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## **Comments to Proposed Regulations to 34 CFR Part 200 Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments**

**Docket ID ED–2016–OESE–0053**

Submitted via [www.regulations.gov](http://www.regulations.gov)

U.S. Dept. of Education  
Office of Elementary and Secondary Education

The Advocacy Institute supports the NPRM regulations regarding academic assessments under the ESSA and urges the Department to preserve all of the provisions as proposed.

These proposed regulations will help to ensure that students with disabilities are fully included in state assessment systems.

Below we highlight several provisions we feel are particularly critical to preserve. We also request one technical change.

### **§200.2 State responsibilities for assessment.**

- §200.2(c)(1)-(2) 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.

This language will guard against computer adaptive testing locking lower performing students into the simplest content. State assessments must provide information on the student's performance at the student's enrolled grade, regardless of how poorly the student may be performing. The language also ensures alignment with proposed §200.6 (a)(2)(i).

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

- *(b) State approval.* §200.3(b)(2) requires 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.

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](https://www.ada.gov/regs2014/testing_accommodations.html))

### **§200.6 Inclusion of all students.**

- *(a) Students with disabilities in general.* §200.6 (a)(2)(i) 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.”

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>)

- *(b) Appropriate accommodations.* The Department is urged to make the following technical 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--

Reason for requested change: As currently 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.

- *(b) Appropriate accommodations.* §200.6(b)(3)(i)-(ii) 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.

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.* §200.6(c)(3)(iv) 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.

This requirement ensures transparency and will provide the public with information necessary to monitor use of the state’s alternate assessments aligned with alternate academic achievement standards.

- *(c) Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* §200.6(c)(4) 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).

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.”

- *(d) State guidelines.* §200.6(d) 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.

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.

### **REQUEST FOR NON-REGULATORY GUIDANCE**

The Department is urged to move swiftly to develop and disseminate non-regulatory guidance on the alternate assessment aligned with alternate academic achievement standards (AA-AAS).

Both ESSA and the proposed regulations make significant changes to the current ESEA regulation regarding the AA-AAS for students with the most significant cognitive disabilities, 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 more than 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.

Thank you for consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Candace Cortiella". The signature is written in a cursive, flowing style.

Candace Cortiella

Director

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