



September 8, 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 Consortium for Citizens with Disabilities (CCD), the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society, appreciates the opportunity to respond to the proposed regulations for selected programs under Title I of the Elementary and Secondary Education Act, now known as the Every Student Succeeds Act (ESSA).

This is an important time for the U.S. Department of Education (the Department) to be proactive in supporting states and school districts as they implement ESSA, particularly through the Department's promulgation of regulations, non-regulatory guidance and technical assistance.

The CCD Education Task Force appreciates the hard work of the negotiated rulemaking committee in crafting the proposed regulations regarding academic assessments. We recognize that the Department is required to publish proposed regulations that conform to the consensus agreement reached by the negotiated rulemaking committee.

The Task Force is very satisfied with the outcome of the negotiated rulemaking and we want to reinforce how important this regulation is to implementing ESSA so that States, districts and school teams have the regulatory guidance they need to improve the academic performance of the 5.8 million school-age students with disabilities attending the nation's traditional and public charter schools.

The undersigned members of the CCD Education Task Force urge the Department to preserve all of the provisions in the proposed regulations.

Below we highlight some of the proposed regulations that we feel are particularly important and also make one recommendation for a revision.

§200.2 State responsibilities for assessment.

- CCD strongly supports proposed §200.2(c)(1)-(2) which makes clear that a State that administers computer-adaptive assessments meeting the requirements of section 1111(b)(2)(J) the assessment (i) “must measure a student’s academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and (ii) May measure a student’s academic proficiency and growth using items above or below the student’s grade level. If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student’s academic proficiency for the grade in which the student is enrolled must be reported on all reports required by §200.8 and section 1111(h) of the Act.

Comment: CCD has been and continues to be concerned about the potential pitfalls of computer-adaptive testing as it relates to students with disabilities. As stated in our 2012 position paper, *Serving all students with a Standards-based Computer Adaptive Test*,

“While well-designed adaptive tests bring many benefits, poorly designed adaptive tests can result in unacceptable consequences, including locking lower performing students into the simplest content. For example, a poorly engineered adaptive test risks testing lower performing students only on cognitively simpler skills such as recall, recognition and rote applications of mathematics. Furthermore, because the assessment will never test lower performing students on more difficult and/or cognitively complex items, it risks creating a situation that encourages teachers to limit the curriculum and instruction for lower performing students to the simplest tasks. Thus, teachers may avoid focusing on critical skills such as higher level problem solving and analysis.”

Our paper includes a list of key characteristics of a well-designed, standards-based computer adaptive test. (See <https://www.c-c-d.org/fichiers/CCD Computer Adaptive Testing final.pdf>)

The proposed language at §200.2(c)(1)-(2) will guard against the potential consequences posed by CAT for students with disabilities.

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

- *(b) State approval.* CCD 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 important to retain in light of ongoing issues regarding difficulties encountered by students with disabilities with testing entities, particularly related to obtaining accommodations on assessments. To help address this, in September of 2015, 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.” 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 upon taking such assessment(s), including students with disabilities and English learners.

- Proposed §200.3(b)(1)(v) states that the State must ensure that the nationally recognized high school academic assessment produces “valid and reliable data on student academic achievement with respect to all high school students and each subgroup of high school students in the LEA that (A) are comparable to student academic achievement data for all high school students and each subgroup of high school students produced by the statewide assessment.”

Comment: A recent study by the American Institutes for Research (AIR) finds that college entrance exams such as the ACT do not provide accurate data on low-performing students and large percentages of historically underserved students because they are designed to assess college-bound, high-performing students and they lack sufficient test questions to differentiate among low-performing students (J. Cohen, *College Entrance Exams as Statewide Accountability Exams: Why Not? Here Is a Reason:* American Institutes for Research: Washington, DC, 2016). One state shows that the ACT was not able to provide accurate data for 87 percent of the state’s English learners, 71 percent of the state’s students with disabilities, and 31 percent of the state’s economically disadvantaged students. This is because, in this state, these students did not receive a sufficiently high score on the test to meaningfully assess their performance.

Without the capacity to provide valid and reliable data on the performance of subgroups of students, as required under ESSA, states will be limited in accurately identifying high schools with low-performing subgroups of students for Targeted Support and Improvement. In addition, high schools adopting these types of assessments in their current form may be unable to demonstrate progress in improving student achievement, overall and for subgroups, over time.

Therefore, CCD urges the Department to emphasize to States and to assure through peer review that all assessments, including those used under this provision provide comparable data between and among student subgroups, schools and districts for reporting and for accountability purposes.

- CCD supports the additional requirements at §200.3(c)(1)(ii) and (c)(2)(ii) clarifying that public charter schools [whose students would be included] have meaningful participation in an LEA's decision to request from the state the use of a nationally recognized high school academic assessment. CCD also supports the provision which explains how a public charter school that is an LEA must consult its authorized public chartering agency, consistent with state charter law.

§200.6 Inclusion of all students.

- *(a) Students with disabilities in general.* CCD strongly 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 a 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>)

- CCD 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 which addresses that important distinction and clarifies 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.

- *(b) Appropriate accommodations.* CCD urges the Department to make the following change (indicated in **BOLD** and strikethrough) to §200.6(b)(1) 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 way this proposed regulation is written, 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.

- CCD strongly supports §200.6(b)(2)(ii) directing States to ensure that all education staff, including specialized instructional support personnel (SISP), receive 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 inter-professional practice as student success and achievement can only be realized when team members learn together, integrate their expertise, and collaborate effectively. SISPs need to be included on school teams, given professional development opportunities, and provided ongoing opportunities for dialogue and collaboration.

- CCD strongly supports proposed §200.6(b)(3)(i)-(ii) which clearly articulates that States must 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 additional language is particularly welcome as it will accentuate the responsibility of States 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.

- *(c) Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* CCD strongly supports proposed regulation §200.6(c)(3)(iv), which would require all States to make publicly available the information submitted by an 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: CCD 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.

- CCD 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]

- CCD 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.

- *(d) State guidelines.* CCD strongly supports §200.6(d), which provides clarification about the factors related to cognitive functioning and adaptive behavior 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 and IEP teams must make individual decisions that support the best interest of the student and also protect against potential negative consequences to students that assessment decisions can sometimes lead to (e.g. placement in a segregated setting for instruction aligned to a particular assessment). It is also important for the Department to help States understand their full responsibility 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.

CCD REQUEST FOR NON-REGULATORY GUIDANCE

While CCD is supportive of the proposed assessment regulations, we feel strongly that the Department must move swiftly to develop and disseminate non-regulatory guidance regarding Alternate Assessments aligned with Alternate Academic Achievement Standards (AA-AAS) and other important provisions.

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 AA-AAS as well as the vast information developed by the alternate assessment consortia, the Dynamic Learning Maps and the National Center and State Collaborative.

In particular, we would like to see new guidance and technical assistance to address and clarify the following issues:

- Providing students with disabilities accommodations on assessments, including appropriate resources, training, and support for educators and families; information for state and local school leaders and policymakers to assist in creating relevant policies and procedures; and additional dissemination of the DOJ guidance to ensure its full implementation.
- 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 educational 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 percent of students who take an alternate assessment are educated in the general education classroom or resource room, see <http://www.ncscpartners.org/Media/Default/PDFs/Resources/NCSC%20LRE%20Article%20Exceptional%20Children%20EC%201670%20APA.pdf>);
 - 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 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 need for adaptations and/or modifications.

The CCD Education Task Force would welcome the opportunity to assist the Department in the development of new non-regulatory guidance and technical assistance.

In closing, we appreciate the opportunity to provide feedback on critical areas of the ESSA proposed regulations that will impact our nation's 5.8 million school-age students with disabilities. CCD pledges to continue to provide the Department with the views of people with disabilities, families, educators, employers, experts and advocates working to ensure that high expectations are upheld for all students with disabilities. CCD looks forward to continuing to be a vocal advocate for students with disabilities as the regulatory process unfolds. Our organizations stand ready to work with the Department and States across the nation to ensure they are implementing measures that will help all students with disabilities achieve their full potential.

Sincerely,

The Advocacy Institute
The Arc
American Dance Therapy Association
American Foundation for the Blind
American Occupational Therapy Association
Association of Assistive Technology Act Programs
Association of University Centers on Disabilities
Brain Injury Association
Council for Exceptional Children
Council for Learning Disabilities
Council of Parent Attorneys and Advocates
Easter Seals
Higher Education Consortium for Special Education
Judge David L. Bazelon Center for Mental Health Law
Learning Disabilities Association of America
Mental Health America
National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Center for Learning Disabilities
National Center for Special Education in Charter Schools
National Council on Independent Living
National Down Syndrome Congress
National Down Syndrome Society
National PTA
School Social Work Association of America
Teacher Education Division of the Council for Exceptional Children
United Cerebral Palsy

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