

PUBLIC COMMENT MEMORANDUM

To: National Assessment Governing Board

Date: November 10, 2009

From: Miriam Kurtzig Freedman, M.A., J.D.

RE: NAGB Technical Advisory Panel Recommendations on Uniform National Rules for NAEP Testing of English Language Learners (ELL)

Reviewing the Panel's ELL recommendations saddened me and reminded me of the time that I immigrated to America in fourth grade and attended public schools in New Jersey. I am an expert in education law, specifically the laws related to students with disabilities (not specifically ELL)¹, and have been a public schools' attorney in Massachusetts. Now I provide consultation, trainings, and written materials and books for schools, officials, parents, and others about legal requirements for all students, including ELL.

Let me be as emphatic as I can be—I am grateful that NO accommodations were provided to me or my sibling when we learned English and were tested like everyone else. Learning a foreign language is doable. Indeed, many of us in America have made the issue far too complicated. Let us not forget that in many countries, children are bilingual or multilingual. ELL students should not be held back by the use of language-based accommodations. In my judgment, the Panel's recommendations do that.

The story continues. Years later, my children had the opportunity to attend public schools in a foreign country where English was not spoken. They, too, received NO language accommodations at school. While it was hard for them, they struggled and learned. Due to their language deficits, their school work was not as good. However, it improved as their foreign language capacity improved. Much learning—YES. Accommodations that detract from learning the language—NO.

The Panel's recommendations for accommodating ELL students on NAEP, including its reading, math, writing, and subject area tests, fail to highlight the purpose of NAEP—to measure student achievement in English and to provide a representative and valid sampling of groups of (not individual) students.² If the above sentence states the purpose, there can be NO language-based accommodations. If it does not, please see footnote 1.

¹ The laws and requirements for educating ELL and SD are very different. As a general rule, there is far less litigation regarding ELL than SD.

² If NAEP is NOT designed to measure reading, writing, math, and other subjects in English, then what are we discussing and fretting over? Why not let all students use dictionaries or other language-based accommodations and resources? NAGB needs to be crystal clear on the role of the English language in NAEP, test by test and subject by subject, if need be.

In this public comment, **‘language-based accommodations’** include those that the Panel specifically recommends; e.g., plain language, side-by-side bilingual Spanish-English test booklets, word-to-word bilingual glossaries without definitions, ‘and others.’ Language-based accommodations do not include other accommodations, such as extended time (the one accommodation the Panel cites). These two types of accommodations (language-based and non-language based) should not be conflated. I am very concerned that the former changes the test construct and moves away from NAEP’s purpose to provide valid and representative testing. It is notable that this Panel did not differentiate between accommodations and modifications, as did the SD Panel. Such differentiation and clarity is critical to decision-making.

The Panel cites the need for ‘plain language’ several times. ‘Prompts, items, and directions’ should be in language that avoids ‘unnecessary linguistic complexity.’ The Panel recommends that for ELL students, tests should be devoid of “unnecessary or construct-irrelevant linguistic complexity.” Rather amazing, since such recommendations are simply statements about good test constructs for ALL students. No student should be faced with ‘unnecessary linguistic complexity’ or ‘construct-irrelevance.’ The Panel’s recommendation is puzzling, as it assumes that NAEP is unnecessarily complex and, thus, a badly developed test. I, for one, do not accept that assumption.

These recommendations for ‘plain language’ tests have nothing to do with ELL students, *per se*. **Such tests should exist for ALL students.** The recommendations raise at least three other concerns. **First**, NAGB should not create policies for ELL students built on an assumption and acknowledgement that its tests are poorly developed and include ‘unnecessary linguistic complexity’ and irrelevancies. **Second**, were NAGB to provide plain language (i.e., well-written) tests for some students but not others, that would give them an unfair advantages and lead to flawed test results for all students. Thus, it would not be a useful or valid accommodation. **Third**, the term “unnecessary linguistic complexities” is subjective: who decides what is necessary or unnecessary? Where is the standard? The terms are circular and fraught with challenge. No test should have ‘unnecessary linguistic complexities.’ For any student.

In short, NAGB should assure us that NAEP is appropriately developed and includes no unnecessary and construct-irrelevant complexities, etc. NAGB should not base its accommodation policy for ELL on the assumption that NAEP is NOT well-developed.

The Panel also recommends that NAGB research the impact of various accommodations on ELL testing. Based on these recommendations, this one is simply too late here. The horse is out of the barn. NAGB should not place students at risk with questionable accommodations while it researches the impact of those accommodations on testing. Only after NAGB has solid research that these language-based accommodations DO NOT ALTER THE NAEP CONSTRUCT should it allow their use. Not the other way

around, as that is unfair to schools and students. While the Panel asserts that its recommendations maintain the test construct, this assertion is not convincing.³

It is puzzling that students can take tests in math, science, history, civics, and other subjects in Spanish. Isn't English part of the NAGB mission? It would surprise many Americans to know that English is not a necessary component of NAEP in most subject areas. I urge NAGB to review its mission before agreeing to go down this path. In practice, in the coming years, other language groups (besides Spanish) will, undoubtedly, pressure NAGB for native-language testing—taking NAGB away from the goal of measuring student achievement in America's schools that is a valid and comparable sampling from city to city and state to state. It would also be inordinately costly.

Until NAGB knows with certainty that language-based accommodations, including testing in a foreign language, do NOT alter the constructs and purpose of NAEP, it should not proceed down the path of allowing and promoting them.

A possible alternative?

One approach to avoid these language-based accommodations is for NAGB to allow a longer period of time in U.S. schools before ELL take NAEP. Based on available research and input from experts, NAGB should specify either a two or a three-year period (longer time for older, high school students). Thereafter, NAGB should allow NO language-based accommodations for ELL (or former-ELL).

Clearly, among NAGB's goals in this review of exclusions and accommodations for ELL is to rebuild confidence in the reliability, validity, and comparability of NAEP results. Providing language-based accommodations does not foster such confidence. Waiting a reasonable and research-based time before testing ELL may do so.

Thank you for this opportunity to provide input into the NAGB decision-making for testing Ell students. Should you have concerns or questions, I would be honored to respond.

Miriam Kurtzig Freedman, M.A., J.D.
 Stoneman Chandler & Miller LLP
 99 High Street
 Boston, MA 02110
 617 542 6789
Miriam@schoollawpro.com
www.schoollawpro.com

³ The Panel asserts that it allows only ELL-responsive accommodations that maintain the test construct, even as it recommends research to understand the effects of these accommodations on the NAEP. Where is the proof that the NAEP standards are maintained? It is too easy to say that language-based accommodations do NOT alter the test construct. I find that unconvincing. For example, giving a test in "plain language" that differs from the complex or irrelevant language other students get is an easier and thus, a different test.