

FairTest

National Center for Fair & Open Testing

FairTest Supplementary Comments to Department of Education Draft Regulations on Accountability

Draft Regulation 200.15: The right to opt out and the “95%” rule

ESSA says that testing requirements shall not preempt “a State or local law regarding the decision of a parent to not have the parent’s child participate in the academic Assessments.” It later reinforces this point by stating parents must be informed, on request, of “any State or local educational agency policy regarding student participation in any [federal, state or district] assessments..., which shall include a policy, procedure, or parental right to opt the child out of such assessment.” The law also requires that 95% of all students be tested (as did NCLB) and that states shall “Provide a clear and understandable explanation of how the State will factor the requirement into the statewide accountability system.” However, this clause does not support the excessive regulations proposed by the Department.

The Department’s draft regulations omit any mention of the right to opt out stated in ESSA. The law’s briefly stated requirement to factor the 95% rule becomes a long list of actions and options states must choose among to win federal approval for their ESSA Title I plans and money.

If a school does not demonstrate at least 95% participation among all students and among identified “subgroups” (race, ELL, disability, low income), then it would have to first choose among:

“(i) A lower summative rating in the State’s system of annual meaningful differentiation.” [As discussed below, the draft regulations would require establishing “at least three” levels, a requirement not found in ESSA].

“(ii) The lowest performance level on the Academic Achievement indicator in the State’s system).

“(iii) Identification for, and implementation of, a targeted support and improvement plan.” (“Targeted support” is intended to focus improvement efforts on schools in which students in one or more subgroups are performing poorly on state tests and other indicators.)

“(iv) Another equally rigorous State-determined action... that will result in a similar outcome for the school in the system of annual meaningful differentiation and will improve the school’s participation rate so that the school meets the requirements.”

The draft regulations go on to say:

“(1) A school that fails to assess at least 95 percent of all students or 95 percent of each subgroup of students must develop and implement an improvement plan that--

(i) Is developed in partnership with stakeholders (including principals and other school leaders, teachers, and parents);

(ii) Includes one or more strategies to address the reason or reasons for low participation rates in the school and improve participation rates in subsequent years;

P.O. Box 300204, Jamaica Plain, MA 02108
fairtest@fairtest.org 617-477-9792 <http://fairtest.org>

- (iii) Is approved by the LEA prior to implementation; and
- (iv) Is monitored, upon submission and implementation, by the LEA; and

However, if a state chooses the “targeted support” approach, then it automatically covers the second set of requirements. In the Department’s draft regulations on targeted support, they say that for schools identified as not testing 95% of students, the support may focus on improving student participation.

The regulation then adds, “(2) An LEA with a significant number of schools that fail to assess at least 95 percent of all students or 95 percent of each subgroup of students must develop and implement an improvement plan...”

Logically, a state could streamline its actions and lessen antagonism with parents, students, educators and communities by selecting “targeted support.” However, by prioritizing the lowering of a school’s ranking – and asking those who comment on the regulations to suggest still more punitive actions - the Department is encouraging states to go beyond taking steps to bolster participation. A few already have; nothing in ESSA would prohibit this, but nothing in ESSA requires or even encourages it.

But even identifying schools for targeted support ignores the law’s twice-stated right of parents to refuse the tests. At a minimum, it would seem that if a state or district allows opting out, then there is no basis for imposing any sanctions, including targeted support.

Thus FairTest’s recommendation to drop its proposed requirements and either just re-state the law or not address the issue at all. Either option would allow states to decide how they will factor participation into their state plan, a position that fits the letter and spirit of the law.

This regulation also reasonably states that a state, district or school “may not systematically exclude students in any subgroup... from participating in the assessments required.” However, it proposes no sanctions to curtail such actions beyond those noted for not making 95%. Once again, it seems clear that the real intent is to punish schools for parental audacity, not protect students.

Draft Regulation 200.18: Overall

FairTest identifies three specific aspects of this regulation as needing complete revision. FairTest also concludes that these draft regularly provisions functionally exceed the meaning of the limits set upon the Secretary at 1111(e) (1)(B)(iii) regarding:

“(IV) the weight of any measure or indicator used to identify or meaningfully differentiate schools, under this part;

“(V) the specific methodology used by States to meaningfully differentiate or identify schools under this part;”

Draft Regulation 200.18: Meaningful differentiation and “three distinct levels”

ESSA, under its discussion of state plans and accountability (S. 1111(c)) requires states to establish “meaningful differentiation” among schools. The purpose of such differentiation is to identify schools needing “support and intervention.” The Department, however, chooses to perpetuate another damaging tool from the NCLB era, sorting schools into levels. Such a requirement is not in ESSA in its description of “meaningful differentiation.

The draft regulation says that differentiation “Includes, for each indicator, at least three distinct levels of school performance.” In its discussion, the Department does not meaningfully defend this decision (see pp 33-34).

NCLB was all about sorting schools based on test scores and scaring all schools into staying in line. The multiple variations enacted in states, from Jeb Bush’s A-F “report card” to Massachusetts levels 1-5, had high scorers fighting to stay at the top and bottom scorers seeking to rise. This induced intense teaching to the test and narrowed curriculum, though usually most intensely among low-scorers, according to evidence from across the nation. Between the requirement to set three levels and other provisions that prioritize testing, the Department’s draft regulations appear to re-mandate a test-centric system.

It is completely unnecessary to set three or more levels in order to accomplish the expressed intent of “meaningful differentiation” under ESSA, which is to identify schools where some or all students are not doing well or the school is otherwise dysfunctional in order to implement effective means of improvement. Mandating the levels perpetuates the Washington-knows-best syndrome. States are perfectly capable of identifying schools in need of assistance using the required ESSA processes without sorting them into levels.

Draft Regulation 200.18: Requiring a summative number

This draft regulation tells states they must combine their various indicators into a single score, use that score to identify schools, and report to the public both the single score and the results of each indicator. Combined with the draft regulatory requirements to set three levels, to over-emphasize test results, and to establish a quick timeline for implementation, this provision is more evidence of the Department’s intent to reassert the primacy of test-based accountability over school improvement. Once again, Once again, it goes beyond the letter of the law and violates its spirit.

ESSA itself does not require a single, summary number (or grade). Rather, it refers to “in the aggregate” when requiring academic indicators to outweigh school quality indicators in identifying schools for “support and improvement.” The law is sufficiently clear that states must use its multiple indicators to identify schools needing assistance. The regulations need say no more and should simply leave it to the states to establish a means of doing so.

Draft Regulation 200.18: Too little weight given to non-test indicators

There are several flaws in the Department’s regulations regarding additional indicators. The law requires the use of results on statewide exams, scores on tests by which English language learners show developing proficiency in English, and graduation rates for high schools. They require one additional “Academic Progress” (“growth” or another, and the draft regulations emphasize use of “growth”) and at least one “School Quality or Student Success” indicator.

First, the tight timeline to identify schools for “support and improvement” will make it harder for states to carefully consider, adopt and implement a rich set of indicators, both the other academic and the non-academic. In our reading, the regulations lean toward simply identifying just one, though they quietly note that a state faces no limit in the number of non-academic indicators.

Second, DoE here simply repeats the language of the law: that the academic indicators carry “much greater weight” than the school quality indicator(s). It acknowledges it provides no further definition.

From the weight of NLCB history to the multiple draft ESSA regulations that emphasize testing, most states are likely to excessively focus on the academic indicators and give short shrift to the non-academic ones.

Draft Regulation 200.19: Establishing too short a time for implementing new accountability mandates

By rushing introduction of a new system, the Department would short-circuit states' ability to implement new indicators and thereby would encourage the dominance of current indicators, meaning test results. The department proposes to require states implement the consequences of the new accountability system (e.g., require schools in the bottom 5% to develop and implement a support and improvement plan) in the 2017-18 school year. States would therefore have to use accountability results from 2016-17 - next year - for identifying those schools!

To use more than the current indicators - test scores and graduation rates - states would have to select and then implement the other academic indicator and at least one non-academic indicator. Many states have and may retain their so-called 'growth' measures – but they could choose better options that are not simply a reworking of state test scores. That is unlikely with so little time.

Further, it will take states a while to figure out what non-academic indicators will best help school improvement, more time to determine how to balance and weight them, then time for implementation. (Non-academic indicators can include such things as school climate surveys, data on discipline actions [more].) The regulations call at many points for stakeholder involvement in making decisions. Indeed, Secretary King has emphasized their participation. But that also requires sufficient time. The Department does say states can revise their plans in future years, but states are reluctant to expend resources doing so, and many educators don't like constantly changing requirements. As a result, the Department is stacking the deck towards its preferred tools: state exams used two ways (scores and 'growth') and less weight given to non-academic indicators.

As noted in FairTest's summary discussion, this regulation is based on a misreading of ESSA's language. ESSA reads (at 1111(c)(4)(D)):

“(D) IDENTIFICATION OF SCHOOLS.—Based on the system of meaningful differentiation described in subparagraph (C), establish a State-determined methodology to identify—

“(i) beginning with school year 2017–2018, and at least once every three school years thereafter, one statewide category of schools for comprehensive support and improvement...”

This says that identification shall be in 2017-18, in which case implementation would be in 2018-19.