



September 9, 2016

Jessica McKinney
U.S. Department of Education
400 Maryland Avenue, SW
Room 3W107
Washington, DC 20202

Docket ID ED-2016-OESE-0053

Dear Ms. McKinney:

I am writing to provide the comments of the Foundation for Excellence in Education (ExcelinEd) on the U.S. Department of Education's proposed regulations governing assessments under the Elementary and Secondary Education Act (ESEA) as reauthorized by the Every Student Succeeds Act (ESSA). ExcelinEd is a national nonprofit organization focused on helping states build education systems that ensure each child achieves his or her full potential.

ExcelinEd finds numerous provisions to support in the Department's proposed assessment regulations, which were developed through a negotiated rulemaking process. The proposed rules clarify a number of concepts that are unclear in the statute and provide workable, common-sense requirements in areas such as the use of locally selected, nationally recognized high school assessments and the administration of alternate assessments to students with the most significant cognitive disabilities. However, we are concerned about one element of the proposal: the requirements related to assessment of English learners (ELs) in non-English languages. We urge the Department to more carefully consider the high costs that states would incur in developing, going through peer review of, and administering these assessments to what – in some states – would be a very small number of students.

Our more detailed comments follow.

Elements of the Proposed Regulations that ExcelinEd Supports

- **Assessments, including computer-adaptive assessments, must be based on grade-level standards.** ExcelinEd supports §200.2(b)(3)(B) of the Department's proposal, which would require that a state's assessments provide coherent and timely information on whether a student is performing at grade level. Similarly, §200.2(c)(1)(i) would require that, if a state uses computer-adaptive assessments, those assessments measure a student's academic proficiency based on the challenging state academic standards for the grade in which the student is enrolled. This language is consistent with the Department's proposed regulations for accountability, which called for states to develop long-term academic proficiency goals based on grade-level proficiency.

ExcelinEd supports the language on assessments, just as we did the parallel language on goals (in our letter of July 29), because the language reiterates that states must continue to hold schools accountable for helping each student reach the important milestone of true grade-level proficiency. While we agree with many others that an effective accountability system ought to measure student achievement against multiple achievement levels (both low and high), we believe that grade-level achievement must be part of any system and must be measured by states' assessments. Without assessments that can determine whether a student is achieving at the appropriate level for his or her grade, it will be impossible to measure progress toward long-term goals that are based on grade-level proficiency.

Furthermore, focusing on grade-level achievement does not preclude states from holding schools accountable for student improvement. All 50 states now have the capacity to measure students' growth on assessments, and most states give student growth equal or greater weight than student proficiency in their accountability calculations.

- **Provisions governing locally selected, nationally recognized high school assessments.** ESSA includes new authority permitting a state to approve a local education agency (LEA) to administer a locally selected nationally recognized high school assessment in lieu of a statewide assessment. ExcelinEd supports the proposed regulations in this area, as agreed to by the negotiated rulemaking team, which include the following helpful clarifications and other provisions:
 - Defining 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 in those and other states for the purposes of entrance or placement into courses of postsecondary education or training programs (§200.3(d));
 - Requiring an LEA that administers a nationally recognized assessment to administer that assessment to all its high school students, except for students with the most significant cognitive disabilities (§200.3(a)(2));
 - Requiring that a state education agency (SEA), before approving a locally selected, nationally recognized assessment, ensure that students with disabilities and English learners (ELs) will receive appropriate accommodations and will not be denied any benefits that are afforded to other students through their participation (§200.3(b)(2)(i));
 - Requiring an LEA, before requesting state approval to administer a nationally recognized assessment, to consult with stakeholders (including with all charter schools whose students would be affected) about its plans for doing so (§§200.3(c)(1)(ii) and 200.3(c)(2)(i)); and
 - Requiring an LEA, again before it requests state approval, to notify parents of high school students of the LEA’s intent to request approval to administer a nationally recognized assessment in place of the statewide assessment and to give those parents the opportunity to provide input on the LEA’s request (§200.3(c)(i)).

ExcelinEd supports these provisions because they strike an appropriate balance. They would give states and districts flexibility to improve and streamline their assessment systems while maintaining federal guardrails that ensure, among other things that: nationally recognized assessments meet rigorous technical criteria; the assessments are fully accessible to students with disabilities and ELs; and parents and other stakeholders are meaningfully included in the decision to use a nationally recognized assessment in place of the statewide assessment.

- **Alternate assessments for students with the most significant cognitive disabilities.** The reauthorized ESEA permits states to assess students with the most significant cognitive disabilities using alternate assessments aligned with alternate state academic standards, so long as the total number of students assessed does not exceed 1 percent of all students in a state who are assessed in the applicable subject. The law also permits the Department to waive the 1 percent cap at the request of a state. The proposed regulations would set a number of parameters around this authority, including:
 - Requiring states to develop guidelines for the use of alternate assessments and requiring states to include a definition of “students with the most significant cognitive disabilities” that addresses factors related to cognitive functioning and adaptive behavior (§200.6(d)(1)); and
 - Providing that, if an SEA desires a waiver of the 1 percent cap, it must submit a request, at least 90 days before the state’s first testing window, that: (1) assures that the SEA has verified that each LEA that will assess more than 1 percent of its students using an alternate assessment has followed the state’s guidelines on alternate assessments, will not significantly increase its use of alternate assessments from the prior year, and will address any disproportionality across subgroups; and (2) provides a plan for meeting the 1 percent limit in future years (§200.6(c)(4)).

ExcelinEd supports these provisions because we believe that the goal should be to assess as many students as possible using regular assessments aligned with challenging state standards. The proposed rules clearly support this objective. We also recognize, however, that the requirements will be challenging for some states. We urge the Department to provide states with extensive assistance on developing and implementing strategies, including training on appropriate identification of students with the most significant cognitive disabilities, that enable as many students as possible to take the regular assessments.

Element of the Proposed Regulations Where Changes Are Needed: Assessment of English Learners in Non-English Languages

Under the statute, a state must assess ELs in the language and form most likely to yield accurate and reliable information on what those students know and can do. Toward that end, a state must identify non-English languages that are present to a significant extent in the participating student population and make every effort to develop assessments in those languages. This requirement is identical to language in the previous law, except that the earlier language did not include the clause “to a significant extent”; the reauthorization thus narrowed state requirements in this area.

Under the prior version of ESEA, the Department did not regulate on this issue beyond repeating the statutory language. By comparison, the Department’s proposed regulations would require each state to:

- Identify, as a language present to a significant extent, the “most populous” language other than English spoken by the participating student population, and then to make “every effort” to develop assessments in that language (§200.6(f)(1)(iv)(A));

- Consider identifying, and developing assessments for, multiple additional languages, including those spoken by distinct populations of ELs, by migratory students, by EL students not born in the United States, by Native American students, and by a significant number of students in one or more LEAs (§200.6(f)(4)(iv)(B) and (C)); and
- Describe, in its state plan, as applicable, why it has not been able to complete the development of assessments in the significantly present languages, despite making every effort to do so (§200.6(f)(ii)(2)(E)(3)).

We strongly question the wisdom of these new requirements because of the high costs of compliance (relative to the benefits) and because we believe states need more flexibility to meet the particular needs of their diverse EL populations.

In part, our concern is over the sheer number of assessments that states would need to develop, submit for peer review, and administer under this policy, when added to the assessments already required by the law. By our calculation, the statute requires that each state produce and submit for peer review 17 regular statewide assessments (seven each in reading/language arts and math, plus three in science), 17 additional alternate assessments in the same subjects, and English language proficiency assessments. A state that allows LEAs to use nationally recognized high school assessments will need to submit each such assessment for peer review, and a state that implements the exception for 8th-graders taking advanced math courses will need to submit at least one advanced high-school assessment. Thus, the total number of assessments statutorily required to be submitted for peer review, even without consideration of the proposed language on non-English assessments, is nearly 40.

Adding in the Department’s proposed requirement for development and peer review of assessments in the most “populous” language in each grade and subject area would add another 17 regular assessments and 17 more alternate assessments, for a total over 70. If states develop assessments in more than one non-English language (as is clearly encouraged by the proposed regulations), the total would go even higher. We question whether any state has the capacity to meet this requirement and, indeed, whether the Department itself has the capacity to manage such a massive peer review process.

Developing, piloting, submitting for peer review and fully implementing a new assessment is very expensive and very time consuming. In some states, the benefit of developing a non-English language assessment would almost certainly be outweighed by the costs. The EL student population is still highly concentrated in a handful of states, and in many other states the total number of ELs who are most appropriately assessed in a non-English language (and even more so the number of those students speaking a single language) is very small – no more than a few thousand, or even a few hundred, in total. The costs would be particularly apparent in the states in which Spanish is not the most commonly spoken non-English language, because in those states the number of students speaking the most “populous” language is particularly small (e.g., 293 in Montana, 304 in Vermont, according to the Department’s data) and they would not be able to share development costs with other states.

For these reasons, we strongly recommend that the Department continue allowing each state to determine, based on its own circumstances, which languages in the state are spoken to a significant extent by its EL students and, thus, in which languages a state will make every effort to develop assessments. More specifically, we recommend that the regulations not require that the “most populous” language in a state automatically be considered a language spoken to a significant extent.

Thank you for the opportunity to comment on these proposed regulations. If I can provide any other information or assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Patricia Levesque". The script is fluid and cursive, with the first letters of each word being capitalized and prominent.

Patricia Levesque
Chief Executive Officer
Foundation for Excellence in Education