



Every Student Succeeds Act: Assessment Regulations

The Every Student Succeeds Act (ESSA) required that the U.S. Department of Education (USDOE) convene a negotiated rulemaking committee to help develop proposed regulations on certain parts of the law. In negotiated rulemaking, the USDOE has to use any consensus regulatory language as the proposed regulations, which will be released for public comment. Consensus for this purpose means a unanimous vote. Assessments and the Supplement Not Supplant (SNS) rule were the topics for a negotiated rulemaking committee in April. SNS is a funding rule that is supposed to ensure that federal ESSA funding does not take the place of state/local school funding, but rather supplements it.

The committee consisted of voting members and non-voting alternates from specific stakeholder groups, in addition to the numerous USDOE staff that were involved. Ten of those voting members represented educators and administrators, two represented parents/students, two represented tribal leadership, two represented the business community and two represented civil rights groups (including one disability advocate).

NDSC was busy throughout the month of April providing input to the two negotiated rulemaking committee members (and their alternates) who represented civil rights and disability organizations to ensure that they had the support they needed to advocate on assessment issues for all students with disabilities, including issues related to alternate assessments. ***One controversial issue with respect to assessments was whether to define “students with the most significant cognitive disabilities” for purposes of participation in state alternate assessments.*** Under ESSA no more than 1% of all students tested may participate in an alternate state assessment, unless a waiver from the USDOE is obtained.

Another contentious issue involved the criteria for allowing states to waive the 1% cap on participation in the alternate assessments.

The draft regulations developed with the input of the negotiated rulemaking committee were voted on at the conclusion of the committee meetings. There was consensus on the assessment language, but not on the SNS rule. NDSC is generally pleased by the consensus regulations, given that there is great political pressure not to clarify the statute through regulations. NDSC and our grassroots advocates will get the opportunity to provide input on these regulations during the public comment period, which has not yet been scheduled. You can read the text of the consensus regulations here: <http://1.usa.gov/1XjLP7h>. USDOE will also release

proposed regulations for public comment on other important issues, such as accountability, in June or July.

The issues from the consensus regulatory language, discussed below, are those that have the greatest impact on students with Down syndrome and other intellectual and developmental disabilities.

Enrolled Grade Content

Many educators believe that students with disabilities (especially those taking an alternate assessment) should be instructed and assessed on content from lower grades. Therefore, it hasn't been enough to say that all students must receive instruction and assessment based on grade-level academic content. That language has been interpreted to mean it is acceptable for a 6th grader with Down syndrome to work on grade-level content for the 2nd grade.

NDSC believes that students with Down syndrome, and other intellectual and developmental disabilities, should be taught and assessed on the key skills and knowledge that other students in their enrolled grade are taught, but in some cases with less breadth, depth and complexity. Therefore, ***NDSC advocated strongly for language that all assessments, including alternate assessments, must be aligned with the academic content standards for the grade in which the student is enrolled. That language did not make it into the statute, but with the help of the disability and civil rights negotiators on the committee, NDSC was successful at getting the "enrolled grade" language in a number of places in the consensus regulations!***

Students with the Most Significant Cognitive Disabilities

In order to ensure that the alternate assessment is only used for the appropriate students, there was an effort to put a definition of "students with the most significant cognitive disabilities" in the federal regulations. NDSC was concerned about the definition offered by the USDOE because it was weaker than the participation criteria already being used by many states that have adopted the National Center and State Collaborative or Dynamic Learning Maps alternate assessments.

NDSC wanted a requirement that a student must have IEP goals and instruction based on grade-level aligned content before he/she can be considered a "student with the most significant cognitive disabilities" for purposes of being assigned to the state's alternate assessment. If a student isn't taught the content how can educators tell whether the problem is the lack of instruction or the disability? Since we couldn't get the federal definition we wanted, NDSC advocated for a description of the requirements that states must follow in developing their IEP team guidelines for alternate assessment participation. That will allow parents to advocate for stronger language at the state level without being hampered by a weak federal definition.

The following consensus regulatory language provides the requirements that states must use in developing their definition of students with the most significant cognitive disabilities for IEP team guidelines:

“Such guidelines must include a State definition of ‘students with the most significant cognitive disabilities’ that would address factors related to cognitive functioning and adaptive behavior, such that--

- (i) The identification of a student as having a particular disability as defined in the IDEA must not determine whether a student is a student with the most significant cognitive disabilities;
- (ii) A student with the most significant cognitive disabilities must not be identified solely on the basis of the student’s previous low academic achievement, or status as an English learner, or the student’s previous need for accommodations to participate in general State or districtwide assessments; and
- (iii) Students with the most significant cognitive disabilities require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled”

NDSC had hoped for a more direct requirement about enrolled grade instruction. However, ***the indirect reference to enrolled grade content in the last subparagraph is a foot in the door for state advocates to get a requirement in their state guidelines that a student must have IEP goals and instruction based on grade-level aligned content before he/she can be considered a “student with the most significant cognitive disabilities.”***

Waiver of the 1% Cap on Statewide Alternate Assessment Participation

A big concern for disability advocates is that states are going to try to increase the number of students taking alternate assessments by requesting that the Secretary of Education grant a waiver of the 1% cap. ***There are students with Down syndrome and other intellectual or developmental disabilities who should not be taking the alternate assessment, but will be pushed into that assessment if states can get a waiver of the cap without an appropriate process in place to avoid abuse.***

The consensus regulations added some important parameters about the information that a state must provide to USDOE in order to request a one year waiver, at least 90 days prior to the start of the state’s first testing window. For example the state must provide assurances that it has verified certain conditions have been met by the local education agencies (LEA’s e.g. school districts or school corporations) that will assess more than 1% of its students using an alternate assessment.

The state must also provide data on the number and percentage of the students in each subgroup of students (e.g. English learners, students of color, economically disadvantaged students) who are taking an alternate assessment. The state must show that it has measured the achievement of 95% of all students and 95% of the

students with disabilities subgroup that are enrolled in a grade for which a state assessment is required.

Finally, the state must submit a plan and timeline by which the state will: (i) improve the guidelines for determining participation in an alternate assessment, and if necessary, revise its definition of students who take the assessment so that the state meets the 1% cap, (ii) provide oversight to ensure that LEA's and schools properly use the participation guidelines for the assessments, and (iii) address any disproportionality in the subgroups of students who are taking the assessment (e.g. too high a percentage of Black students are taking the alternate assessment). **The state cannot get the waiver extended for an additional year unless substantial progress towards each of these three plan components has been achieved.**

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