

ESSA PROPOSED REGULATIONS: TOP 5 ISSUES FOR KIDS WITH DISABILITIES

The U.S. Department of Education has issued proposed regulations to implement provisions of the Every Student Succeeds Act (ESSA) regarding school accountability, data reporting and state plans. The proposed regulations are available at <https://www.federalregister.gov/articles/2016/05/31/2016-12451/elementary-and-secondary-education-act-of-1965-as-amended-by-the-every-student-succeeds>.

While the proposed regulations are both extensive and complex, the following issues constitute those of the greatest importance regarding students with disabilities as determined by The Advocacy Institute and the Center for Law and Education. The public may submit comments on the proposed regulations on or before August 1, 2016.

Submit your comments at <https://www.regulations.gov/#!submitComment;D=ED-2016-OESE-0032-0001>

ISSUE 1: ENSURING PARTICIPATION

The Department has asked whether the final regulations should include additional or different options, beyond those proposed in this NPRM, to support States in how they can meaningfully address low assessment participation rates in schools that do not assess at least 95 percent of their students, including as part of their State-designed accountability system and as part of plans schools develop and implement to improve, so that parents and teachers have the information they need to ensure that all students are making academic progress. (Sec. 200.15)

Comment: The list of proposed actions set forth in the NPRM (§200.15(b)(2)(i)-(iv)) provides several strong ways that States can address low assessment participation rates. For students with disabilities, the assessment participation requirement established under No Child Left Behind led to significant improvements in including students who had been historically not included in testing and/or tested at lower grade levels. None of the proposed actions are as rigorous as the NCLB's Adequate Yearly Progress (AYP) provision regarding participation. The final regulations should make clear that the proposed actions for missing the requirement do not prevent a State from establishing a different factor customized to address the requirement that is more rigorous than those proposed under the federal regulations.

ISSUE 2: COUNTING TEST PERFORMANCE OF PREVIOUS SPECIAL EDUCATION STUDENTS

The Dept. has asked specifically for comment on whether to retain, modify, or eliminate in the title I regulations the provision allowing a student who was previously identified as a child with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA), but who no longer receives special education services, to be included in the children with disabilities subgroup for the limited purpose of calculating the Academic Achievement indicator, and, if so, whether such students should be permitted in the subgroup for up to two years consistent with current title I regulations, or for a shorter period of time. (Sec. 200.16)

Comment: This provision was part of the amendments to Title I regulations in April 9, 2007. It came at a time when states were operating under NCLB regulations, including Adequate Yearly Progress (AYP), which required that the annual measurable objectives (AMO) for each student subgroup be the same. Congress expressly repealed AYP in ESSA, incorporating only those AYP provisions that it wanted maintained, such as the 95 percent participation requirement, now known as Annual Measurement of Achievement, while repealing other elements of AYP such as the AMO requirement.

Now, under ESSA, States will set “long-term goals and measurements of interim progress” separately for each student subgroup. Those goals must take into account the improvement necessary for each student subgroup to make significant progress in closing statewide gaps. This requirement makes clear that the long-term goals and measurements of interim progress are to be established based on the most recent performance of each student subgroup on the state’s assessments in reading/language arts and mathematics. For the students with disabilities subgroup, performance on state assessments measures only the achievement of students who meet the definition of a student with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA). Thus, including the achievement of “previously identified” students in determining achievement of goals for this subgroup would have the effect of measuring apples and oranges: goals based on actual performance of one group (IDEA students) compared to the achievement of two groups (IDEA students and previously identified IDEA students no longer receiving services), rendering the data on a state’s performance on its goals as completely false.

Based on this, the Department is strongly encouraged to eliminate the Title I regulation allowing the performance of students who previously received special education services to be included in the achievement of the “students with disabilities” subgroup under ESSA.

ISSUE 3: DEFINING THE “STUDENTS WITH DISABILITIES” SUBGROUP FOR REPORTING OF GRADUATION RATES.

The Dept. has asked specifically for comment on whether to standardize the criteria for including children with disabilities, English learners, homeless children, and children who are in foster care in their corresponding subgroups within the adjusted cohort graduation rate (ACGR), and suggestions for ways to standardize these criteria. (Sec. 200.34). The Dept. recognizes that States are defining these student subgroups in a variety of ways, compromising comparability across States.

COMMENT: The criteria for students who should be reported in the ACGR “students with disabilities” subgroup should be standardized. A two-fold criteria is recommended. Only students meeting both of the following criteria should be reported:

- The student was a student with a disability as defined in 602(3) of the Individuals with Disabilities Education Act at the time of being awarded a regular high school diploma and
- The student was a student with a disability as defined in 602(3) of the Individuals with Disabilities Education Act for the majority (i.e., more than 50 percent) of their time in the cohort.

This two-fold criteria will ensure that the ACGR for the “students with disabilities” subgroup is representative of the achievement of students receiving services and supports under the IDEA and is comparable across States. It will also align, to some degree, with the data collection under Section 618

of the IDEA for exiting students, which is being used in the Department's Results Driven Accountability initiative. Lastly, it will guard against students being identified as a student with a disability for short periods of time (such as just prior to exiting) in order to inflate the ACGR for this subgroup.

ISSUE 4: ESTABLISHING MINIMUM GROUP SIZE

The proposed regulations state that the minimum group size must not exceed 30 students unless the State provides a justification for doing so (§ 200.17(a)(2)(iii)). The minimum group size, frequently called "n" size, is the number of students needed to include a subgroup of students in the accountability system.

Comment: The proposed regulation that sets an upper limit "n" size of 30 will strongly suggest to States that 30 is an acceptable minimum group size when, in fact, there is little evidence to support this. Under the No Child Left Behind Act, many states set n-sizes higher than necessary to avoid the consequences of missing Adequate Yearly Progress. A report referenced by the Department in its proposed regulations specifically noted that "while raising the minimum n-size is an effective means of increasing the passing rates of schools, it does so at a considerable cost to special education students in terms of being excluded from the accountability system." [Page 34553]

In order to ensure that, to the maximum extent practicable, each student subgroup is included in the accountability system, the Department should lower its proposed n-size from 30 to 10 students in the final regulations. Even at a level of 10, many subgroups of students in many schools will not be addressed, no matter how poorly they may be faring. Equally important, the Department should retain the requirement that States must submit information regarding the number and percentage of all students and all student subgroups for whose results schools would not be held accountable in the accountability system.

ISSUE 5: DEFINITION OF REGULAR HIGH SCHOOL DIPLOMA

The proposed regulations add language to the definition of a "Regular high school diploma" which refers to the use of IEP goals (§200.34(c)(2)). This language is unnecessary and creates ambiguity, for there is no mention of an IEP within the statutory definition of a "regular high school diploma" for all students.

Comment: A State's "Regular high school diploma" should only be one that is fully aligned with state standards. Basing receipt of any diploma wholly or in part on meeting IEP goals, regardless of whether a student's IEP goals are purportedly "standards-based," goes beyond the express statutory definition.

The Department should delete the following language from proposed § 200.34(c)(2) "such as a diploma based on meeting individualized education program (IEP) goals that are not fully aligned with the State's grade-level academic content standards." This deletion will align the regulatory definition with the definition in ESSA.