February 21, 2006

Jacquelyn C. Jackson, Ed. D., Acting Director
Student Achievement and School Accountability Programs
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, SW Room 3w230, FB-6
Washington, DC 20202-6132

Dear Dr. Jackson:

On behalf of the American Association of School Administrators (AASA), representing more than 13,000 school superintendents and local educational leaders, we would like to offer comments on the recently released regulations regarding the assessment of students with disabilities under Title I, Part A of the No Child Left Behind (NCLB) Act. As an organization that recognized the underlying flaws in the law, we appreciate the Department’s efforts to provide flexibility but we are not sure the proposed regulations will accomplish that goal.

The introduction of the additional two percent regulations was a clear departure from the current statute, and yet 40 states were provided the flexibility even before a formal rule-making process was proposed. This appears to violate negotiated rulemaking under Title I of NCLB. Despite this initial flexibility announced by Secretary Spellings in the spring of 2005 and even though most states have already been granted a version of this flexibility on at least a temporary basis, AASA remains concerned that timely input was not requested before the U.S. Department of Education put major portions of this proposed regulation into action. The late comment period on this proposed flexibility will make it difficult to coincide with the state assessment periods. We are concerned that the delay in its proposal will create even more confusion.

AASA, once again, questions the use of an arbitrary cap on the number of students with disabilities who may be assessed to modified or alternative standards. As we stated in our earlier comments on an assessment cap for students with disabilities; “specifically, AASA maintains that the Individualized Education Plan (IEP) which sets goals, benchmarks, methods, placement and determines how students learning will be assessed based on educational decisions made by a team of experts and the child’s parents, continues to make the best choices for children with disabilities. If a district is forced to make a decision in an IEP meeting that is based upon how close the district is to reaching their cap, the student’s right to a Free Appropriate Public Education (FAPE) may be violated. The purpose of the Individuals with Disabilities in Education Act (IDEA) is to look at each eligible child on a case by case basis. By imposing a cap, the Department is limiting the effectiveness of having an individualized program for children with disabilities.”
In Section 200.1, the Department of Education modifies its existing regulation to allow states to develop modified achievement standards in addition to the alternate achievement standards that have already been encouraged. Unfortunately, states are given little direction as to what should comprise modified achievement standards. Additionally, the scientific validity of modified standards and assessments versus simply using out-of-level testing to accomplish the same aim is not clear to us. Once the standards are established, the IEP team would be allowed to determine on an annual basis if students would be eligible to be assessed to the modified achievement standards. AASA applauds the authority given to the IEP teams during this process, but hope the final regulations allow even greater autonomy. If the IEP team is closest to the student in question and allowed to make the assessment decision; their decision should not be overridden by an arbitrary cap put in place by these regulations.

Section 200.6 requires states to provide one or more alternate assessments for students with disabilities. The proposed regulations would allow states to develop assessments specific to modified academic achievement standards according to the parameters established by the state. AASA remains concerned that there is a lack of appropriate alternate assessments; therefore, it would be very difficult for states to develop the necessary assessments for modified academic achievement standards as well. The modified achievement standards are defined as less than the grade level standards but there remains vagueness as to what that means.

AASA strongly objects to the elimination of out-of-level assessment as a way to count the progress of students with disabilities through these regulations. If out-of-level assessments are the most appropriate academic measure to determine the progress and success of a disabled student, then the results should be used. It is the determination of the IEP team as to how a student should best be assessed. The regulations of the U.S. Department of Education should not overrule that local decision.

The proposed regulations of Sec. 200.7 would establish that all states must have the same subgroup size for each disaggregated student group. This decision reverses a previous Department of Education policy that allowed states to have a larger subgroup size for students with disabilities and English language learners. This proposed regulation would overrule the peer-reviewed accountability plans for eleven states forcing them to change to a single subgroup size. In addition, the proposed regulations on modified achievement standards are given as the reason for this reversal of policy, but these regulations do not create additional flexibility for English language learners and other areas. Unfortunately, it only removes flexibility for states and local districts when it comes to assessing other students.

AASA remains concerned about the arbitrary nature of these decisions that reverse the hard work and research completed by so many states. There is little way to ensure that this elimination would not lead to additional overruling of provisions in approved state accountability plans. The Department of Education expands the reach of federalism by
coercing states to accept new decisions of the department instead of honoring state’s rights.

The regulations of Sec. 200.13 establish the one percent cap for counting the scores of students with disabilities who were assessed to alternate standards. These regulations would be modified to include capping the number of scores of students assessed to modified academic achievement standards to two percent. Once a cap on the number of scores that can be counted is established, the regulations walk away from the individualizing of services for special education students and therefore, violate the spirit of the law. The U.S. Department of Education states that the reason it set the numerical limit to two percent is “because we do not believe it is necessary or appropriate for more than three percent of students to be assessed based on alternate or modified achievement standards.” 1 The use of this language is concerning because it does not appear to be backed up by scientifically based research. Instead, it is proven here to be based on the subjective decision—beliefs—of the U.S. Department of Education. Research supports that in many cases more than 97 students in 100 will have difficulty scoring proficient on rigorous tests in the standard 180 day school year.

Another troubling aspect of the proposed regulations in Sec. 200.13 is the restriction of the availability of waivers, especially when they may be needed due to statistically insignificant numbers of students. While we applaud the ability for individual school districts to apply for the state for a waiver to exceed the three percent cap on the inclusion of students with a disability to other standards when calculating AYP, AASA is concerned over the elimination of a waiver possibility for a state. This is most concerning to the more than 5,000 rural and small school districts and states filled with small school districts. Under these circumstances, in order for a school district to receive a waiver to extend beyond the three percent due to statistically small numbers of students being assessed; another school district in the state would have to use less than their three percent allotment. This would maintain the required state-wide equilibrium of three percent, but unfairly burden the school districts and states in rural America. This is another example of how arbitrary policy most often hurts the school districts that need the most assistance.

We support the efforts of the department to now allow multiple assessments for the same child in a given year under proposed regulation Sec. 200.20. This will help to reward the progress of students who may receive a failing mark on a state assessment but work hard to improve in order to pass the test when it is administered again. States, such as Virginia, have been asking for this flexibility for years, in order to maintain a consistency with their previous state assessment practices. The new provision will now reflect the true achievement of the student at the end of grade level.

In addition, AASA supports the inclusion of students in the IDEA subgroup after they no longer receive special education services as is proposed also in Sec. 200.20. However, in the categories of students most likely to be involved in either alternate or modified

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1 Federal Register 4000-01-U, Department of Education 34 CFR Parts 200, 300 RIN 1810-AA98, 32. Emphasis added.
academic standards and assessments are very unlikely to ever leave special education, so the practical effect on making AYP may be very small. However, the change will now more accurately reflect the progress of students with disabilities within AYP.

Finally, AASA objects to the department statement that “these proposed regulations would not add significantly to the costs of implementing either the Title I or IDEA programs...” The development of quality assessments is an expensive requirement. Under No Child Left Behind, states were given a minimal amount of money to develop all of the new assessments required under the new law. At the time, the development of assessments to modified academic achievement standards was not included. This is a new set of assessments to be developed and yet, the states are not offered an additional funding to do so.

The department cites the overall Title I funding level as proof of adequate monies to implement these new assessments, but they fail to mention that funding for Title I was cut by $28 million in FY 2006 despite the record number of federal requirements that school districts are trying to meet. Student enrollment is growing and thus the number of student needing Title I services is growing. Furthermore, since IDEA was instituted in 1975, Congress has failed to pay its share of special education funding; providing only 17.8 percent instead of the promised 40 percent of the National Average per Pupil Expenditure for every student in special education. This has forced local districts and states to cover the more than $13 billion federal funding shortfall. Given these circumstances, AASA argues that the proposed regulations will add additional pressures on shrinking federal resources.

We appreciate the opportunity to comment on the proposed regulations. Regardless of the forty states that have already been granted a version of the flexibility; AASA urges the department to take all comments received into full consideration.

Sincerely,

Mary Kusler
Assistant Director, Government Relations

Cc: Chairman Michael Enzi,
Senator Ted Kennedy
Chairman “Buck” McKeon
Representative George Miller

2 Federal Register 4000-01-U, 49.