

**Docket ID ED-2016 -OESE-0053 : Title I – Improving the Academic Achievement of the Disadvantaged –
Academic Assessments
Docket RIN 1810-AB32
September 9, 2016**

South Dakota Department of Education (SD DOE) appreciates the opportunity to comment on proposed rules relating to assessments under the Every Student Succeeds Act (ESSA). Overall the rules maintain the expectation of assessment quality instituted under prior law and allow for the development and use of an expanded set of best practices that will give states some flexibility in balancing the needs of their systems with federal law. While many of the expectations for assessment have not been changed, there are new expectations that have potential to place undue burdens on a state, particularly a small, rural state like South Dakota, without accompanying fiscal and technical support.

The SD DOE would like to highlight several areas that either require additional clarification or that raise concerns regarding the U.S. Department of Education's (US ED) vision of how small, rural states can and should implement the law.

State Responsibilities for Assessment (Section 200.2)

Requirements to report grade level information, depth and breadth, and readiness for college credit-bearing coursework are appropriate. US ED's directions allowing states to explore options of a single summative or multiple statewide interim assessments that result in a single summative score, and at the state's discretion, student growth, are appropriate options for an assessment system. This flexibility is appropriate and appreciated, provided that states are given the freedom to determine which pathway is most appropriate to the context of their individual needs -- either to continue on their established course or explore options that meet needs within the context of the state.

p. 4 lines 22 – 30 Multiple options/translations for parent reports: The proposed rules offer insufficient instruction to states with low incidence EL populations as to the extent of detail required in translations for parent reports. Additionally, as a small state with limited resources, in order to comply with the law and proposed rules, South Dakota would need technical support to comply with this provision in languages that are prevalent locally yet rare nationally and languages that are primarily oral and not written, such as Hutterische, Karen, Lakota, Dakota, and Nakota.

200.3 Locally Selected, Nationally Recognized High School Academic Assessments

The SD DOE appreciates the clarification of "state may permit" and "the state will provide guidance to the LEA;" this clarification will help states determine if and how this flexibility is best utilized. Additionally, the guidance on criteria for ensuring that the assessment is equivalent or more rigorous are appropriate to the extent they are spelled out in the rules. Yet, the mechanisms for approval and proof of comparability should be such that this is not necessarily defined as being equivalent to raw score interchangeability. Instead, it should demonstrate sufficient evidence of comparability.

The SD DOE applauds the burden of proof contained in the proposed rules to ensure appropriate accommodations and that students with disabilities and English learners are afforded the full benefit of participation, including score reports that can be used for college admissions. Many commercial

assessments are not yet on par with state assessments in meeting all the stated criteria, and the SD DOE is hopeful that the proposed rules, if finalized, will push commercial vendors in this direction.

The proposed rules also set out high expectations that LEAs will include annually all schools and students in a district, provide translated parent reports, and meet the accessibility needs for students. Although these goals are appropriate, the proposed rules may create unintended consequences through an additional burden on LEAs and states trying to ensure that these requirements are met at the same time as they support existing state assessments. The proposed rules do not appear to address or account for this conundrum.

200.6 Inclusion of all students South Dakota will continue to strive to meet the 95% participation and reporting of all subgroups and sets out that expectation for all LEAs. However, as noted in the SD DOE's comment on the accountability rules (Docket ED-2016-OESE-0032), states must be given the flexibility envisioned in the original law to devise plans that balance the unique circumstances small states and LEAs face when complying with this important component of the law.

Alternate Assessment participation: The language as written in the proposed rules related to the 1% cap for testing students in a state, along with the waiver and monitoring processes, has the potential to place the SEA at odds with IEP teams and parents at the LEA level. The proposed regulations rightly identify the IEP team as the entity to determine how best to meet the educational needs of students with disabilities in their local schools and places the SEA in the role of training, providing technical assistance, and monitoring.

However, nothing in the regulations takes into account special circumstances in rural states and LEAs where simply having one or two students take the alternate assessment may exceed the cap. South Dakota has 110 LEAs with fewer than 600 students in their K-12 system; many schools have enrollments in tested grades well below 100. This means that one student taking the alternate assessment will force a number of LEAs to exceed the cap. The regulations as written would require more monitoring of these programs, thereby taxing limited SEA resources, and could result in a system that inadvertently pressures rural LEAs to recommend general assessments for students who truly need to be taking the alternate assessment.

The reality in many rural areas throughout South Dakota is that schools often partner to create regional hubs to support students with the most severe disabilities, utilizing the state's open enrollment laws to provide the specialized educational supports necessary, but which would be burdensome at best and at worst, nearly impossible, to provide in our small districts. The LEAs that take the lead in providing these specialized programs necessarily will exceed the 1% cap as a result of providing supports for this population of students. Requiring additional or more rigorous monitoring of these programs would put the SEA in a position of implying mistrust of the good work they are doing and ultimately, is counterproductive to meeting the needs of this student population.

Additionally, the SD DOE is concerned that the proposed regulations do not take into account the potential differences between states that are high-incidence Special Education and low-incidence Special Education states. The nature of high-incidence states is such that they may test the same proportion of students with disabilities on the alternate assessment as low-incidence states, and exceed

the cap, while a low-incidence state would not. The waiver rules as written do not take this into account, but should in order to provide a level playing field for all states.

The proposed regulations also require that states apply for a 1% waiver 90 days before the start of the test window. Yet it is unclear what recourse states have if the waiver is denied, or if the state does not apply and unexpectedly finds themselves over the 1% cap for any number of valid reasons -- unexpected identification, excessive numbers of refusals to test, or even the results of high mobility students moving in and out of the public system in areas that are also served by multiple public LEAs, BIE, and tribal schools. In many cases, SEAs may not know that they have exceeded the participation cap until after the assessments have been completed. If US ED persists in requiring states to apply for a waiver in advance of the test window, a process must be put in place to accommodate legitimate unforeseen circumstances.

Further guidance is also needed as to the manner in which the 1% cap is applicable to English learner students needing to take English Language Proficiency assessments, particularly in the case that such students are first year in country students. States are allowed to exempt this population of students from participation in reading or English language arts assessments, yet the regulations are unclear whether testing these or other English learner students who happen to fall into the category of students with the most severe cognitive disabilities taking the alternate version of the English language proficiency exam will count against the state in terms of the 1% participation cap.

Native language assessments: The SD DOE requests more clarity to the proposed regulations requiring a state to determine when languages other than English are present to a significant extent and to make every effort to provide assessments in such languages if those languages are more likely to yield accurate and reliable information on what students know and can do. English learner population and language diversity varies across the country, and identifying appropriate languages may mean these requirements are more easily met in areas where there are large populations of students speaking languages other than English.

In South Dakota, less than 3% of the students in grades 3-8 and 11 identified as EL per the 2015 SEA report card. Given this context, it is difficult to define what “significant” means – particularly as this number translated to fewer than 1,800 students across 151 LEAs. Additionally, many of the languages present in the state have no agreed upon written etymology (as they are spoken languages only utilized by small groups of individuals). Often, these languages are shared by refugee or other new-to-the-country students who have no formal education and are not literate in their native languages, so providing a written assessment in said languages would not provide more accurate information as to a student’s skills.

Further concerns arise as this portion of the regulations appears to contradict parts of the law. Section 1111 b(1) of ESSA requires that academic standards and academic assessments:

- *Apply to all public schools and public school students in the State; and with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.*

- *Each State shall demonstrate that the challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards.*

This appears to contradict the flexibility described in the proposed regulations and in Section 1111(b)(2)(F) relating to the administration of Language Assessments in languages other than English that are present to a significant extent in the participating student population. Using alternate language assessments will measure different constructs than assessments in English, making the collection of evidence measuring the same levels of achievement difficult if not impossible. Additionally, limited numbers of students in any language group also make it difficult for SEAs such as South Dakota to validate alternate language assessments in a manner that demonstrates comparability between assessment forms and, ultimately, may be cost prohibitive.

The regulatory guidance describes that such assessments must undergo peer review. This process would likely identify the conflict between constructs being measured for every state using alternate language assessments, but does not serve to resolve this conflict in advance nor does it address a state's obligation if it has adopted English language arts standards rather than reading language arts standards.

The regulatory guidance should be explicit regarding the requirements for comparability and validity especially in regard to college and career readiness. In addition, the regulatory guidance should address the LEA and SEA obligations to address the potential unintended consequences of assessing in the native language in regards to students' long term academic performance.