Department of Education not to retreat from its obligation to protect the civil rights of ALL students with disabilities. We urge the Department to ensure that students with disabilities are not, once again, subjected to discrimination in the knowledge and skills they are provided through limited opportunities to learn. We expressly oppose initiatives - whether by members of Congress, national organizations representing school boards, school administrators, teachers, other service providers, even parents – who, without having produced *any* validated, research based evidence, urge the U.S. Department of Education to change existing regulations that will raise the 1% cap and thus permit with impunity a far broader range of students with disabilities to be taught to different/alternate achievement standards. This modification is without justification, and contrary to recent research reflecting improved

achievement outcomes for students with disabilities being taught to higher state achievement standards. See, e.g., *“Progress Report on Students Attaining Competency Statewide by School and District: Classes of 2005 and 2006,”* MA Dept. ED, Feb. 2005, pp. 7, 12-14; *“A Study of MCAS Achievement and Promising Practices in Urban Special Education, Data Analysis and Site Selection Methodology,”* U. Mass. Donahue Institute, September 2004. See also, Browder, Diane, et al., *“The Impact of Teacher Training on State Alternate Assessment Scores,”* Council for Exceptional Children, vol. 71, no. 3, (2005), pp. 267-282 (alternate assessment scores of student with most significant cognitive disabilities improved after training teachers in instructional strategies); Towles, E., et al., U. KY., ED 478482 (2003) *“What are the Consequences? Validation of Large-Scale Alternate Assessment Systems and Their Influence on Instruction,”* (alternate assessment influenced instruction to a greater degree than Individualized Education Plan development).

It is completely foreseeable that the Department is being pressured to raise the percentage of students with disabilities who may come within the limited 1% cap to 2, or even 4%, as significant numbers of schools and school districts across the nation are being found “in need of improvement” – at least based on the indicators being used for all other students. Criterion referenced and other performance assessments, federal monitoring reports, drop-out and graduation data attest to the many, many years that students with disabilities have been deprived of a free appropriate public education consistent with state education agency standards as prescribed by the Individuals with Disabilities Education Act. Disaggregated student assessment results by race, ethnicity, limited English proficiency, economic disadvantage and disability reveal students’ exposure to years of low expectations and limited opportunities to authentic teaching and learning to high standards. The educational achievement of these students, particularly those with disabilities, who were previously denied access to the general educational curriculum, cannot be expected to turn around overnight. States, LEAs and schools must be held accountable for accelerating the education of all these students who are capable of learning and making progress toward the standards set for all. Because some members of these protected student groups may not currently be functioning or receiving instruction at grade level is no excuse for failing to hold individual schools and school districts accountable to teach these students so they too may attain the same achievement standards expected of all other white, non-disabled, economically advantaged, English proficient students. This is a civil rights issue.

Accordingly, a regulation that results in states, school districts and individual schools over-inclusively teaching ANY student with a disability, except a student with the most significant cognitive disabilities who meets the criteria of 34 C.F.R. §200.6(iii), to lower standards, violates Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and arguably the Equal Protection and Due Process Clauses of the Fourteenth Amendment, U.S. Constitution. Any such regulation might also be challengeable on the merits based on Title I, 20 U.S.C. §1111(b) and 20 U.S.C. 1412(a)(15),(16) and 20 U.S.C. §1407(b)(2).

We are also disturbed by those who seek to speak for students with disabilities, and who would deny students with disabilities their right, as all other students, to hold their States, schools and school districts accountable for effective teaching and instruction. It is not legally or technically sound to test and to hold ANY student, with or without a disability, responsible for material which he/she has not been taught. What is at issue here, however, is accountability – specifically, whether the States, districts and schools have met their obligations to effectively teach all students with disabilities, except that very limited portion of students with the most significant cognitive disabilities, who will never be able to demonstrate progress on grade level academic achievement standards - even if provided the best possible education and accommodations.

It is our organizations' shared position that the educational necessity of such a proposed modification cannot be justified. Such modification will have a foreseeable discriminatory effect on a broad range of students with disabilities who can, if effectively taught and provided the opportunities to learn, learn what other students are expected to learn. Many students with disabilities have yet to receive an education that is fully aligned with the general education curriculum or to be effectively taught by highly qualified teachers. Many students with disabilities have not yet been assessed using reasonable and appropriate accommodations that have been used in the classroom to aid their teaching and instruction. Increasing the cap increases exponentially the potential harm to other students with other disabilities, particularly those who are non-verbal and may have autism, significant traumatic brain injury, cerebral palsy. For many students whose cognitive functioning cannot be validly or reliably measured, an increase in the 1% cap will enhance the likelihood of their being inappropriately channeled into classes where they will be taught to the different State standards on which they will be assessed.

Finally, to the degree that increasing the 1% cap currently mandated by regulation is being contemplated by the Department of Education, the review process has not been and must be transparent to the public. No scientifically validated research, including the *underlying data in support of increasing the cap* has been published, disseminated and/or publicly discussed and subjected to open and critical peer review. As a preliminary matter, any effort to withdraw or to modify the regulations without adherence to the rulemaking process set forth in the Administrative Procedures Act, 5 U.S.C. §551 *et seq.* will be subject to challenge. An amendment to a regulation is subject to the APA to the same extent as the original parent regulation. Just as the legislative rules promulgated on December 9, 2003, were required to follow the notice and comment procedures of 5 U.S.C. §553, any amendment to the regulation(s) should follow the same procedures. A modification of the 1% cap regulation will be highly significant. Invocation of the "good cause" exception (or other exceptions) to the notice and comment procedures cannot be justified on the ground that the procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(3)(B).

Thank you for your consideration of this important issue that has potential to adversely affect the education of millions of students with a range of disabilities. We appreciate your kind attention to this matter, and are available to respond to any questions or concerns.

Yours truly,

Kathleen B. Boundy
Co-Director
Center for Law and Education

Maureen Hollowell
Chair, IDEA Subcommittee
The National Council on Independent Living (NCIL)

Advocacy Institute
National Down Syndrome Congress

National Down Syndrome Society
TASH

cc: Honorable John H. Hager
Assistant Secretary
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