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## MEMORANDUM

TO: **Interested Parties**  
FROM: **Penn Hill Group**  
DATE: **December 14, 2016**  
SUBJECT: **Final Regulations on Academic Assessments under Title I, Part A of the Elementary and Secondary Education Act**

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On December 8, the U.S. Department of Education (ED) published final regulations on the academic assessments administered under Title I, Part A of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA). The December 8 Federal Register notice, which can be accessed [here](#), revises the proposed assessment regulations that ED published in a Notice of Proposed Rulemaking (NPRM) on July 11, and responds to public comments on those proposals. The initial proposal reflected the consensus agreement of ED's negotiated rulemaking panel on Title I, reached earlier in the spring.

The purpose of this memorandum is to describe the final regulations. Specifically, we have identified places where the final language differs from the proposed rules.

### **State Responsibilities for Assessment**

§200.2 of the final regulations describes the general State responsibilities for assessment under Title I, with many of the specific provisions taken directly from the statute. The final regulations differ only slightly from the NPRM. In brief, they specify that:

- States must annually administer high-quality assessments, at a minimum in mathematics, reading or language arts, and science, in the grades specified in the statute (grades 3-8 and once in high school for math and reading/language arts, and once in each of three grade spans for science);
- A State's assessments must be administered to all students, *and the final regulations clarify that this includes migratory students, homeless children and youth, children in foster care and students who have a parent in active duty in the armed forces*;
- All public school students in the State must take the same assessments, except for (as described below) high school students taking locally-selected, nationally-recognized assessments, students covered by the middle school mathematics exception and students with the most significant cognitive disabilities;
- Assessments must be designed, to the extent practicable, consistent with the principles of "universal design for learning";
- Assessments must be aligned with the State's academic standards (and address the full content and breadth of those standards), and must provide coherent and timely information on whether a student is performing at grade level;

- Assessments must be valid, fair and reliable; be consistent with nationally recognized technical testing standards; and be of adequate technical quality;
- The State must make publicly available (including on its website) evidence that its assessment system meets those requirements, *and the final regulations clarify that this requirement applies to all assessments that are part of a State's system*;
- Assessments must involve multiple up-to-date measures of student achievement, which must include measures of higher-order thinking skills, may include valid and reliable measures of student growth and may be partially delivered in the form of portfolios, projects or extended-performance tasks (*and the final regulations include examples of higher-order thinking skills, such as critical thinking, reasoning, and complex problem solving*);
- The assessments may be administered either through a single summative assessment or through multiple interim assessments taken during the course of the school year that result in a single summative score;
- A State's assessment system must enable results to be disaggregated, for the State and for each local educational agency (LEA) and school, by gender, each racial and ethnic group, status as an English learner, status as a migratory child, children with disabilities (compared to all other students), economically disadvantaged students (compared to all of other students), status as a homeless child or youth, status as a child in foster care and status as a child with a parent who is on active duty in the armed forces (*and the final regulations clarify that these disaggregations are not required if the number of students in a subgroup is insufficient to yield statistically reliable data or ensure student privacy*);
- Assessments must produce individual student reports and enable the production and reporting of itemized score analyses; and,
- The State must submit – for ED peer review – evidence that its assessment system meets the statutory and regulatory requirements.

### **Computer-Adaptive Assessments**

Computer-adaptive assessments (CATs) are tests that use a student's responses on an exam to identify and adjust the difficulty of subsequent questions. While CATs were not expressly authorized under prior law, ED permitted States to use these assessments through its Title I assessment peer-review process and ESEA waivers. The reauthorized law specifically recognizes a State's authority to administer a CAT, provided that it meets the statutory requirements for assessments, except for the requirement that all students be tested using the same test items. The reauthorization also provides that a CAT must measure a student's academic proficiency based on the State's grade-level standards (including growth toward those standards), and may measure a student's proficiency and growth using test items above and below grade level, including for use as part of the State's accountability system.

§200.2(c) of the final regulations specify the requirements for CATS. They:

- Specify that CATs must measure a student’s academic proficiency based on the standards for the grade in which the student is enrolled (and on growth toward those standards);
- Provide that CATs may measure proficiency and growth using items above or below the student’s grade level; and,
- Specify that, if a State administers a CAT, it must report students’ grade-level proficiency on the student interpretive, descriptive and diagnostic reports required under Title I and in Title I report cards.

The final regulations in this area are substantively the same as the language in the NPRM.

### **Locally-selected, nationally-recognized high school assessments**

ESSA added a new authority for an LEA, with State approval, to administer a “locally-selected, nationally-recognized” high school assessment in place of the State’s reading/language arts, math or science assessment. Under the statute, such an assessment must: (1) be aligned with the State’s academic content standards; (2) address the breadth and depth of those standards; (3) be equivalent to or more rigorous than the State assessment in terms of content coverage, difficulty and quality; (4) provide comparable, valid and reliable data on academic achievement, as compared to the State assessment, on all students and on each student subgroup; (5) meet the technical requirements that apply to State assessments; and, (5) provide unbiased, rational and consistent differentiation between schools within a State. The statute also requires each State educational agency (SEA) to establish technical criteria for determining if a locally selected assessment that an LEA applies to use meets these requirements. The State must then review any locally selected assessments against those criteria and submit evidence for ED peer reviewers demonstrating that the assessment meets the statutory criteria.

Once a locally-selected, nationally-recognized high school assessment has been approved by an SEA and through the ED peer review process, any district in the State may use that assessment, so long as the LEA notifies the SEA. In addition, the law requires that a district notify the parents of all high school students that it has requested the authority to administer and, as applicable, is administering a locally-selected, nationally-recognized assessment in lieu of the State assessment.

§200.2 of the final regulations specifies the requirements for locally -elected, nationally-recognized assessment. In addition to restating the statutory language, the final regulations:

- Define a nationally-recognized high school assessment as an assessment of high school students’ knowledge and skills that is administered in multiple States and is recognized by institutions of higher education (IHEs) in those or other States for the purpose of entrance or placement into courses of postsecondary education or training programs;
- Require an LEA to administer the same locally-selected, nationally-recognized assessment to all of the LEA’s high school students (with the exception of students with the most significant cognitive disabilities who take alternate assessments);

- Clarify that an SEA may establish other technical requirements for equivalence or rigor, in addition to those called for in the statute;
- *Clarify in the final language that the requirement for comparable, valid and reliable data (for a locally-selected assessment versus the State assessment) means the data must be comparable for each academic achievement level under the State's standards:*
- *As added in the final language, clarify that an SEA must disapprove an LEA's application if it does not meet the statutory and regulatory requirements and may revoke an approval for good cause;*
- Require an SEA, before approving a locally-selected assessment, to ensure that the accommodations provided under that assessment to students with disabilities and English learners (ELs) do not deny those students the opportunity to participate in the assessment or afford them any benefit that is not equal to the benefits afforded to other students:
- Require an LEA, prior to submitting its request to the SEA, to provide an opportunity for meaningful consultation to charter schools whose students would be affected;
- Specify that an LEA desiring to receive approval to administer a locally-selected assessment must revise its Title I plan or its local consolidated plan (as applicable), including by meeting the consultation requirements applicable to those plans;
- Require that, if applicable, the revised Title I plan include an assurance that the use of the locally-selected assessment is consistent with the State's charter school laws, and that the LEA has consulted with the authorized public chartering agency;
- Require that the LEA's parental notification process include providing information on how parents (*and, as appropriate, students, as added in the final language*) can provide meaningful input on the LEA's request, and notifying parents of any impact of the request on the LEA's instructional program;
- Require that, after initial approval, the LEA notify the SEA and parents in each subsequent year, as applicable, of its intention to continue administering the approved locally-selected assessment; and,
- Require that parental notifications be provided: (1) in an understandable and uniform format; (2) to the extent practicable, in a language that parents can understand; and (3) in an accessible alternative format upon the request of a parent with a disability.

### **The Middle-School Mathematics Exception**

ESSA amended the statute to exempt an 8<sup>th</sup>-grade student taking an advanced math course (such as Algebra I) from the requirement to take the State's regular 8<sup>th</sup>-grade math assessment, so long as such a student takes the end-of-course assessment that the State administers for the course in which he or she is enrolled and, once in high school, takes a more advanced math assessment. The student's scores on each of these assessments must be included in the State's accountability system. While ESEA did not previously authorize these exemptions, ED allowed them under the "ESEA Flexibility" waiver initiative.

§200.5(b) of the final regulations provides the following rules applicable to the middle-school math exception.

- An affected 8<sup>th</sup>-grade student's performance on the end-of-course assessment must be used for measuring academic achievement and assessment participation under the State's accountability system for that grade (8<sup>th</sup> grade) for the school in which the student is enrolled;
- Any student taking an end-of-course assessment in 8<sup>th</sup> grade also must take a State-administered end-of-course or nationally-recognized high school math assessment in high school that is more advanced than the regular statewide high school math assessment and that provides for appropriate accommodations;
- The student's performance on the assessment administered when he or she is in high school must be used for the purposes of measuring academic achievement and assessment participation under the State's accountability system for that student's high school; and,
- The SEA must describe, in its Title I State plan, its strategies for providing all students in the State the opportunity to be prepared for and to take advanced math coursework in middle school.

The final language in this area is substantively identical to the language included in the NPRM.

### **Inclusion of students with disabilities in academic assessments**

The law continues to require that appropriate accommodations be provided for students with disabilities identified under the Individuals with Disabilities Education Act (IDEA), as well as those who are provided accommodations under an Act other than IDEA. In addition, ESSA added a new requirement that all assessments be developed, to the extent practicable, using principles of universal design for learning, a framework that supports the learning needs of all students.

Under the statute, the term "universal design for learning" means a scientifically valid framework for guiding educational practice that: (1) provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and (2) reduces barriers in instruction, provides appropriate accommodations and supports, and challenges and maintains high achievement expectations for all students, including students with disabilities and students who are limited English proficient.

§200.6(a) and (b) of the final regulations specify the requirements for inclusion of students with disabilities in assessments. In addition to restating the statutory requirements, the language:

- Clarifies that students with disabilities who are eligible for accommodations under "other Acts" (not just IDEA) must be assessed with appropriate accommodations under Title I;
- Provides that the use of appropriate accommodations may not deny a student the opportunity to participate in an assessment or afford any benefit that is not equal to the benefit afforded to students who do not use such accommodations;

- Provides that those accommodations must be consistent with nationally-recognized accessibility standards;
- Requires SEAs to develop, disseminate information on (to, a minimum, schools and parents, *as well as, under the final language, LEAs*) and promote the use of appropriate accommodations; and,
- Requires that SEAs ensure that general and special education teachers, paraprofessionals, specialized instructional support personnel and other staff, *including, under the final language, teachers of ELs*, receive necessary training on administering assessments and providing appropriate accommodations.

**Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities**

The reauthorized ESEA allows a State to administer an alternate assessment, aligned with alternate academic achievement standards, for students with the most significant cognitive disabilities, but limits the number of students who may take such an alternate assessment to no more than 1 percent of the total number of all students in the State who are assessed in a given subject. While this authority to assess students with the most significant cognitive disabilities through an alternate assessment (subject to a 1 percent cap) was provided for in previous regulation, ESSA’s passage required these regulations to be modified.

Under the updated law, a State must ensure that an alternate assessment meets specific requirements in such areas as parental notification, educator training in using accommodations and administering alternate assessments, and incorporation of universal design for learning in developing the assessment. A State must also show that a student who takes an alternate assessment is not precluded from attempting to complete the requirements for a regular high school diploma and that, in accordance with IDEA, a child’s individualized educational program (IEP) team determines whether a child will take an alternate assessment, in accordance with the State’s assessment guidelines.

The statute specifically prohibits ED or a State from setting a district-level cap on the percentage of students who may be assessed with an alternate assessment, but the law also specifies that any district that exceeds the 1 percent cap must submit information to the State justifying the need to exceed it. The alternate assessment requirements are subject to the Secretary’s waiver authority (i.e., the Secretary may waive the 1 percent cap).

§200.6(c) and (d) of the final regulations provide the regulations on alternate assessments aligned alternate achievement standards. In addition to restating the statutory language, the regulation requires that:

- A State’s guidelines for IEP teams to use in determining if a student will take an alternate assessment include a State definition of “students with the most significant cognitive disabilities.” This definition must address factors related to cognitive functioning and adaptive behaviors, such as: (1) providing that a student is not identified as having the most significant cognitive disabilities based on his or her having a particular disability (*or, under the final language, by his or her status as an EL*); (2) a student not being identified solely on the basis of previous low academic achievement, status as an EL, or previous



need for accommodations; and (3) providing that students with the most significant cognitive disabilities require extensive, direct individualized instruction and substantial supports to achieve measurable gains in achievement;

- The SEA make publicly available an LEA's justification to the State for exceeding the 1 percent threshold;
- If an SEA anticipates that the State will exceed the 1 percent cap for any subject during a school year, the SEA, at least 90 days prior to the start of the State's first testing window (*which the final regulations clarify as referring to the testing window "for the relevant subject"*), submit a waiver request to the Secretary;
- This waiver request include data for the current or prior school year: (1) on the number and percentage of students in each subgroup who took the alternate assessments; and, (2) demonstrating that the State assessed at least 95 percent of all students, and all students with disabilities, in the relevant grades;
- A waiver request also include an assurance that each LEA the SEA anticipates will assess more than 1 percent of its students using an alternate assessment: (1) followed the guidelines for the use of those assessments and, (2) will not disproportionately assess students in any particular subgroup with an alternate assessment (*but, unlike the NPRM, the final regulations do not require that this assurance also cover other LEAs that will contribute significantly to the State's exceeding the cap*);
- Such a waiver request also include a plan and timeline by which the State will: (1) improve its implementation of the State's guidelines for the use of alternate assessments, in order to meet the cap in future years; (2) provide increased support to and oversight of LEAs that it anticipates will exceed 1 percent (and other LEAs that it anticipates will contribute significantly to the State's exceeding the cap), in order to ensure that only students with the most significant cognitive disabilities take the alternate assessment, including by ensuring that each such LEA provides staff with training on this issue; and (3) address any disproportionality in the *percentage (changed from "number and percentage" in the NPRM)* of students taking the alternate assessment; and,
- Any subsequent waiver request demonstrates substantial progress towards achieving the prior year's plan and timeline.

*In addition, unlike the NPRM, the final regulations do not require a State's waiver application to include an assurance that LEAs the SEA anticipates will assess more than 1 percent of its students using an alternate assessment (as well as other LEAs that will contribute significantly to the State exceeding the cap) will not significantly increase, from the prior year, use of the alternate assessment, unless such an LEA can demonstrate an increase in the enrollment of students with the most significant cognitive disabilities*

### **Inclusion of English learners in academic assessments**

The reauthorized ESEA maintains the requirement that each State's annual academic assessments provide for the inclusion of ELs, who must be assessed in a valid and reliable manner and be provided appropriate accommodations. To the extent practicable, States must



assess ELs in the language and form most likely to yield accurate data on what ELs know and can do in academic content areas, until they have achieved English language proficiency.

The statute further requires that a State administer reading/language arts assessments in English for any student enrolled in U.S. schools for more than three consecutive school years, with a possible two-year delay of this timeline, on a case-by-case basis, if a student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on reading/language arts assessments written in English.

Finally, the law requires that each State identify in its State plan languages other than English present to a “significant extent” in its student population and indicate the languages for which assessments are not available and are needed. A State must make “every effort” to develop such assessments and may request assistance from the Secretary.

§200.6(f)-(j) of the final regulations specify the requirements for the assessment of ELs. In brief, the language requires that the SEA:

- Provide appropriate accommodations to ELs, *which the final language clarifies as meaning that the SEA must develop, disseminate (to, at a minimum, LEAs, schools, and parents) and promote the use of those accommodations;*
- Ensure that the use of accommodations for ELs does not deny them the opportunity to participate in an assessment or afford any benefit from participation that is not equal to the benefit afforded students who do not use the accommodations (this is parallel language to the language described above on students with disabilities);
- Provide in its State plan: (1) the State’s definition of “languages other than English that are present to a significant degree in the participating student population,” (2) an identification of the languages in the State that meet that definition; (3) an identification of the non-English assessments available in the State; and (4) an identification of the languages meeting the definition in which assessments are not available; and,
- Describe, again in its State plan, how the SEA will make every effort to develop assessments in, at a minimum, the non-English languages that are present to a significant extent, including: (1) the State’s plan and timeline for developing those assessments; (2) a description of the State’s process for gathering input, collecting and responding to public comment and consulting with stakeholders (including educators, parents and families of ELs, other stakeholders, *and, as added in the final regulations, students, as appropriate*) on the need for assessments in non-English languages; and (3) as applicable, an explanation of why the State has not completed the development of those assessments despite making every effort.

The language also requires that a State’s definition of the languages present to a significant degree include at least the “most populous” language, other than English, spoken by the participating student population. Further, in developing its definition, a State would be required to “consider”: (1) languages spoken by distinct populations of English learners (including migrant, foreign-born, and Native American students); and, (2) languages spoken by a significant portion of students in one or more LEAs, as well as languages spoken by a significant portion of the student population statewide.



Finally, the language exempts students in Native American and Alaska Native language immersion schools from the requirement that they be assessed in English in reading/language arts (*and, as added in the final regulations, in math and science*). Under this exemption, the students would need to be assessed using an assessment in a Native American language, and that assessment would go through ED peer review. In addition, States would still be required to assess students in language immersion schools in English no later than *high school (rather than the 8<sup>th</sup> grade, as in the NPRM)*.

#### **Issue #5b: Inclusion of English learners in English language proficiency assessments**

The reauthorized ESEA continues the requirement that an SEA ensure that each LEA in the State provide for an annual assessment of English language proficiency (ELP) for all ELs. The annual ELP assessment must be aligned with the State's ELP standards. Other sections of the new law explicitly or implicitly indicate that the ELP assessment must be statewide.

In addition to restating the statutory requirements, the final regulatory language:

- Clarifies that the ELP assessments be uniform statewide assessments;
- *As clarified in the final regulations, requires the State to administer its ELP assessment to all ELs in schools served by the State in all grades in which there are ELs, kindergarten through grade 12;*
- Requires that ELP assessments meet other Title I assessment requirements (such as being assessable to the widest range of students, being valid and reliable for the purposes of the assessment and being supported by evidence that the assessments are of adequate technical quality);
- *As added in the final language, provides that if an EL has a disability that precludes assessment in one or more domains of the State's ELP assessment and there are no appropriate accommodations, the State will assess that student based on the remaining domains; and,*
- Requires that if the ELP assessments are administered through a computer-adaptive assessment, the assessment meet all requirements pertaining to assessments under the statute.