



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

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September 9, 2016

Ms. Jessica McKinney
U.S. Department of Education
400 Maryland Avenue, SW, Room 3C106
Washington, DC 20202-2800

Docket ID: ED-2016-OESE-0053-0001

Dear Ms. McKinney:

I am writing to provide the comments of the New York State Education Department (NYSED or "the Department") on the United States Department of Education's (USDE) Notice of Proposed Rulemaking (NPRM) on Title I Academic Assessments under *the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA)*.

We appreciate this opportunity to share with you our concerns regarding how the proposed rules may affect the students and educational communities within New York State.

We request that the USDE give serious consideration to addressing the issues specified below:

I. Testing of recently arrived English Language Learners and students in the English Language Learner subgroup

Proposed regulations require that students within the English Language Learner subgroup who are outside of the recently arrived English Language Learner status be required to complete the state's reading/language arts assessment, in addition to the annual completion of the English Language Proficiency exam. New York believes that requiring these students to complete these multiple assessments, including a reading/language arts assessment that is not developed to measure skills in languages other than English, is not the most effective way to measure academic growth of English Language Learners.

Recommendation:

We recommend that the USDE develop a process by which states that can demonstrate that their English language proficiency assessments are fully aligned to their

state language arts standards would be permitted to use the results of the English Language Proficiency exam as the measure of growth in reading/language arts for students in the English Language Learner subgroup until such time as a student is expected to achieve proficiency in English. This would provide states with a consistent annual assessment of student proficiency and ease the burden of testing on this group of students.

II. Testing of students with significant cognitive disabilities who are not eligible for New York State Alternate Assessment (NYSAA) test

New York State is concerned about the new requirement prohibiting more than one percent of assessed students from taking the state's Alternate Assessment, which is a far more inflexible standard than that under No Child Left Behind, which placed no cap on the number of students who were administered an Alternate Assessment. Rather states could give equal weight to proficient and advanced performance, based on the alternate standards in calculating school, district, and state Adequate Yearly Progress (AYP), but only to the extent that the number of proficient and advanced scores based on the alternate achievement standards did not exceed one percent of all students in the grades tested at the state or the local educational agency level. In recent years, while New York State has adjusted its accountability reporting to meet federal requirements, between 1.8 – 2.3 percent of students participated in the New York State Alternate Assessment. This new requirement will compel New York State to disregard the judgment of students' Individualized Education Program (IEP) teams, which have determined that the Alternate Assessment is the most appropriate test for a student. Disability advocates and parent groups consistently indicate that even with accommodations, many students who are required to take grade level exams find the experience onerous and humiliating. As we note in our recommendation below, New York has long advocated for greater flexibility to allow a subset of students with severe cognitive disabilities who are not eligible to participate in Alternate Assessments to be able to take a grade level assessment instead.

Recommendation:

Provide states increased flexibility in assessing students with significant cognitive disabilities. Absent the ability to administer the Alternate Assessments to more than one percent of a state's students, we recommend that pursuant to ESSA 1111(b)(2)(B)(vii)(II) states be allowed to administer a developmentally appropriate off-grade assessment as an accommodation to a subset of students with severe cognitive disabilities. We note that ESSA allows for off-grade assessment items in conjunction with computer-adapted testing, and we believe that states should be offered the opportunity to administer off-grade assessments while they transition to computer-adaptive assessments.

III. Regulations regarding waiver of State-level cap of 1% of students taking an alternate assessment aligned with alternate academic achievement standards

New York State is concerned that the proposed regulations regarding the application of a waiver to the state-level one percent cap on these assessments will make it difficult for our Local Educational Agencies (LEA) to provide this Alternate Assessment to all of their

students who require it. Proposed 200.6(c)(4)(i) requires that state waiver requests “be submitted at least 90 days prior to the start of the state’s first testing window.” Since LEAs are not required to submit advanced information about the population of students who participate in the Alternate Assessments, it is likely that states would not be aware of their need to request a waiver prior to the deadline. Proposed 200.6(c)(4)(ii)(B) requires that state waivers “show the state has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup.” New York believes that by linking the participation rate requirement to these waiver requests, this proposed regulation contradicts ESSA’s intent to provide more flexibility in the measurement of student achievement.

Recommendation

Adjust the Alternate Assessment waiver request deadline so that it follows receipt of LEA justification reports through which states will be able to determine the percentage of students who participate in the Alternate Assessment.

Recommendation

Eliminate the requirement that waivers to the Alternate Assessment cap provide evidence of states’ fulfilling the 95 percent participation rate for all students in the state assessment system.

IV. Requirement that nationally-recognized locally-selected assessment be administered to all students within the LEA (except those with the most significant cognitive disabilities)

ESSA requires that any nationally-recognized, locally-selected assessment must be reviewed by New York State to determine that it satisfies criteria of standards alignment, technical quality, fairness, and data reporting consistent with those of New York’s own state assessments before such assessment can be approved for LEA use as an alternative to the state assessment. Given this high level of equivalence that must be identified, we believe that any approved, nationally-recognized, locally-selected assessment will be at least as rigorous as the New York State assessments; otherwise the state would deny any local use of the assessment. We, therefore, disagree with the rationale that comparability of assessment results can only be achieved by administering the same assessment to all high school students within a district.

Recommendation:

We recommend that students in LEAs that are selected to use a State-approved, nationally-recognized high school assessment be individually offered the opportunity to take either this locally-selected assessment or the New York State assessment for accountability purposes.

IV. Extending the middle school mathematics exemption to accelerated students in grade 7 and in Grade 8 Science

ESSA and the proposed rulemaking provide accelerated eighth-grade students who take a high school mathematics exam an exemption from the requirement that they also must take the state-administered Grade 8 Mathematics Test. The current practice in New York and other states provides teachers and administrators the ability to develop and expand rigorous programs that serve these students. Through our most recent ESEA Flexibility Waiver, however, New York State has also been able to provide advanced instruction and assessment to seventh-grade students with accelerated mathematics proficiency, as well as in Grade 8 Science. Requiring these students to be administered the Grade 7 Mathematics Test, in addition to the high school assessment that measures an accelerated curriculum, will detract from these students' ability to focus their attention on higher level mathematics.

Recommendation

The USDE should develop a procedure to allow states to provide the middle school exemption from the mathematics assessment to seventh-grade students, as well as to those in the eighth grade. We recommend that this procedure should further exempt students who complete high school mathematics assessments in both grade 7 and grade 8 from the requirement to take a more advanced assessment in high school, since these students already will have been measured against two different levels of achievement in high school mathematics.

Recommendation

In addition to mathematics, a subgroup of New York students complete advanced science courses and high school science assessments in grade 8. We recommend that the USDE develop a procedure to allow states to provide a middle school exemption from the intermediate science assessment that the state typically administers to eighth-grade students comparable to the middle school mathematics exemption provided in ESSA and the proposed rulemaking.

V. Expansion of Peer Review

Proposed regulations include multiple, new requirements for assessments to undergo Peer Review, including state-developed and state-administered assessments such as native language versions of state assessments and English proficiency exams. Additional regulations, however, would require states to submit assessments outside of the state system for Peer Review, including nationally-recognized, locally-selected assessments used by an LEA in place of the state assessment or by students who previously completed the state's high school mathematics assessment under the middle school mathematics exemption. Regulation 200.3(b) requires that states may only approve these exams for use following a review for criteria addressed in Peer Review, such as technical quality, standards alignment, and depth of knowledge.

Recommendation

Allow states to submit reports created for their internal review of nationally-recognized assessments as part of the Peer Review to demonstrate to the USDE that these assessments meet the requirements of ESSA.

Sincerely,

A handwritten signature in black ink that reads "MaryEllen Elia". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail on the "l" in "Elia".

MaryEllen Elia
Commissioner

c: Beth Berlin
Jhone Ebert
Angelica Infante
Ira Schwartz