



The National Down Syndrome Congress is submitting comments to oppose the proposed New York State Department of Education (NYSED) waiver request that would allow students with significant cognitive disabilities to be assessed using below grade level assessments (referred to by NYSED as “instructional level” assessments) and for those assessments to count for purposes of making accountability and participation rate determinations under the Every Student Succeeds Act (ESSA).

ESSA and its assessment regulations have not altered the requirement under the No Child Left Behind Act (NCLB) that all students are to be instructed and assessed on the grade level content standards. Under ESSA there are only two possible state assessments, the general assessment and the alternate assessment. Although the alternate assessment is based on alternate academic achievement standards, these achievement standards are still to be based on the grade level content standards. In other words, although the expectations for achievement are different, the content is still from the grade in which the student is enrolled. Since below grade level assessments are not permitted for students who take an alternate assessment, there is no valid rationale for offering below grade level assessments to students who are supposed to take the general assessment. The assessment regulations under ESSA clearly express the importance of aligning assessment and instruction to the grade in which the student is enrolled:

**§ 200.6 Inclusion of all students.**

*(a) Students with disabilities in general.*

(1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

- (i) All children with disabilities as defined under section 602(3) of the IDEA;
- (ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and
- (iii) Students with disabilities covered under other acts, including—
  - (A) Section 504 of the Rehabilitation Act of 1973, as amended; and
  - (B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) 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.

(ii) 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  
If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, the State must measure the achievement of those students with an alternate assessment that— (i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled.

This regulation was the product of a negotiated rule-making process. There was consensus among the stakeholders that this language, which clarifies that no assessment may be based on below grade level content, was important enough to be added.

In Title I ESSA states: “the purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.” The accountability required under ESSA must be designed to meet this purpose. Therefore, all state assessments must determine how students are performing against grade level content standards.

New York’s waiver request undermines the purpose of ESSA and should not be submitted to the U.S. Department of Education (ED) for approval. A similar request for a waiver under NCLB was submitted and subsequently rejected by the ED in 2015 for reasons that still apply under ESSA. In fact the language in ESSA regulations is even stronger than that under NCLB in explicitly calling for ALL students to be assessed on the content standards for the grade in which there are enrolled. NYSED should be focused on improving instruction for students who are not meeting the state standards, rather than on advocating for a waiver of ESSA requirements. Students with disabilities are being singled out for low expectations with this waiver. Other subgroups include students who are performing poorly (Level I), but NYSED is not requesting a waiver to assess these students with “instructional” level assessments—nor should they.

In particular, NYSED data regarding the educational environments of students with disabilities in the state indicate a high degree of segregation compared to the nation. Furthermore, this high level of segregations is more prominent among students whose disability category would make them most likely affected by the proposed waiver, particularly students with an Intellectual disability and Multiple disabilities. This segregation is likely leading to a lack of access to the general education curriculum and a lack of appropriate instruction which is something that would disqualify a student from meeting the proposed criteria and guidelines for the “instructional level” assessments that NYSED is requesting a waiver to use. A 2015 study by Harold Kleinert et.al, *Where Students With the Most Significant Cognitive*

*Disabilities Are Taught: Implications for General Curriculum Access*, discusses the negative academic impact on students with significant cognitive disabilities who are educated in segregated settings. The New York Part B 2017 Data Display (retrieved from [osep.grads360.org](http://osep.grads360.org)) indicates that there is disproportionality in the percentage of students of color being identified for IDEA services in the Intellectual Disability category. Therefore, these students are likely overrepresented in special education classrooms and will also likely be overrepresented in the “instructional level” assessments proposed by NYSED.

EDUCATIONAL ENVIRONMENTS, AGES 6 THROUGH 21

Percent of Time Spent Inside the Regular Classroom

Disability Category	≥ 80% of Day State (%)	≥ 80% of Day Nation (%)	40 to 79% of Day State (%)	40 to 79% of Day Nation (%)	< 40% of Day State (%)	< 40% of Day Nation (%)	Separate School or Residential Facility State (%)	Separate School or Residential Facility Nation (%)
All disabilities	57.8	62.6	11.7	18.6	19.8	13.4	5.8	3.2
Autism	25.4	39.9	9.2	18.0	44.0	32.8	19.9	7.8
Deaf-blindness	16.7	23.2	5.6	13.4	27.8	34.4	38.9	25.3
Emotional disturbance	31.1	46.2	11.1	17.6	30.3	18.8	23.4	14.6
Hearing impairment	56.7	60.2	7.7	15.5	11.2	11.6	17.2	10.9
Intellectual disability	6.0	16.9	15.7	26.3	56.1	49.2	21.4	6.6
Multiple disabilities	8.2	13.4	14.0	16.4	45.4	46.0	28.7	20.2
Orthopedic impairment	64.2	54.5	7.0	15.9	11.2	21.8	8.7	4.4
Other health impairment	64.0	65.4	13.1	21.0	14.9	9.3	2.7	1.9
Specific learning disabilities	69.2	69.2	13.7	23.0	11.9	5.8	0.8	0.5
Speech or language impairment	65.7	86.8	7.5	5.1	18.4	4.3	1.2	0.3
Traumatic brain injury	39.5	49.9	21.0	22.2	24.0	19.6	9.6	5.6
Visual impairment	57.1	66.3	9.0	12.3	9.4	10.3	19.6	8.9

Source: New York Part B 2017 Data Display retrieved from [osep.grads360.org](http://osep.grads360.org)

The NYSED waiver request also will result in masking the students who would be assessed in this below-grade manner. Both ESSA and IDEA require states to report on the number and percentage of students with disabilities who are assessed on the general state assessment (with or without accommodations) and the alternate assessment on alternate achievement standards. There is no reporting requirement for students with disabilities tested on an assessment for a lower grade. Thus, NYSED will not “maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the

subgroups of students identified in section 1111(b)(2)(B(xi)” as required by ESSA section 8401 (b)(1)(F).

**About the National Down Syndrome Congress**

Founded in 1973, the National Down Syndrome Congress is the country’s oldest organization for people with Down syndrome, their families, and the professionals who work with them. A 501(c)(3) non-profit advocacy organization, the NDSC provides support and information about issues related to Down syndrome throughout the lifespan, as well as on matters of public policy relating to disability rights. The National Down Syndrome Congress is committed to creating a national climate in which all people will recognize and embrace the value and dignity of people with Down syndrome. For more information about the NDSC, please visit our website at [www.ndscenter.org](http://www.ndscenter.org).