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Comments to Docket ID ED-201200ESE-0018

Notice of Proposed Rulemaking

U.S. Department of Education

The Center for Law and Education¹ (CLE) submits the following comments in response to the U.S. ED's Notice of Proposed Rulemaking (August 23, 2013) to amend the regulations under Title I of the Elementary and Secondary Education Act of 1965, as amended, to eliminate authorization to a state to define modified academic achievement standards and develop alternate assessments based on those modified achievement standards (AA-MAS) to be administered to certain students with disabilities. CLE supports that portion of ED's proposed amendment to §200.1(e)(1) that would eliminate a state's authority to define modified academic achievement standards. Setting modified or lower standards for assessing certain students with disabilities means 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. (The lower standards set for these students inevitably set the ceiling of their education as the standards are incorporated in their IEPs and their overall instruction.) This is clearly a violation of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, at least in cases where there is not *irrefutable evidence* that giving any such student the same access to the same level as all non-disabled students under Title I is pointless.

CLE's position is consistent with our letter to former ED Secretary Margaret Spellings in March 2005, in which we opposed consideration of new regulations that would allow any student with a disability, who does not meet the criteria of a student with the most significant cognitive disability per 34 C.F.R. § 200.6(a)(2)(ii)(B), to be taught to lower standards in violation of their federal statutory and civil rights. It is also consistent with our comments to the NPRM re/proposed regulations to Title I, December 15, 2005, in which CLE contended that then-proposed regulatory provisions under Title I that authorized states, districts and schools to assess certain students with disabilities based on modified achievement standards (AA-MAS) and to teach them to lower (modified achievement) standards was contrary to the plain language of Title I's single system of accountability for all students, Section 504, the ADA, the Equal Protection and Due Process Clauses of the U.S. Constitution. In response to the NPRM in Dec. 2005, CLE pointed out that there neither scientifically validated research nor educational necessity justified ED's proposed 2% regulation to authorize states to develop an AA-MAS,

¹ The Center for Law and Education is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation.

which would discriminate against a broad range of students with disabilities, including some whose cognitive functioning cannot be validly or reliably measured, and those who can learn if they are effectively taught and provided the opportunities to learn what other students are expected to learn.

CLE's legal position remains unchanged –i.e., authorizing certain students to be assessed and taught to lower standards violates their federal statutory, civil and constitutional rights. Accordingly, CLE does not support: (1) ED's new *proposed regulation §200.1(e)(2)* that allows continued, *albeit* limited continued use of the AA-MAS by those states that administered an assessment based on modified standards in the 2012-2013 school year; (2) ED's proposed regulation §200.1(e)(4) to use the results of the AA-MAS for accountability purposes through the 2013-14 school year; and (3) proposed amendments to regulation §200.6 consistent with the changes to §200.1(e) that have the effect of continuing to recognize the AA-MAS –even for the limited period so authorized.

Whatever ED's rationale for continuing to authorize states – even a limited number of states for a limited period of time – to violate the rights of students with disabilities who are over-inclusively assigned to take the AA-MAS, and thus taught to lower standards, it is not justifiable even through a phase-out plan. ED states in the August 23, 2013 NPRM: "Although we believe that new, more accessible assessments will eliminate the need for modified academic achievement standards and alternate assessments based on those standards, *we recognize that these new assessments cannot be implemented immediately.*" 78 Fed. Register 52470. Students with disabilities cannot be deprived of their rights to an opportunity to learn to the same standards as all other students. Even ED acknowledges through referencing a number of footnoted authorities in the August 23, 2013 NPRM that "[r]esearch demonstrates that low-achieving students with disabilities who struggle in reading and low-achieving students with disabilities who struggle in mathematics can make academic progress when provided appropriate supports and instruction." 78 Fed Register 52469-70 [footnotes omitted].

Moreover, ED's own data undermines continued use of the AA-MAS; the data shows that more than 400,000 students with disabilities were assessed (and taught) by their states based on lower academic achievement standards on the AA-MAS in 2010-2011. Of the 17 states that relied upon the Title I 2007 regulation authorizing states to develop and assess certain students with disabilities based on an AA-MAS, the percentage of students with disabilities captured by the criteria used to assigned them to the AA-MAS ranged from highs of 52% in Oklahoma, 42% and 39% in Tennessee and California, respectively, to a low of 8% in Minnesota.² These variant figures ought to suffice to persuade ED that the criteria set forth in current regulation §200.1(e)(2)(i),(ii) are overly inclusive and cannot define and delineate accurately those students who, if effectively taught, will still not achieve grade-level proficiency within the year covered by their IEPs.

There is no educational justification to continue to deny these students with disabilities --- students who cannot be distinguished from students without disabilities who have not achieved grade level proficiency at the end of the school year --- their legal rights to a meaningful opportunity to be taught and assessed based on the same assessment used to measure the

² https://www.ideadata.org/arc_toc13.asp#partbAssess

achievement of all students on the general education curriculum aligned with the State's adopted standards, including for some states, the Common Core State Standards. As described at 78 Fed. Register 52468: "In April 2007, the Department amended the Title I regulations to permit States to define modified academic achievement standards for certain students with disabilities, specifically those 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;..." Yet, then and now, the looming question remains how ED would respond to a request "to permit States to define modified academic achievement standards for certain *disadvantaged students*, specifically those whose *disadvantage* 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." That request would be dismissed in a heartbeat as undermining the most basic premise of NCLB. And the fact that many or most disadvantaged students who are far behind will not reach grade-level proficiency in the same time frame does not provide any justifiable rationale for deeming them proficient based on a less challenging standard. Hence, the only rationale for distinguishing the two and not seeing the same statement about students with disabilities as contrary to core of Title I/NCLB (as well as discrimination explicitly on the basis of disability) is that these students with disabilities do not have the cognitive ability to meet the same standards if appropriately taught and supported. There has been no valid basis for that determination, which is contrary to the research cited in the footnotes cited at 78 Fed. Register 52469-70, and the huge variations evidenced from state to state.

Whether or not those states that relied upon the AA-MAS in 2012-13 and taught students with disabilities based on lower standards now have a greater burden to prepare them for a "smooth transition" to attain college and career ready standards is irrelevant; lessening that burden cannot be done at the expense of the students' education. It is also noteworthy that no state's AA-MAS will be aligned with the CCSS; and it is critical that students with disabilities participate in the field tests of the PARCC and Smarter Balanced consortia states. Failure to ensure that students with disabilities, who have been relegated to their state's AA-MAS, are included in the PARCC/Smarter Balanced field tests and other state assessments aligned with the Common Core State Standards, will further violate their rights under Sec. 504 and the ADA.

CLE appreciates being provided the opportunity to comment on the proposed changes to the Title I regulations concerning use of the AA-MAS, and urges ED to eliminate outright authorization to states to use an AA-MAS that results in over-inclusive numbers of students with disabilities being taught to lower standards. We further encourage ED to acknowledge that because the selection of students with disabilities to participate on the AA-MAS is arbitrary, capricious and not supported by valid research-based evidence, legal principles of fairness, equity and non-discrimination mandate that its use by states should be considered suspect and be eliminated forthwith.

Thank you for your consideration of our comments.

Yours truly,

A handwritten signature in black ink, appearing to be "J. A. B. M.", is located at the bottom left of the page.

Kathleen B. Boundy
Paul Weckstein
CO-Directors