



September 2, 2016

Ms. Jessica McKinney
U.S. Department of Education
Room 3W107
400 Maryland Avenue, SW
Washington, DC 20202

RE: Docket ID ED-2016-OESE-0053

Comments submitted via Regulations.gov

Dear Ms. McKinney:

The National Down Syndrome Congress (NDSC) is a member-sustained, nonprofit organization, which works to promote the interests of people with Down syndrome and their families through advocacy, public awareness, and information. NDSC wants to express appreciation for the negotiated rulemaking process that resulted in consensus regarding these proposed regulations on academic assessments. It is critically important to protect the results of this process, which will support the implementation of ESSA so that states, districts and school teams have the regulatory guidance they need to improve the academic performance of students with disabilities. Therefore, NDSC supports the proposed regulations with only one request for a technical correction regarding accessibility. We also strongly urge the Department to quickly develop non-regulatory guidance to clarify some important issues related to the alternate assessments, which will be described later in this letter.

NDSC urges the Department to preserve all of the provisions in the proposed regulations, but below we highlight some of the proposed regulations that we feel are particularly important to students with disabilities and also make one request for a technical correction. In this letter NDSC supports the contents of the response to the NPRM made by the Consortium for Citizens with Disabilities' (CCD) Education Task Force. We will also make some additional points that are particularly important to students who participate in alternate assessments.

§200.3 Locally selected, nationally recognized high school academic assessments.

- NDSC strongly supports the language at §200.3 (b)(2) requiring States to ensure that the use of appropriate accommodations under 200.6(b) and (f) does not deny a student with a disability or an English learner the opportunity to participate in the assessment and any of the benefits from participation in the assessment that are afforded to students without

disabilities or students who are not English learners.

Comment: This language is particularly important in light of ongoing issues regarding difficulties encountered by students with disabilities with getting appropriate accommodations from testing entities. To help address this, the Department of Justice issued technical assistance on testing accommodations for individuals with disabilities who take standardized exams and other high-stakes tests, including assessments that would fulfill the definition of a “nationally recognized high school academic assessment,” in September of 2015. The technical assistance points out that DOJ “continues to receive questions and complaints relating to excessive and burdensome documentation demands, failures to provide needed testing accommodations, and failures to respond to requests for testing accommodations in a timely manner.” (See https://www.ada.gov/regs2014/testing_accommodations.html)

States and LEAs implementing a “nationally recognized high school academic assessment” must ensure that the assessment offers all State-determined appropriate accommodations, including by ensuring that the tests—and any benefits to students from taking such tests, such as valid college-reportable scores—are available to all students, including students with disabilities and English learners.

§200.6 Inclusion of all students.

- NDSC supports the language at §200.6 (a)(2)(i) which states that “A student with a disability under paragraph (a)(1)(i) or (iii) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.”

Comment: This explicit language will ensure that students with disabilities are not subjected to an assessment designed for students in a lower grade. The practice of giving students with disabilities “out-of-level,” “below-level,” and/or “instructional level” assessments was ended under No Child Left Behind, allowing assessment results to honestly reflect student performance at their enrolled grade level. This information is critical to improving instruction and closing significant achievement gaps.

Furthermore, we are hopeful that a continued and enhanced focus on the performance of students with disabilities—as measured against the academic content standards for their enrolled grade—will facilitate widespread implementation of the U.S. Department of Education’s November 16, 2015 Dear Colleague Letter on Free and Appropriate Public Education (FAPE), which states in part:

“To help make certain that children with disabilities are held to high expectations and have meaningful access to a State’s academic content standards, we write to clarify that an individualized education program (IEP) for an eligible child with a disability under the Individuals with Disabilities Education Act (IDEA) must be aligned with the State’s academic content standards for the grade in which the child is enrolled...This interpretation also appropriately harmonizes the concept in the IDEA regulations of

“general education curriculum (i.e., the same curriculum as for nondisabled children),” with the ESEA statutory and regulatory requirement that the same academic content standards must apply to all public schools and children in the State, which includes children with disabilities.” (See: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>)

The only problem with this regulation is that it may create confusion regarding students with the most significant cognitive disabilities, to whom this regulation does not apply because these students take an assessment based on an alternate academic achievement standard. However, this achievement standard must still be based on the challenging State academic content standards for the enrolled grade. The source of confusion is the use of the term “academic standards” to refer to both content and achievement standards in this regulation. Fortunately, the regulation discussed below addresses this issue.

- NDSC strongly supports the language at §200.6 (a)(2)(ii), which states, “a student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—
(A) The general assessment under paragraph (a)(2)(i) of this section; or
(B) An alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

Comment: There is a great deal of confusion in the field about the difference between content standards and achievement standards. Therefore, it is critically important to retain this language to address the important distinction between content and achievement standards, as well as clarify that all students, including those who take alternate assessments, must be assessed on the challenging State academic content standards for the grade in which the student is enrolled.

- NDSC urges the Department to make the following technical correction below to §200.6(b)(1). It simply requires moving some words to a different part of the sentence.
A State's academic assessment system must **be developed consistent with nationally recognized accessibility standards and** provide, for each student with a disability under paragraph (a) of this section, the appropriate accommodations, such as interoperability with, and ability to use, assistive technology devices ~~, consistent with nationally recognized accessibility standards,~~ that are necessary to measure the academic achievement of the student consistent with paragraph (a)(2) of this section, as determined by--

Rationale: Currently, the reference to “consistent with nationally recognized accessibility standards” applies to assistive technology devices, which is inappropriate and inaccurate. There are no accessibility standards for AT devices. Nationally recognized accessibility standards are applicable to the assessments (e.g. WCAG or NIMAS). Therefore, the proposed rule needs to be revised so that the phrase “consistent with national recognized accessibility standards” applies to the assessment, *not* the assistive technology. This change

is required to ensure the rules are consistent with the requirement in the law for accessibility and interoperability with AT.

- NDSC strongly supports §200.6(b)(2)(ii) directing States to ensure that all education staff, including specialized instructional support personnel (SISP), receives training to administer assessments and provide individualized accommodations as documented on the IEP or 504 plan.

Comment: It is important that all staff be trained and proficient in the recommended accommodations so that students who need accommodations are fully supported by the whole team. Staff training should include the tenets and skills needed for interprofessional practice as student success and achievement can only be realized when team members learn together, integrate their expertise, and collaborate effectively. SISP need to be included on school teams, given professional development opportunities, and provided ongoing opportunities for dialogue and collaboration.

It is also important that all staff receives training to administer assessments, especially when portfolios are involved. Historically, there have been problems with school staff ensuring that the rigor for portfolios is adequate to reflect high expectations for students who take alternate assessments. Even when the tasks are sufficiently challenging, there have been reports of many students being permitted to redo the tasks numerous times until they receive a proficient or advanced score. Staff must also receive training on how to use a student's assistive technology with the assessment.

- NDSC strongly supports proposed §200.6(b)(3)(i)-(ii), which underscores the State responsibility to ensure that the use of appropriate accommodations does not deny a student with a disability the opportunity to participate in the assessment and any of the benefits from participation in the assessment that are afforded to students without disabilities.

Comment: This language is important to ensure that students with disabilities are not denied equal opportunity to participate in or benefit from educational aid, benefits, or services, as required by Section 504 of the Rehabilitation Act of 1973.

- NDSC strongly supports proposed regulation 200.6(c)(3)(iv), which would require all States to make publicly available the information submitted by an Local Education Agency (LEA) justifying the need of the LEA to exceed the cap on the number of students with the most significant cognitive disabilities who may be assessed in a subject using an alternate assessment aligned with alternate academic achievement standards.

Comment: NDSC is committed to maximum transparency as States and LEAs work to implement the new requirements regarding alternate assessments contained in ESSA. This requirement supports that commitment.

- NDSC strongly supports proposed §200.6(c)(4), which articulates the criteria that States will be required to submit to the Secretary in requesting a waiver to the cap at §200.6(c)(2).

Comment: We agree with the Department’s view that “these elements would provide a comprehensive picture of the State’s efforts to address and correct its assessment of more than 1.0 percent of students on an alternate assessment aligned with alternate academic achievement standards.” [page 44938]

- NDSC strongly supports §200.6(c)(7), which clarifies that an alternate computer adaptive assessment, must be based on the State academic content standards for the grade in which the student is enrolled:

Comment: This regulation is very important in that it clarifies that participation in an alternate computer adaptive assessment (or any type of alternate assessment) does not deny the student the right to an assessment based on enrolled grade content standards.

- NDSC strongly supports §200.6 (d)(1), which provides clarification about the factors to be addressed in the State definition of students with the most significant cognitive disabilities. §200.6(d)(1)(iii), which addresses the instruction and supports a student with the most significant cognitive disabilities requires to achieve measureable gains on the challenging State content standards for the grade in which the student is enrolled, is particularly important.

Comment: It is necessary for the Department to provide clarification on key factors for the State definition in order to protect the validity of assessments used for ESSA accountability. Alternate assessments are designed and field tested for students with certain learner characteristics and would not be valid for other students. It is also important to safeguard the instruction of students with the most significant cognitive disabilities by pointing out that they are expected to make measureable gains on the challenging State academic content standards for the grade in which the student is enrolled.

REQUEST FOR NON-REGULATORY GUIDANCE

While NDSC is supportive of the proposed regulations on academic assessments, we also feel strongly that there is further need for guidance to help States, LEAS and school teams implement the ESSA requirements regarding alternate assessments. NDSC strongly urges the Department to move swiftly to develop and disseminate non-regulatory guidance regarding Alternate Assessments aligned with Alternate Academic Achievement Standards). CCD made the same request in its response to the NPRM.

Both ESSA and the proposed regulations make significant changes to the current ESEA regulation regarding the AA-AAS, including many new responsibilities for States and LEAs. Timely and responsible adherence to these responsibilities requires comprehensive guidance from the Department.

Much has been learned about alternate achievement standards for students with the most significant cognitive disabilities since the Department issued non-regulatory guidance on the topic in August of 2005. New guidance should incorporate all of the knowledge learned through a decade of states' administration of the alternate assessment on alternate academic achievement standards, as well as the vast information developed by the alternate assessment consortia, which were funded by the Department, the National Center and State Collaborative and Dynamic Learning Maps.

In particular, we would like to see new guidance include clarification on the following issues:

- Alternate assessments must allow for a measure of growth. If a State is going to measure growth on their general assessment, it should also be required for the State alternate assessment. Substituting other growth measures, especially growth on IEP goals, should not be permitted.
- To the extent alternate assessments will be partially delivered in the form of portfolios, projects, or extended performance tasks, the State education agency should have to provide evidence from independent reviewers of the technical quality of these measures of achievement and provide technical assistance on their valid administration;
- In developing a State definition of “students with the most significant cognitive disabilities” clarify that:
 - only adaptive behavior relevant to academic learning should be considered;
 - the identification of a student as having a particular IQ score must not determine whether a student is a student with the most significant cognitive disabilities;
 - a student with the most significant cognitive disabilities must not be identified solely on the basis of a student’s educational setting to participate in general State or districtwide assessments;
 - the determination that a student is a student with the most significant cognitive disabilities must not be a factor in determining the Least Restrictive Environment for that student (a NCSC study demonstrated that only 7% of students who take an alternate assessment are educated in the general education classroom or resource room) ¹;
 - students with the most significant cognitive disabilities require extensive, direct individualized instruction, substantially adapted materials, and substantial supports, which are not of a temporary nature, to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;
 - a student must have IEP goals and instruction that are based on the challenging State academic content standards for the grade in which the student is enrolled

¹ Harold Kleinert et al, *Where Students with the Most Significant Cognitive Disabilities Are Taught: Implications for General Curriculum Access*, retrieved from <http://www.ncscpartners.org/Media/Default/PDFs/Resources/NCSC%20LRE%20Article%20Exceptional%20Children%20EC%201670%20APA.pdf> on August 26,2016

- before it can be determined that the student is a student with the most significant cognitive disabilities;
- a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards must not be precluded from *attempting* to complete the requirements for a regular high school diploma, regardless of the adaptations and/or modifications that all these students require.²

In addition to providing clarification on the provisions in ESSA related to the alternate assessments in the non-regulatory guidance, NDSC urges the Department to provide guidance (as well as technical assistance) to aid States, LEAs and schools in promoting progress in the enrolled grade general education curriculum for students who participate in these assessments, as required by ESSA, and in ensuring that these students are educated in the Least Restrictive Environment, as required by the Individuals with Disabilities Education Act (IDEA). It will be important to address the use of Universal Design for Learning as part of the guidance and technical assistance. NDSC and the families it represents make the same query as the authors of the NCSC study:

In the context of a growing research body that demonstrates that students with the most significant cognitive disabilities can effectively learn academic content in general education classes (Collins et al., 2007; Hudson et al., 2013; Jameson et al., 2008; Jiminez et al., 2012; McDonnell et al., 2002; McDonnell et al. 2006), we have to question why students with the most significant cognitive disabilities are the least likely of any students to experience those settings.

The conclusion of the NDSC study goes on to state:

That we have clear evidence of the benefits for including students with the most significant cognitive disabilities in general education activities with their peers, as well as effective strategies for doing so, makes the results of this study all the more imperative. Our findings simply illustrate the gap between what is reality in the lives of these students, and what could possibly be.

² If this point is not clarified, the statutory provision ensuring that States permit them to attempt to complete the requirements for a regular high school diploma will be undermined. Even if many of these students do not complete the regular diploma requirements by the time they exit high school because of the level of modifications they required, the opportunity to remain on diploma track as long as possible will improve their progress in the general education curriculum.

NDSC, along with other organizations that participate in the CCD Education Task Force, would welcome the opportunity to assist the Department in the development of new non-regulatory guidance on the alternate assessment provisions and the impact on students who take these assessments.

In closing, NDSC appreciates the opportunity to provide feedback on the ESSA proposed academic assessment regulations and how they will impact our nation's students with disabilities. We especially hope to be a resource on issues that impact students with significant cognitive disabilities, particularly those who participate in alternate assessments.

Sincerely,

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National Down Syndrome Congress