COMMENTS ON PROPOSED TITLE I REGULATIONS (December 15, 2005)

Submitted by:
CENTER FOR LAW AND EDUCATION

Title I- Improving the Academic Achievement of the Disadvantages

Legal Framework and Concerns

The explicit language of the Act is quite clear in requiring the adoption and use of the *same* standards for *all* students in the State, without exception. Hence, §1111(b) of the Act requires:

> ''(1) CHALLENGING ACADEMIC STANDARDS.—
> ''(A) IN GENERAL.—Each State plan shall demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.
> ''(B) SAME STANDARDS.—The academic standards required by subparagraph (A) shall be *the same academic standards that the State applies to all schools and children in the State*.
> ''(C) SUBJECTS.—The State *shall have such academic standards for all public elementary school and secondary school children*, including children served under this part, in subjects determined by the State, but including at least mathematics, reading or language arts, and (beginning in the 2005–2006 school year) science, which shall include the same knowledge, skills, and levels of achievement expected of all children.[1]

The NPRM cites no other provision in Title I that indicates or even implies that this categorical language means anything less than what it says on its face.

Given the clear, plain language of the Act (which greatly circumscribes the deference normally accorded to regulations), the Department proceeds at considerable peril in promulgating regulations that depart from that language in permitting the development and use of standards for some students that are different from, and less rigorous than, those applied to others. Even assuming that the Department were to find a statutory basis for this departure, the peril becomes all the greater if any Department-created exception to the statute is not carefully constructed and restricted to cover only the very narrowest exception necessary.

[1]There is a variety of other requirements in the Act concerning uniform standards, assessments, and adequate yearly progress – such as §1111(b)(1)(E); (2)(B), (F), (G)(iii) and (iv); and (3)(A) and (C)(i), (ix)(I) and (II), and (xiii) – each of which are also stated in terms of "all" students without exception and each of which ultimately links back in turn to the provisions for uniform standards for all students in §1111(b)(1)(A), (B), and (C) cited above. [As another example, see §1115(b)(2)(A), explicitly requiring that children with disabilities (among others) be eligible for Title I services in targeted assistance schools on the same basis as other children selected receive such services. If other students are selected for these services on the basis of not yet being proficient on the regular standards, but students with disabilities who would score equally low or lower in relation to those standards are not selected because they have achieved proficiency on lower alternate or modified standards, then they are at least arguably not being treated as eligible for services on the same basis as other students.]

Moreover, the very strong presumption against applying lower standards to the education of any students with disabilities is greatly heightened even further by the mandates of other laws which also apply to the students at issue here.

First, Section 504 of the Rehabilitation Act of 1973 and its long-standing regulations require that students with disabilities not be discriminated against or denied comparable aids, benefits or services. 34 C.F.R.§104.4(b). The setting of lower standards for certain students with disabilities will inevitably mean 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, that are not included in the same form in either the alternate or the modified standards. (The lower standards set for these students will set the ceiling of their education as they are incorporated in their IEPs and their overall instruction.) This is clearly a violation of Section 504, at the least in those cases where there is not irrefutable proof that giving any such student the same access to the same level is utterly pointless.

Second, the Equal Protection Clause of the Fourteenth Amendment is directly applicable here. In permitting the adoption of lower standards for these students on the basis of their disabilities, the regulations would authorize an intentional classification on the basis of the students' disability, not merely one that has the effect of subjecting them to lower standards. As such, it is subject to the strictest scrutiny applicable to treatment of persons with disabilities. Again, even if one were to concede that there are some instances where a student may, on the basis of his/her disability, be denied full access to the same level of public education as other students, this scrutiny would require the most careful tailoring to avoid over-inclusion in such a category and ensure that students are not unnecessarily denied such access.

Third, the Individuals with Disabilities Education Act, as recently reauthorized and amended, expressly requires all students with disabilities to participate in all State and districtwide assessment programs, including those specifically prescribed by the Title I, with appropriate accommodations and alternate assessments where necessary as indicated in their respective IEPs. 20 U.S.C. § 1412(a)(16). Students with disabilities, who cannot participate in regular assessments with appropriate accommodations, shall as needed, and consistent with their IEPs, participate in an alternate assessment. Id., § 1412(a)(16)(A) Guidelines developed by the State must provide for alternate assessments that are aligned with the State's challenging academic content standards and challenging achievement standards. Id., § 1412(a)(16)(C)(ii). IDEA 2004 clarifies that if the State adopts an alternate assessment that measures alternate academic achievement standards, as permitted under the ESEA regulations for students with the most significant cognitive disabilities, the achievement of the students must be measured against those standards that must, nonetheless, be aligned with the State standards set for all students. Id., § 1412(a)(16)(C)(ii). If an IEP Team determines that a student will take an alternate assessment on a particular State or districtwide assessment, the IEP must now include a statement explaining why the student cannot participate in the regular assessment and, perhaps, more significantly, why the particular alternate assessment selected is appropriate. Id.,§1414(d)(1)(A)(i) (VI)(bb).

From this vantage point there are several places in the proposed regulations where, even if one were able to justify any departures from the statute (along with 504 and the Fourteenth Amendment), the language is drafted in a way that will in fact result in many students with disabilities being subjected to lower levels of education in instances where the purported justification does not apply.

In some cases, this is because the criteria in the proposed regulation are themselves overbroad, without adequate justification, and on their face sweep in more students than fit the underlying standard the Department is seeking to establish, such as:

- The conclusion that 3% of the overall student population (or 30% of students with disabilities) are simply incapable of mastering the regular standards applicable to other students, even with high-quality instruction or, at least for 10% of the students, the "best" education,

- The different criterion, articulated in the proposed regulations at §200.1(e)(2)(ii)(A), that provides for students being subject to modified standards because they are "not likely" to master the regular standards, even with high-quality education – which means that students can and will be effectively limited to being taught to lower standards even if they would have at least a one-in-four chance, one-in-three chance, or even 49% chance of mastering the higher standards if properly taught (even assuming that our concerns, articulated in the point immediately above, about the basis for that conclusion, were not valid). In the aggregate, this thus sweeps in good numbers of students who, in fact, *would* achieve full proficiency (e.g., one out of every four students who has a 25% chance), even applying the questionable assumptions made in the NPRM. At the individual level, we are contemplating a decision that a child's purported one-in-four chance to succeed at the same level as other children is not going to be effectively exercised by that child.

- The assumption that allowing up to 3% of students with proficient scores on reduced standards is consistent with and narrowly tailored to focusing on the 3% of students who are purported incapable of mastering (or "not likely" to master) the higher standards applicable to other students is flawed. In fact, this would permit, and result in, much more than 3% of students to be subject to the lower standards, because it allows up to 3% of the total scores to consist of students who score *proficient* on the lower standards, which means that the total of students who are measured against the lower standards for AYP purposes will consist of that 3% *plus* all the students who score *below* proficient on the modified or alternate standards.

In other cases, the proposal will result in many students with disabilities being subjected to lower levels of education in instances where the purported justification does not apply because the criteria are stated in a general way which will not result in their intended and proper application without more carefully constructed guidance and direction. Good rule-making should always take into account what is known about the practices of the institutions or entities being regulated, and the range of ways that those entities are likely to interpret and implement the regulations being contemplated. In this instance, however, where the regulations are carving out an exception to a clear statutory policy (and constitutional principle), the need to take into account likely issues with interpretation and implementation in the field is particularly acute. The NPRM in several instances fails, we believe, to take the likely range of field response sufficiently into account and thereby will directly result in violations of both the Act and the intent of the NPRM itself.

Such examples include: The requirement to base the decision, inter alia, on the student's "progress in response to high quality education." [200.1(e)(2)(ii).] Is it not likely that many schools will focus their inquiry here on whether the student had teachers who meet the NCLB definition of "highly qualified"? Yet, surely the measure of whether a student is capable of mastering standards when provided with high quality education cannot be whether s/he failed to achieve proficiency in the presence of a teacher who (capturing the main thrust of "highly qualified") is certified in his/her field. Such reliance undermines the most basic assumptions of NCLB, as should be evident from trying to generalize that approach to other students. Yet, if there are other, more significant markers for whether the actual instruction was of sufficiently high quality (let alone the "best"), the NPRM provides no indication of that fact, let alone guidance as to what they are and how to apply them. Moreover, the basic structure of §200.1(e)(2)(i) and (ii), despite its intent, sets up the conditions for turning NCLB on its head. For all

other students, the core structure of NCLB creates a presumption that students' not becoming proficient or advanced performance in relation to the full range of state standards indicates that the quality of their instruction needs to be improved in order to get them to proficient and advanced levels. For the students at issue here, that presumption becomes non-operative. (Instead, for these students, the conclusion is drawn that the reason that are not fully mastering the standards is that they are simply incapable of doing so – and the assessment results are themselves used to justify that very divergent conclusion.)

As discussed below in our section-by-section comments, we identify other instances – other parts of §200.1(e) that are not adequately defined and explained, and the problems that will thereby occur – e.g., "documented and validated standards-setting process," "access" to grade level curriculum, "the student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by achievement assessment data, assessments without accommodations. Query how does that not translate into simply disability + low scores = justification for setting lower standards? Query too what is needed to effectively prevent that interpretation? As discussed below, the Department needs to provide greater clarity and content to ensure that the state guidelines are adequate to protect students with disabilities from being held to lower standards.

Proposed Regulations

1. **Proposed regulation §200.1(a)(1)**

§ 200.1 State responsibilities for developing challenging academic standards.

a) * * *

(1) Be the same academic standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part, except as provided in paragraphs (d) and (e) of this section;

Current regulation Subsection 200.1(a) requires each State to develop challenging academic content and student academic achievement standards that will be used by the State, its LEAs and schools to carry out subpart A. Proposed subsection §200.1(a)(1) reiterates that these *academic content and academic achievement standards* shall be the "same academic standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part," but broadens an exception that currently applies only to paragraph (d) [students with the most significant cognitive disabilities] to include paragraph *(e)* [students to be assessed based on modified standards] of this section."

a. **Content v. achievement standards**. Application of the exception to paragraph (e) is inconsistent with Title I . First, §200.1(a) applies to both *academic content and academic achievement standards*, and the proposed regulation that extends the exception to paragraph (e) should only apply to academic achievement standards not academic content standards. Applying the exception from academic content standards to paragraph (e) is inconsistent with the statute at §1111(b). The academic content standards that subsection (e) students are expected to learn must be the same academic standards that the State applies to all public schools and public school students in the State. The proposed regulations at §200)e)(1)(i) state that a State may define modified academic achievement standards for use if they "[a]re aligned with the State's *academic content standards for the grade in which the student is enrolled*…"

2. **Proposed regulation §200.1(b)(1)(i)** provides that a State's academic content standards may "[s]pecify what all students are expected to know and be able to do, *except as provided* in paragraphs (d) [Alternate academic achievement standards] and (e) [Modified academic achievement standards] of this section."

For the reasons discussed above, CLE opposes including subsection (e) under this provision, and recommends deleting the reference to "and (e)".

As discussed above, CLE believes that applying this exception to paragraph (e) [students assessed based on modified standards] violates the plain language of Title I-A, 20 U.S.C. §6311(b), 20 U.S.C. §1412(a)(1)(A) [FAPE consistent with State education agency standards, and Section 504.

The challenging academic content standards established for all students are not and should not be modified under the proposed regulations for students covered by paragraph (e). The proposed regulations give States greater flexibility by allowing them to choose to develop and use an alternate assessment based on modified achievement standards to measure, and thus be credited for, the progress of a student within this classification toward meeting grade level proficiency of the *same academic content standards for the grade in which the student is enrolled*. The assessment based on modified achievement allows the school/district to be credited for the student's learning and being taught to a lower standard.

3. Proposed regulation §200.1(d) Alternate academic achievement standards

CLE urges the Department to use this opportunity to provide more guidance at §200.1(d) regarding the standard for identifying students with the "most significant cognitive disabilities." This is especially important in light of the Department's proposal to create yet another category of students who would fall between this group of student with the "most significant cognitive disabilities" and those students who participate in alternate assessments based on the grade level academic achievement standards defined under 200.1(c). Assuming the new categorical grouping represented by those covered by paragraph (e) is not withdrawn on constitutional or statutory grounds or as premature, based on insufficient research and evidence, CLE recommends drawing a brighter line between those students with the most significant cognitive disabilities under paragraph (d) and those covered by paragraph (e) who are eligible to be assessed based on modified standards. In particular, the language previously set out in the commentary on this point (FR50987 August 6, 2002) should be incorporated into §200.1(d) and §200.13.

Accordingly, CLE recommends replacing "students with the most severe cognitive disabilities" with "only 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 very best possible education and accommodations.[1] This determination must reflect the judgment of qualified professionals based on clear, valid, documented evidence."

With this bright line, many more students with cognitive disabilities who are now being assessed based on alternative assessments based on alternate standards, and using inappropriate out-of-level tests, may meet the eligibility criteria for being assessed based on modified standards.

[1] This sentence is taken directly from the commentary, except that we have added "and accommodations" to ensure that the assessment is not the barrier, in order to conform to IDEA and Section 504.

4. Proposed regulation §200.1(e). Modified academic achievement standards.

a) Research and analysis lacking

Proposed § 200.1(e) would allow a State to use a documented and validated standards - setting process to define modified achievement standards for assessing certain *students whose disability has precluded* the student from achieving grade – level proficiency. It is difficult to fathom what is involved in this process given the lack of research and analysis supporting the coherence of this new classification within a State accountability system.

i. Undermining accountability provisions of Title I

The Department offers little rationale for creating this new classification of assessment other than by analogy, referring to the *increased flexibility* afforded to States and LEAs through the creation of the alternate achievement standard – described as differing in complexity from a grade-level achievement standard -for only those students with the most significant cognitive disabilities who even with the best instruction "will likely never reach grade-level achievement standards." [70 FR 74625] In creating this new classification under Title I the Department appears to be mixing two different purposes – program accountability which is mandated under Title I and individual student accountability based on performance. Although the purpose and intent of Title I was to make schools and school districts more accountable not only to states but to students and their parents, the Preamble to the NPRM explains that modified achievement standards, though aligned with grade-level content, are adjusted to reflect reduced breadth or depth of grade-level content so that students with disabilities participating in an assessment based on modified achievement standards would be better able to demonstrate what they know and can do. [70 FR 74626] Elsewhere in the Preamble, we are told that modified achievement standards may be expressed, for example, as scores from an assessment limited to 'core content and achievement' expectations, or as results from an assessment that includes non-traditional items based on grade-level content." [70 FR 74627] Without sufficient analysis or explanation to support this new classification, the Department's proposed regulations risk undermining the accountability provisions of Title I .

ii. **IDEA fails to support**

Despite the Individuals with Disabilities Education Act's only having been recently reauthorized and amended to reflect Congress's deliberate intent to link IDEA with the accountability provisions of Title I, including, for example, by requiring for the first time special education teachers to meet the 'highly qualified' standard consistent with Title I, IDEA regulations having not yet been promulgated, and critical Title I requirements governing the quality of teaching and instruction to standards only just being implemented, the Department suggests that "information accumulated from the experiences of the States" and "recent research shows" there is another group of students beyond those with the most significant cognitive disabilities who "have significant difficulty achieving grade-level proficiency, *even with the best instruction*." [70 FR 74624] Further, the Department reports with no analysis or discussion that information and research indicates that this group of students with disabilities "whose progress in response to high-quality instruction, including special education and related services designed to address the student's individual needs, is such that the student is *not likely to* achieve grade-level proficiency within the school year covered by the student's individualized education program (IEP)." [70 FR 74624-74625] By any measure given the changes in the law under Title I and IDEA, such a conclusion seems reckless – especially knowing that assessment drives instruction –and the potential adverse impact on the education of an excess of 20% of students with disabilities.

CLE is concerned that the research cited by the Department does not support the premise for which it is asserted. As other organizations, we seriously question that the adequacy of the research base that warrants a finding that there is a group of students with disabilities [approximately 20% in addition to the 10% previously identified as having significant cognitive disabilities and assessed based on alternate standards] "whose progress in response to high-quality instruction, including special education and related services designed to address individual need, is such that the student is *not likely* to achieve grade-level proficiency within the school year covered by the student's individualized education program (IEP). [70 FR 74625]

iii. **Lack of match between numbers proposed and population held to lower standards**

Even if the research were valid that 3% of students are unable to attain grade-level proficiency, of particular concern is the mismatch between this number and the impact of the decision of the Department to count up to 3% of students who score proficient based on alternate/modified standards. If 3% of those who score proficient are counted for AYP purposes, the reality is that substantially larger numbers of students will have participated in alternate/modified assessments and been subject to lower standards.

b) <u>Proposed regulations §200.1(e)(1)(i) – validating and documenting modified achievement standards</u>

Proposed regulation §200.1(e)(1) allows a State to use a "documented and validated standards-setting process" to define 'modified' achievement standards for certain students with disabilities.

i. Need for guidance re: documented and validated standards setting process.

In light of the lack of rationale offered in support of this proposed new category of standards, CLE urges the Department to provide concise and narrow guidance about the *documented and validated* standards-setting process which a State will need to use to define *modified* achievement standards that are aligned with the State's *academic content standards* for the grade in which the student is enrolled, although the so-called "modified" achievement standards may reflect reduced breadth or depth of grade-level content; provide access to grade level curriculum; and not preclude a student from earning a regular high school diploma. §200.1(e)(1)(i)-(iii). .

In contrast to an "alternate achievement standard" that the Department has defined as "an expectation of performance that differs in complexity from a grade-level achievement standard," a "modified standard" *must enable a student to have the opportunity to achieve grade level proficiency of the academic content standards for the grade in which the student is enrolled.* We recommend that the Department spell out a careful validation process – one that ensures that the modified achievement standards are aligned with the State's academic content standards for each grade level.

ii. **Need to define "align."**

We recommend that the Department define "align" so that while not necessarily meaning total overlap, there is a guarantee that the modified standards are an integral part of a coherent body of core knowledge and skills comprising what all students need to know and be able to do that has been strategically developed by persons with content knowledge and instructional expertise.

iii. **Need to identify what needs to be validated.**

In this context, we recommend that the regulations articulate more specifically what needs to be validated, and how – including, e.g., What goes into identifying the various assumptions that form the judgments about what are the learning standards that must be met for particular students, whose disabilities have precluded their learning to grade level standards within the period covered by the annual IEP, to meet grade level achievement standards despite being assessed based on modified achievement standards reflecting reduced breadth or depth of grade level content, so as to be able to meet over an extended time grade level proficiency; and indicating the level of evidence needed to support those assumptions? Accountability testing, here using assessments based on modified achievement standards, must be on grade level content standards that will enable this particular group of diverse students whose disabilities have precluded them from learning to grade-level proficiency to be effectively taught so they may attain that grade level proficiency they need for a high school diploma.

iv. Need to identify who defines the standards.

At §200.1(e)(1) the question is also left unanswered by the proposed regulation as to who will define the modified academic achievement standards utilizing a documented and validated standards-setting process. These modified academic achievement standards must be aligned with the State's academic content standards and reflect professional judgment of qualified persons based on valid documented evidence. CLE suggests that the proposed regulation needs to more comprehensively and specifically address the standard-setting process, including by requiring the state to involve content experts with professional judgment and experience in standards-setting so as to ensure that these particular students are, in fact, taught the knowledge and skills they need to meet the grade level proficiency standards set by the State.

v. Participants in standard-setting process.

Judgment by professionals intimately familiar with the content standards by grade level, prerequisite knowledge and skills needed to be learned to meet the State standards, and differentiated instruction based on type of disability; by parents who are knowledgeable of the child, the child's disability related educational needs; and by their advocates knowledgeable about the child's rights and protections, is essential.

vi. Role of specialists and parents.

At a minimum, these individuals should include those most familiar with each State's standards by content area, who are most qualified to identify the key skills, concepts and content to be taught, learned and assessed; to determine the benchmarks needed to reach each level of achievement; individuals with direct experience in developing alternate assessments, including authentic performance assessments; and individuals, including special educators and parents, who are most knowledgeable about children with diverse disabilities, what obstacles to learning are created by their disabling conditions, impede progress in learning, and can be addressed through high quality instruction and extended learning opportunities provided over a longer period of time.

c) <u>Proposed regulation §200.1(e)(1)(ii) - access to grade level curriculum</u>

A state that chooses to define modified standards must ensure that such standards "[p]rovide access to grade level curriculum." In determining what constitutes "access" to grade-level curriculum, it is necessary to consider the assumptions made about the level and nature of special education, related

services, and other educational supports that will be provided for students covered by paragraph §200.1(e), including, presumably, through extended school day and extended school year (e.g., summer programs, FAPE through 22 years) so they may learn to grade level proficiency.

i. Proposed regulation §200.1(e)(1)(ii) - access to grade level curriculum

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In determining what constitutes "access" to grade-level curriculum, it is necessary to consider the assumptions made about the level and nature of special education, related services, and other educational supports that will be provided for students covered by paragraph §200.1(e), including, presumably, through extended school day and extended school year (e.g., summer programs, FAPE through 22 years) so they may learn to grade level proficiency.

The term "access to grade-level curriculum" needs to be clarified further in the regulation if the important purpose behind it is to be accomplished. Is some exposure to some portion of that curriculum sufficient to pass muster? We believe not, and that such a standard could not be justified under the statute. Rather we believe that the modified standards must be written in a way that (i) ensures "full" access to (ii) "the entire" grade-level curriculum. And we further believe that it is necessary for the Department to provide additional explanation of those terms in order that they can be reasonably understood by those responsible for implementing them.

d) **Proposed regulation §200.1(e)(1)(iii) - modified standards and qualifying for a high school diploma**

i. Linking modified achievement standards to knowledge and skills needed to attain grade level proficiency .

Proposed regulation §200.1(e)(1)(iii) requires that the modified achievement standards defined through the documented validated standards setting process not preclude a student from earning a regular high-school diploma. Once again, key to this requirement is the validation process responsible for defining modified academic achievement standards which the Department has explained "may reflect reduced breadth or depth of grade-level content." As described above, through the validation process, questions will need to be asked and judgments will need to be made about the evidence needed to ensure that participation in the assessment based on modified standards will allow a student the opportunity to learn the knowledge and skills necessary to demonstrate grade-level proficiency to qualify for a regular diploma. We recommend that the Department clarify the kind of screening and review process that a State must undertake to ensure that the modified standards do not preclude students from earning a regular high school diploma.

ii. Identifying steps for students to attain grade level standards through enhanced opportunities to learn.

Participating in an assessment based on modified achievement standards cannot be the basis for denying any student the possibility of earning a regular diploma. CLE urges the Department to identify steps to ensure that students being assessed based on modified standards are provided opportunities to learn to grade level standards through participation in the regular education curriculum, effective instruction by highly qualified teachers, and use of the assessment to improve teaching, and provision of extended learning opportunities to enable the students to meet the grade-level proficiency. The

Department should require States and LEAs to encourage students with disabilities and their respective IEP teams to utilize extended schooling opportunities [extended school year, extending schooling up to 22 years, generally] to ensure that students assessed based on modified standards are provided the opportunity to meet grade-level achievement standards necessary to receive a regular high school diploma.

e) Proposed regulation §200.1(e)(2) - Eligibility to participate in assessments based on "modified" academic achievement standards

i. Protection in identifying eligible students

Proposed regulation §200.1(e)(2) would require a State to adopt specific criteria for IEP teams to utilize in determining whether a student is eligible to be assessed based on modified achievement standards. Unlike students with the most severe cognitive disabilities, who are only eligible to be assessed based on alternate achievement standards, if, even with the best instruction, "they will likely never reach grade-level achievement standards," the Department recognizes that the group of students who are eligible for participation in the assessment based on "modified" achievement standards will be more difficult to identify. [70 FR 74626] CLE believes that this group of students should include many students with severe cognitive disabilities for whom it cannot be foreclosed that "even with the best instruction" they "will likely never reach grade –level achievement standards. [FR74625] Many of these students are currently being inappropriately assessed based on alternate achievement standards.

The Department suggests that students who qualify for assessment based on modified achievement standards "would not simply be students who are having difficulty with grade-level content or who are receiving instruction below grade level. Nor would they necessarily be the lowest-achieving two percent of students, who are not students with the most significant cognitive disabilities." [70 FR 74626] CLE agrees with the Department's assessment that "it is of paramount importance to ensure that students are not held inappropriately to standards other than grade-level achievement standard." However, we do not share the Department's confidence that the proposed regulations are sufficiently demanding and clear so as "to … distinguish between students whose disability has truly precluded them from achieving grade-level proficiency and those who, with appropriate services and interventions, including special education and related services designed to address the student's individual needs, can be assessed based on grade-level achievement standards." [70 FR 74626] Given the stakes, we believe greater certainty is required.

f) Proposed regulation §200.1(e)(2)(i) Collecting objective evidence based on multiple measures that the student's disability precludes learning to grade-level proficiency

As a precaution in determining which students are eligible to be assessed based on modified academic achievement standards, the State would be required by proposed regulation §200.1(e)(2)(i) to develop guidelines that must include: objective evidence that the student's disability precludes his/her being able to achieve grade-level proficiency within the usual timeframe of a school year based on the "State's assessment described in §200.2 *or* [o]ther assessment data that can validly document academic achievement." The Department has identified such guidelines to include at minimum the State's assessments described in §200.2 or other assessment data that can validly document academic achievement.

i. Challenging a flawed presumption

The basic structure of §200.1(e)(2)(i) and (ii), despite its intent, sets up the conditions for turning NCLB on its head. For all other students, the core structure of NCLB creates a presumption that students'

not becoming proficient or demonstrating advanced performance in relation to the full range of state standards indicates that the quality of their instruction needs to be improved in order to get them to proficient and advanced levels. For the students with disabilities at issue here, that presumption becomes non-operative. (Instead, for these students, the conclusion is drawn that the reason that are not fully mastering the standards is that they are simply incapable of doing so – and the assessment results are themselves used to justify that very divergent conclusion.)

We must not lose sight of the fact that the purpose of the assessment system under Title I is, in fact, to determine whether the student has received high quality instruction in the first place. State accountability systems are expected to make schools and school districts accountable to parents and students, not subject students to reduced standards of learning when the school/school district have failed to effectively educate the student to meet grade level proficiency.

ii. **Not using single test/assessment to determine eligibility.**

Many existing State assessments lack validity and reliability evidence necessary to support the inference that a particular student with a disability is precluded by the nature of that disability from achieving grade-level proficiency. Rather, a student's performance on the State assessment may as likely reflect that the student has not received adequate or effective instruction by a highly qualified teacher in the core subject area being assessed or the obstacle to achievement may be the assessment instrument itself. Consequently the Department must establish clear guidance to ensure that students are not being identified to be held to lower standards based on the use of invalid test instruments. CLE urges the Department to specify that no single assessment shall be the basis for finding a student eligible under §200.1(e) to be assessed based on modified achievement standards. The Department should require that the "objective evidence" relied upon by a school/district to indicate a student cannot because of his disability achieve at grade level standards shall not rely on a single test or assessment.

iii. **Using multiple measures**.

CLE urges the Department to require use of multiple measures to the extent any assessment is utilized to determine eligibility of any student with a disability under paragraph (e) who is to learn, be taught and assessed based on modified achievement standards. Multiple measures should, to the extent possible, always be used since a single test or assessment rarely has sufficient validity and reliability to make significant decisions about individual students. This is especially true in making high-stake decisions affecting individual students. Many students with disabilities will be determined ineligible to be assessed on the basis of modified standards if they are assessed using multiple measures and with such accommodations, as needed, to demonstrate that with effective specialized instruction they are able to keep pace with their grade level peers and meet the grade level achievement standards.

Because multiple measures are warranted in making an individual decision of significant magnitude – here eligibility to be assessed [and provided instruction since assessment drives instruction] on the basis of modified achievement standards - CLE urges the Department to require consideration of other forms of evidence to support or rule out an eligibility determination.

g) **Proposed regulation §200.1(e)(2)(ii)(A) establishing and meeting a heightened standard**

Proposed regulation at subsection (e)(2)(ii) (A) also would require as a criteria in the guidelines for defining who is eligible to participate in the State assessment based on modified academic

achievement standards that "[t]he student's progress in response to high-quality instruction, including special education and related services designed to address the student's disability related individual needs, is such that the student is *not likely* to achieve grade-level proficiency within the year covered by the student's individualized education program (IEP)."

i. "Not likely" versus incapable of mastering regular standards.

The different criterion, articulated in the proposed regulations at §200.1(e)(2)(ii)(A), provides for students being subject to modified standards because they are "not likely" to master the regular standards, even with high-quality education – which means that students can and will be effectively limited to being taught to lower standards even if they would have at least a one-in-four chance, one-in-three chance, or even 49% chance of mastering the higher standards if properly taught (even assuming that our concerns about the basis for that conclusion, were not valid). In the aggregate, this thus sweeps in good numbers of students who, in fact, *would* achieve full proficiency (e.g., one out of every four students who has a 25% chance), even applying the questionable assumptions made in the NPRM. At the individual level, we are contemplating a decision that a child's purported one-in-four chance to succeed at the same level as other children is not going to be effectively exercised by that child.

The assumption that allowing up to 3% of students with proficient scores on reduced standards is consistent with and narrowly tailored to focusing on the 3% of students who are purported incapable of mastering (or "not likely" to master) the higher standards applicable to other students is flawed. In fact, this would permit, and result in, much more than 3% of students to be subject to the lower standards, because it allows up to 3% of the total scores to consist of students who score *proficient* on the lower standards, which means that the total of students who are measured against the lower standards for AYP purposes will consist of that 3% *plus* all the students who score *below* proficient on the modified or alternate standards.

CLE urges the Department to reject this standard. Instead, *prior* to any student with a disability being referred for consideration as eligible to participate in an assessment based on modified achievement standards, the student's IEP team must determine whether the school/school district can meet what must be a very high standard – not some mere prediction of "not likely to achieve grade-level proficiency." The team should be required to collect valid, reliable and objective evidence from a variety of sources to demonstrate to a high level of certainty – i.e., clearly and convincingly that the student as a result of his disability [not inadequate testing, teaching, or opportunities to learn] is incapable of mastering high quality education at grade level standards.

ii. Defining and examining high quality instruction over time

Two major and unsupported assumptions are built into the eligibility criteria. First, that the student's response to intervention is being measured based on high quality instruction, including special education and related services designed to address the student's individual needs, and that the student is receiving instruction by highly qualified teachers in the grade-level curriculum. Many students still do not have IEPs that are appropriate, reflect standards based teaching and learning or that are being properly implemented. In addition, many students with disabilities are still not receiving well-designed grade-level instruction or research based specialized instruction delivered by highly qualified teachers. As discussed previously, the Department must clarify that it is not sufficient that a teacher be "highly qualified" for purposes of NCLB and IDEA. It is also necessary that there is evidence that the "highly qualified" teaching and instruction must be provided consistent with the student's IEP over a sufficient period of time to address identified educational deficiencies, disability-related educational needs, and to allow for an evaluation of the impact of such instruction.

Similar to the students with the most significant cognitive disabilities who are taught to alternate achievement standards, the Department should clarify that the student under consideration here may be assessed based on modified standards only if the IEP team has collected and documented evidence demonstrating that the student cannot effectively learn the academic content standards at grade level proficiency for the grade in which he is enrolled, *even after being provided high quality instruction and effective interventions by highly qualified teachers –as further defined by the Department.* This 'rule out' provision is critical; otherwise students with disabilities will be over-identified and assessed based on [and taught to] modified academic achievement standards contrary to the requirements of Title I and Section 504. Objective evidence might include a record [documentation in the student's annual IEP(s)] that the student over an extended period of instructional time has received research-based, specialized instruction and related, supplemental or support services from highly qualified personnel, including in the form of 'after school' tutoring, other extended school day and school year programming and services, and despite these opportunities to learn, has failed to progress at the rate of learning necessary to meet the state's challenging grade level standards.

iii. Assessing progress in each subject area over time

The extent of the student's progress toward meeting grade-level proficiency within the year covered by his IEP cannot be based on a single State assessment instrument (including one administered multiple times). A student's disabling condition may only preclude the student from learning effectively at grade level achievement standards in a particular subject area but not another, and consequently the Department ought to clarify that a student's progress *in each subject area assessed*, shall be based on multiple measurements, over a period of time, that are valid for the subjects being assessed. §200.1(e)(2)(ii)(B).

iv. Receiving meaningful instruction at grade-level

Furthermore, to ensure that this assessment is fair, the student must be receiving instruction in the grade-level curriculum for the subjects in which the student is being assessed to measure his progress in reaching grade-level achievement standards for the classes in which he is enrolled. §200.1(e)(2)(iii). The Department ought to specify that the instruction, including specialized instruction, must be evidenced based, aligned with the grade level content standard, and as discussed above, of high quality and provided by highly qualified personnel.

v. **Establishing a high standard**

Given the stakes and concerns about students who have been inadequately educated being classified as eligible to participate in a state assessment based on modified academic achievement standards that may have reduced breadth and depth, CLE urges the Department to establish a high standard that must be met by a student's IEP team. Much is at stake for these students and, it is not adequate that an IEP team merely find "the student's progress in response to high quality instruction" "*is such that the student is not likely to* achieve grade-level proficiency within the year covered by the student's individualized education program (IEP)."

The Department ought to reject the "not likely" to achieve standard and establish a high standard that requires the LEA to demonstrate, for example, "*clearly and convincingly that a student is not capable"* of learning what he needs to know and be able to do at grade level proficiency for the grade in which he is enrolled, even after he has received high quality instruction and interventions from highly qualified teachers over time, to demonstrate meaningful progress that will enable him to meet grade level achievement standards.

vi. Individual determination for each subject area assessed

In addition, the Department should clarify that the decision to assess any student with disabilities based on modified achievement standards is an individualized determination to be made by the members of that student's IEP team (including the parent and student). Because this decision will then drive development of the student's IEP and curriculum, it is essential that the student's IEP team (including parent and student, as appropriate) separately determined based on the *clearly and convincingly incapable standard* whether the student can achieve grade-level proficiency in *each* subject area assessed. The IEP team must then set the achievement standard on which the student will be assessed separately for each core academic subject area at the highest level possible for each particular student within this subset of students, so as to best ensure their attaining the standards set for all.

h) Proposed regulation §200.1(e)(3) Student eligibility based on disability category

i. Eligibility and classification

In the preamble to the NPRM, the Department acknowledges that students from any of the 13 disability categories lists in the IDEA will be among those who are assessed based on modified achievement standards. [70 FR 74626] CLE urges the Department to make explicit in guidelines/regulations that a student with a disability who may be eligible to be assessed based on 'modified academic achievement standards' cannot be identified based on any particular classification per se under IDEA.

ii. Eligibility and Section 504.

Although the Department suggests that students for whom a modified achievement standards would be appropriate may require assessments that are different both in format or design due to the nature of their disability, the Department needs to clarify that eligible students who may be assessed based on modified grade-level achievement standards do not include students who are solely protected by Section 504. The Department should clarify that students with disabilities who are not otherwise eligible under IDEA should NOT be subject to modified standards given the Department's standard that these standards have less breadth and depth.

i) Proposed regulation §200(e)(4) – Review of participation separately by subject

i. Separate assessment by subject matter.

CLE supports the proposed regulation that explicitly requires a student's eligibility for being assessed based on modified academic achievement standards be determined separately for each of the subjects for which assessments are administered under §200.2. Given current state practices which discourage or bar students from participating, for example, in alternate assessments at grade level in math and the regular state assessment in English, the Department ought to clarify that this standard is appropriate and legally mandated in order to enable all students to participate in the State's accountability system.

j) Proposed regulation §200(e)(5) - Annual review of decision to assess based on modified standards

Proposed regulation §200(e)(5) provides that "[t]he decision to assess a student based on modified academic achievement standards must be reviewed annually by the student's IEP team to ensure that those standards remain appropriate." CLE suggests that given the relationship between a student's disability, teaching, learning and curriculum that the decision to assess based on modified standards ought to be reviewed annually "for each core academic subject area in which the student is assessed based on modified standards" by the student's IEP team to ensure that those standards remain appropriate "and are supported by objective evidence."

5. Proposed regulation §200.1(f) State guidelines for IEP teams making decisions about student participation in assessments.

a) **IEP decisions and assessments based on alternate/modified standards.**

Pursuant to subsection (f) of the proposed regulation §200.1, States electing to define alternate or modified academic achievement standards under paragraph (d) or (e) of §200.1, are required to establish and ensure implementation of clear and appropriate guidelines for IEP teams to apply in determining students with the most significant cognitive disabilities who will be assessed based on alternate academic achievement standards; and students with disabilities who meet the criteria in § 200.1(e)(2) who will be assessed based on modified academic achievement standards. In addition, States are required to ensure that parents of students selected for assessment based on alternate or modified academic achievement standards under the state guidelines "are informed that their child's achievement will be measured based on alternate or modified academic achievement standards." We believe the Department needs to be more comprehensive in setting out the content of the guidelines in order to ensure states implement these provisions correctly.

i. Involving necessary stakeholders.

First, in developing any such guidelines for IEP teams, CLE recommends that States be required to involve stakeholders in the process, including persons with expertise who are knowledgeable about the range of state assessments, e.g, large scale standardized tests, state developed criterion reference tests, performance assessments, assessment of students with disabilities, including with accommodations; parents of students with a range of disabilities, in particular, parents of students with the most significant cognizant disabilities; special educators and regular education teachers with knowledge and experience in teaching students with disabilities in the general education curriculum; and special educators with specialized knowledge of students with the most significant cognizant disabilities.

ii. Parent and student as IEP members

Second, the guidelines developed for IEP teams, must clearly state that as members of the team, parents and the student, when appropriate, participate in gathering, reviewing and consideration all documented evidence relevant to the student's eligibility for being assessed based on regular standards, with or without accommodations, alternate standards, with or without accommodations, or modified standards, with or without accommodations. Accordingly, it is not enough to suggest that parents need only be informed of a decision by the IEP team that their child has been determined eligible to participate in a State's alternate assessment based on alternate achievement standards or a State assessment based modified grade-level achievement standards.

iii. Fully informed with full explanation.

Third, while parents and the student, as appropriate, are members of the IEP team with a right to participate in all decision-making, subsection (f) should elaborate that to be fully informed of the eligibility decision, parents must "receive a full explanation of the proposed determination of eligibility, an explanation of the implications of such eligibility, why the student is being identified as eligible, including all objective evidence being relied upon to support a finding of eligibility, and other options consider, rejected, and the reasons therefore." Furthermore, the guideline should require that "parents must be fully informed about the determination, its bases and ramifications before parents, as members of the IEP team, participate in the decision that their child's achievement will be based on their disability related need to be assessed based on alternate or modified academic achievement standards."

iv. Drawing bright line: assessments based on alternate & modified standards

Fourth. Assuming that the assessment based on modified achievement standards is not withdrawn because of an inadequate research based knowledge or concerns about its Constitutional and statutory legality, the Department ought to make a bright line distinction between the student who falls within the very limited population of those students with the most significant cognitive disabilities who even with the best instruction will never meet the State challenging academic grade level achievement standards, and the student, who, provided the best instruction, is able to demonstrate some measure of progress toward meeting the achievement standards set for all. Clarify that this latter student cannot be included within that limited number of students with the most significant cognitive disabilities who may be assessed using an alternate assessment based on alternate standards.

CLE urges the Department to draw a bright line between students assessed on the basis of alternate standards and students assessed based on modified standards. The justification for using the alternate assessment based on alternate standards is that this limited number of students will never make progress toward the grade-level achievement standards set for all. Thus, if a student with a significant cognitive disability is provided with the best instruction and shows ability to learn and to make progress toward the standards, that student cannot be assessed using the alternate assessment based on alternate standards. If that student is participating in the alternate assessment based on alternate standards not designed to measure that student's progress toward meeting the full range of grade-level achievement standards, that student is misclassified and being mis-educated in violation of his/her rights under the Fourteenth Amendment, IDEA, Section 504, and the ADA.

v. Developing alternate assessments based on regular standards.

Fifth. Under this section the Department should use this opportunity to clarify what constitutes an Alternate Assessment based on regular education standards that is designed primarily for students whose disabilities preclude them from taking even with accommodations the regular assessment based on regular grade level achievement standards. There is likely to be significant overlap between students with disabilities who are considered for eligibility to be assessed based on modified standards and students with disabilities who with high quality instruction, including specialized instruction and related services by highly qualified teachers, can effectively learn to high standards but cannot because of their disability participate in the regular standardized assessment even with accommodations. Many states have yet to develop alternate assessments based on regular academic achievement standards for those students with disabilities who cannot even with accommodations take the regular assessment. To the extent these students are able to take an Alternate Assessment based on regular achievement standards are not provided such an opportunity, they are being constructively excluded from the state assessment and accountability standard. It is inappropriate and a violation of Section 504 for them to participate in an

assessment based on modified achievement standards when they are capable of meeting the grade-level achievement standards set for all.

6. Proposed regulation §200.6. Inclusion of all students.

a) Accommodations for students and assessments.

With respect to proposed regulation §200.6 pertaining to the provision of appropriate accommodations under IDEA and Section 504, CLE urges the Department to eliminate any ambiguity by clarifying the obligation of the State academic assessment system. The regulations should make clear that accommodations need to be provided when necessary for students with disabilities being assessed using alternate assessments based on regular and alternate standards, and including any assessment based on modified standards.

b) Proposed regulation §200.6(a)(1)(ii) - Increasing participation of students with disabilities assessed based on grade-level standards through appropriate accommodations.

CLE supports the language of proposed regulation §200.6(a)(1)(ii)(A) requiring a State to develop, disseminate information about, and promote the use of appropriate accommodations to increase the number of students with disabilities who are tested based on grade-level achievement standards.

With respect to the provision at §200.6(a)(1)(ii)(B) requiring States to ensure that regular and special education teachers and other staff administering assessments or assisting in the provision of accommodations [ADD: or assistive technology services or devices] understand how to administer assessment and appropriately use accommodations, CLE recommends that the Department require that professional development opportunities incorporate teaching about the Joint Testing Standards, and their application to appropriate test administration, identification and use of reasonable accommodations, as well as their relevance to teaching, instruction, learning and assessment.

c) Proposed regulation - §200.6(a)(2)(iii).

Subsection (iii) of §200.6(a)(2) states: "If a State permits the use of alternate assessments that yield results based on alternate academic achievement standards, the State must document that students with the most significant cognitive disabilities are, to the maximum extent possible, included in the general curriculum."

CLE supports the proposed language adding "maximum" and recommends adding after "general curriculum" "*that is aligned with the academic content standards set for all other students."*

d) Proposed regulation §200.6(a)(3) – Assessments measuring modified academic achievement standards

i. §200.6(a)(3)(i) - condition precedents – alignment.

Proposed regulation §200.6(a)(3) would allow a State to use its regular assessment, with accommodations, if necessary, or an alternate assessment, with accommodations, if necessary, to assess eligible students with disabilities under IDEA based on *modified academic achievement standards*. Such assessments must meet a set of conditions. First, an assessment used to assess eligible students based on modified standards must be "aligned with the State's grade- level academic content standards" for the grade in which the student is currently enrolled.

As CLE has previously suggested, because the term "align" is used frequently through out the proposed regulation, we suggest that the Department define this term "align" with specificity and in the context with which it is used to remove any uncertainty and ambiguity as to its meaning. Clarify that while not necessarily meaning total overlap, when assessments based on modified standards "are aligned with the State's grade-level academic content standards," the modified standards must have been identified by qualified individuals (discussed above) through a documented and validated standards setting process as comprising pre-requisite and grade appropriate core objectives of the grade-level academic content standard – i.e., the knowledge and skills that students are expected to know and be able to do for each grade-level, that will allow a student provided high quality instruction with extended learning opportunities to attain grade-level proficiency of the achievement standards. .

ii. Proposed regulation §200.6(a)(3)(ii) - condition precedent – yield separate results by subject area and by test.

Pursuant to proposed regulation §200.9(a)(3)(ii), assessments that measure modified academic achievement standards of eligible students with disabilities based on proposed regulation §200.1(e) must also "[y]ield results that measure the achievement of those students separately in reading/language arts, mathematics and any other assessed subject and can be administered separately in each subject to ensure that a student who takes this assessment in one subject can take an assessment based on grade-level or alternate academic achievement standards in other subjects, if the IEP team makes this determination."

CLE agrees that assessments must be designed to allow students to take an appropriate assessment that will produce data that is valid for each subject. We urge the Department to clarify via an example that a student who is eligible for an assessment based on modified academic achievement standards in reading/language arts and an alternate assessment based on grade level achievement standard in math must be able to participate in both assessments.

iii. Proposed regulation §200.6(a)(3)(iii) – condition precedent – state responsibility, validity, reliability, high technical quality.

CLE also supports the language of the proposed regulation that requires an assessment used to measure modified achievement standards to meet the requirements of §200.2 and §200.3, including those pertaining to validity, reliability and high technical quality. Based on these conditions, CLE urges the Department to clarify that a regular assessment measuring grade-level academic achievement standards cannot be "modified" to assess students with disabilities based on modified achievement standards by merely setting a lower cut score and meet the criteria of proposed regulation §200.6(a)(3).

iv. Proposed regulation §200.6(a)(3)(iv) – condition precedent - coherent fit in state system.

CLE asks that the Department clarify what is meant by the proposed regulatory provision requiring as a condition precedent to a State using an assessment to assess certain students with disabilities based on modified grade-level achievement standards that the assessment must fit coherently in the State's overall assessment system under §200.2.

7. Proposed regulation §200.6(a)(4) Reporting.

CLE recommends that the Department amend proposed regulation §200.6(a)(4) to require that in each instance, for each type of assessment, and category of alternate assessment that States report the number and percentage of students with disabilities participating without accommodations, with accommodations, and with non-standard accommodations. For students with disabilities participating in alternate assessments –regardless whether based on grade-level achievement standards or the highest possible alternate standards, accommodations may STILL be necessary and should be reported in each instance.

8. Proposed Regulation § 200.7 - Disaggregation of Data

a) Proposed regulation §200.7(a)(2)(ii) - State "may not establish a different minimum number of students" for separate subgroups under § 200.13(b)(7)(ii).

CLE supports the Department's proposed regulation that will bar a State from establishing different minimum subgroup sizes for separate subgroups. Assuming students with disabilities are not misclassified as covered by either §200.1(d) or §200.1(e) and inappropriately assessed based on alternate or modified standards, this change will help eliminate a significant source of inequity that has resulted in States separately setting very high "n" for students with disabilities, and thus allowing schools and school districts having little or no accountability to parents of students with disabilities and students, for the latter's improved education. Because of the tremendous range of "n" across the nation and from state to state, CLE suggests that the Department exercise leadership by providing more clarity as to the bases for properly determining the "n" so as to yield statistically reliable information yet, avoid revealing personally identifiable information about a student. The current range of 'n' from a minimum of 10 to an excess of 250 is not based on reliability principles as required by law, but is illogical, inappropriate and inconsistent with assessment principles.

9. Proposed Regulation Section 200.13- Adequate yearly progress in general.

a) Proposed regulation §200.13(c)(3)

CLE opposes the proposed regulation §200.13(c)(3) authorizing a State or LEA's number of proficient and advanced scores on the modified academic achievement standards to exceed 2% of all students in the grades assessed if the number of proficient and advanced scores on the alternate academic achievement standards described at §200.1(d) [for students with the most significant cognitive

disabilities] is less than 1%, provided the number of proficient and advanced scores based on modified and alternate academic achievement standards combined does not exceed 3% of all students in the grades assessed.

If the Department is going to promulgate the 2% rule, we urge that the Department make clear that it does not constitute authorization to depart from what we hope will be rigorous standards for decision-making, and that caps of 2 or more than 2% are not a substitutes for applying standards which should, in fact, result in a smaller percentage of students being identified.

b) Proposed regulation §200.13(c)(4)

CLE supports the proposed language in §200.13(c)(4) that provides that a State would no longer be able to request from the Secretary an exemption to exceed the 1% cap on proficient and advanced scores based on alternate academic achievement standards. As CLE has previously indicted in comments to the Department, CLE believes that the 1% cap is already too high, and that students are inappropriately being educated and assessed based on alternate standards.

i. Proposed regulation §200.13(c)(6)

CLE supports paragraph (6) of this subsection that provides that a State may not grant an exception to an LEA to exceed the 2% cap on proficient and advanced scores based on modified academic achievement standards.

The Department has not provided adequate research, analysis or policy justification for the 2% cap. As noted above, it is especially disturbing that the Department can suggest without support or analysis that the 2% cap is reasonable "when one takes into account that the cap does not need to equal the total number of students that may meet the criteria for this assessment. The cap is only a cap on the number of proficient scores that may be included in calculating AYP. In addition, we expect that over time State assessments will improve, as well as interventions and services for students with disabilities. The gains we have seen thus far when disabled students are expected to meet high standards should continue." [70 FR 74630].

CLE recommends that the Department modify this language to dispel any notion that there is not an obligation by States, LEAs and schools NOW to provide all students with disabilities FAPE consistent with the highest state content and achievement standards. The language in the Preamble sends the wrong message.

10. Proposed regulation §200.20- Making adequate yearly progress

The proposed §200.20 would amend current regulation §200.20(c)(3) of the Title I regulations to remove the existing requirement 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 opposes the proposed removal of this requirement. While there may be reasons to allow a student to take high-stakes assessments multiple times, given that the purpose of the assessment under Title I 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 acts 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 helps 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. Removing the 'first administration rule' will increase the emphasis on testing, and adversely affect teachers who will feel compelled to focus on test preparation and likely to feel less free and open to improving their teaching practices.

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. First administration best reflects the performance of the school in terms of the preparation *its core academic* program provides in preparing students to master the standards. Subsequent administrations may capture the effects of remediation after the fact for students for whom the core academic program has not been effective. While this is significant, it is not a substitute for ensuring the effectiveness of the core academic program.

If the Department moves forward per the proposed regulation to count 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 have 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 rationale that the primary purpose of assessment 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.

PART 300— INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

Proposed Section 300.160(b)(Accommodation Guidelines) requires that states develop guidelines for the provision of appropriate accommodations and must identify *valid* accommodations.

Recommendation: CLE supports the recommendation of the Advocacy Institute that the Department of Education put in place a procedure that would require States to submit their proposed accommodation guidelines for review and approval by an expert review panel, similar to the process being used for the growth model pilots. Final regulations should add a requirement that States must use a documented and scientific process to define valid accommodations. The goal of this process should be to allow all accommodations routinely used in classroom instruction and testing unless it can be proven that (1) the accommodation invalidity is NOT the result of a poorly designed assessment and (2) use of the accommodation would clearly undermine the target skill.

Rationale: The *"Accommodations Manual: How To Select, Administer, and Evaluate Use of Accommodations for Instruction and Assessment of Students with Disabilities"* published by the Council of Chief State School Officers (August 2005) states that "The accommodations provided to a student must be the same for classroom instruction, classroom assessments, and district and state assessments. … Accommodations for instruction and assessment are integrally intertwined."

Currently there is substantial variability among states with regard to their respective guidelines on accommodations as well as the delivery of accommodations. While is it critical to require States to develop guidelines for the provision of appropriate accommodations and identify valid accommodations, the process that is used for these activities must also be valid and scientific. Frequently, the success of students with disabilities is dependent upon the provision of accommodations. The determination that a particular accommodation is not valid, and therefore would invalid the test score, should be made with the utmost caution. The determination that an accommodation is invalid should be well documented and justified, and should be reviewed by external experts in order to ensure integrity. Such as external review process would also promote a degree of conformity among states, ensuring that students would encounter more consistency when moving from state to state.