



April 17, 2007

**NEA Summary/Analysis of U.S. Department of Education's Final Regulations
on Assessing Students With Disabilities
under the No Child Left Behind Act
and the Individuals With Disabilities Education Act**

On Wednesday, April 4, 2007, the U.S. Department of Education (USED) announced the release of the final regulations for the so-called 2% assessment rule. These regulations define the use of modified academic achievement standards for students with disabilities and how alternate assessment results based on such standards may be used for AYP purposes. The final regulations, published in the Federal Register on April 9, 2007, follow an announcement about the proposed 2% rule originally issued by the USED in December 2005. The new rules take effect on May 9, 2007.

The final regulations are substantially the same as the draft rules that were proposed in December 2005. Notably, some elements of the final regulations are in agreement with NEA's recommendations for ESEA/NCLB reauthorization. Those items are indicated below by bold text that is marked by an asterisk (*).

The key aspects of the final regulations on alternate assessments based on modified academic achievement standards are explained below in response to these critical questions:

What do the final rules allow states to do?

States must ensure that all students with disabilities are appropriately assessed and must provide at least ONE alternate assessment (unless all students with disabilities can be appropriately assessed with the general assessment that is used for all students).

States are not required to develop alternate assessments based on modified achievement standards (see Appendix A of the Guidance issued by USED) as long as they have at least one alternate assessment option.

The final regulations allow states to:

- develop modified academic achievement standards that define a student’s mastery of grade-level content but are less difficult than grade-level achievement standards;
- develop alternate assessments based on the modified academic achievement standards (a.k.a. alternate assessments based on modified standards);
- develop guidelines for IEP teams to ensure that they are appropriately identifying students who will be assessed with alternate assessments based upon modified academic achievement standards;
- develop alternate assessments based on modified achievement standards for just some grades or subjects;
- use “Universal Design” (UDL) principles, to the extent possible, in developing and administering assessments.

How do these regulations relate to AYP calculations?

There is no limit on the number of students who may take an alternate assessment based on modified achievement standards. However, the proficient and advanced scores of students who take these assessments count toward AYP so long as the number of those proficient and advanced scores at the state and district level separately does not exceed 2% of all students in the grades assessed. Additional test scores above the 2% cap are considered “non-proficient” scores. (See page 17,779-17,780 of the Federal Register.)

Here are other important changes that relate to AYP calculations:

- A state is no longer allowed to request a waiver of the statewide 1% limit (for student scores on the alternate assessment based on alternate achievement standards, which may be used for students with significant cognitive disabilities).
- A state may exceed the 2% limit if it is below the 1% limit and does not exceed the combined 3% limit.
- An LEA may receive a waiver of the 1% limit from the state.
- An LEA can receive a waiver of the 2% limit only if it is below the 1% limit.
- An LEA can only exceed the combined 3% limit if it has received a waiver of the 1% limit. Please see the chart on page 17,780 of the Federal Register.

Note: NEA opposes the 1% and 2% caps and believes the IEP team’s determinations regarding which students should take which assessments and whether proficient scores from such assessments count toward AYP should not be artificially limited by federal percentage caps.

Who can take the alternate assessments based on modified standards?

The USED suggests that the alternate assessments based on modified standards are appropriate for a “small group of students” who do not have significant cognitive disabilities but whose disabilities have precluded them from achieving grade-level

proficiency and their progress “is such that they will not reach grade-level proficiency in the same time frame as other students.” For these students, the alternate assessment based on alternate academic achievement standards is not appropriate and the grade-level assessment is too difficult.

The USED emphasized these points:

- Alternate assessments based on modified standards are NOT intended ONLY for students who are performing close to grade level. They could be appropriate for students with any disability.
- Students who take these assessments must have access to grade-level content instruction.
- Based upon the students’ progress, the IEP team is “reasonably certain” these students will not achieve grade-level proficiency within the year covered by the students’ IEPs, “even if significant growth occurs.”
- Students may take an alternate assessment based on modified standards in one subject and a general assessment in another.
- Students who take alternate assessments based on modified standards may still earn a regular high school diploma. In fact, the USED specifically states that students who take these alternate assessments should not automatically be prohibited from attempting to meet the regular high school diploma requirements.

Who decides whether a student will take the alternate assessment based on modified standards?

IEP teams determine the most appropriate assessment for students with disabilities.*

In making this decision, IEP teams must:

- Include IEP goals in the student’s IEP that are based on grade-level content standards.
- **Consider a student’s progress annually based on “multiple, objective measures of the student’s achievement.”** * The USED describes multiple measures as other state assessments (e.g., end-of-course assessments), district-wide assessments, data gathered from classroom assessments or other formative assessments.

What are the assessments that students with disabilities may now take?

Now there are five ways to assess students with disabilities:

- general grade-level assessment
- grade-level assessment with accommodations
- alternate assessment based on grade-level academic achievement standards
- alternate assessment based on modified academic achievement standards

- alternate assessment based on alternate academic achievement standards

What is the difference between alternate assessments based on alternate academic achievement standards (a.k.a. alternate assessments based on alternate standards) and alternate assessments based on modified academic achievement standards?

First, a quick explanation of the different types of standards that are mentioned in the regulations:

- Academic achievement standards are statements of how students are expected to demonstrate that they have learned the skills reflected in the academic content standards.
- Academic content standards are clear statements of the knowledge and skills that schools are expected to teach and students are expected to learn.

Alternate assessments based on modified academic achievement standards cover grade-level content standards for the grade in which the student is enrolled. The way in which a student demonstrates understanding of grade-level content is based on a less rigorous assessment. Examples of ways to assess grade-level content using an alternate assessment based on modified standards include:

- Test items are less complex.
- There are fewer passages to read.
- There are fewer choices in a multiple-choice format with the more difficult choices eliminated.

These two statements are taken directly from the regulations:

"A modified academic achievement standard is an expectation of performance that is challenging for eligible students but is less difficult than a grade-level academic achievement standard."

"This assessment is based on modified academic achievement standards that cover the same grade-level content as the general assessment. The expectations of content mastery are modified, not the grade-level content standards themselves."

What resources are available to help states develop these assessments?

The USED will host a meeting for interested states in July 2007 to discuss the development of these standards. We suggest that state officials ask their state departments of education to include an Association representative as part of the state's team. States may use funds from Title I, Title VI State Assessment Grants and IDEA to develop these new assessments.

Competitive funds (\$21.1 million) will be available as follows:

- \$7.6 million under the Title I Enhanced Assessment Grants program (notice for grant to go out soon)

- \$13.5 million under the IDEA General Supervision Enhancement Grants program (notice for proposed priority for public comment has already been issued).

Since these regulations become effective May 9, 2007, and are intended to affect assessments given in the 2008-2009 school year, what can states do in the interim?

The regulations provide transition authority over the interim flexibility allowing two years for states to put the assessments in place (the 2008-09 school year). States that expressed an interest in developing modified achievement standards and assessments based on those standards after the December 2005 announcement were granted flexibility during the time that the USED was drafting the final regulations. This interim flexibility will be extended to those states that can demonstrate that they are moving toward adopting alternate assessments based on modified standards.

For more information about the “interim flexibility” see these resources:

- Adequate Yearly Progress and Modified Achievement Standards: Interim State Policy Options, May 10, 2005
<http://www.ed.gov/policy/elsec/guid/raising/disab-options.html>
- Accountability for Students with Disabilities: Accountability Plan Amendments for 2004-05
<http://www.ed.gov/policy/elsec/guid/raising/disab-acctplan.html>

What other significant changes are included in the final regulations?

Other changes include:

- States must have standards-based IEPs in place.
- All subgroups must have the same “n” size for all subgroups starting with the 2007-2008 school year. (NEA does not support this change.)
- **The assessment may be taken more than once and the best score counts towards AYP.***
- **States may count test scores from students who have been "exited" from special education programs for up to two years after they are no longer designated as receiving special education services.*** This matches the recent regulation that allows the same for students exiting ELL programs.
- Instructional level assessment is different from an alternate assessment based on modified achievement standards since these modified assessments must be based on grade-level achievement standards. Although not explicit in the new regulations, NEA believes that instructional level assessments will not be allowable under the new regulations. (NEA does not support this change.)

For a copy of the USED press release, go to:

<http://www.ed.gov/news/pressreleases/2007/04/04042007.html>

For a copy of the USED non-regulatory guidance (51 pages), go to:

<http://www.ed.gov/policy/speced/guid/nclb/twopercent.doc>

For a USED Fact Sheet (2 pages), go to:

<http://www.ed.gov/parents/needs/speced/twopercent.html>

For a copy of the final regulations as published in the Federal Register (35 pages), go to:

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-1700.pdf>

If you have questions or need additional information, contact:

Patti Ralabate, Special Education policy desk, EPP (PRalabate@nea.org)

Beth Foley, Testing and Accountability policy desk, EPP (BFoley@nea.org)