

**SUMMARY AND ANALYSIS OF THE
U.S. DEPARTMENT OF EDUCATION'S FINAL REGULATIONS ON
ALTERNATE ACHIEVEMENT STANDARDS AND ALTERNATE ASSESSMENTS
UNDER THE NO CHILD LEFT BEHIND ACT OF 2001**

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INTRODUCTION

On December 9, 2003, the U.S. Department of Education [“the Department” or “ED”] issued final regulations pursuant to the No Child Left Behind Act of 2001 [“NCLB”], which address the use of alternate achievement standards and alternate assessments for students with significant cognitive disabilities. These final regulations, which have the force of law, supercede proposed regulations issued by ED on August 6, 2002, and again on March 20, 2003. The Department indicated that it “may consider revising [the final regulations] in the future should the comments [received] indicate a need to do so” and that it intends “to issue a report on the implementation” of the final regulations “after two years of implementation.”

This document summarizes and analyzes the key provisions of the final regulations.¹

KEY POINTS

- The final regulations permit States to establish *alternate achievement standards* for students with the most significant cognitive disabilities for the purposes of satisfying the adequate yearly progress [“AYP”] requirements of the NCLB. Within certain limits, *alternate assessments* aligned to those standards may be used to determine the proficiency of these students when calculating AYP.
- For students taking alternate assessments aligned to alternate achievement standards, the final regulations establish a *1.0 percent cap* on the number of proficient and advanced scores that may count toward AYP. This cap applies to AYP determinations for States and districts, but does not apply at the school level. This cap also does not affect the number of students who may be administered alternate assessments. (Decisions regarding whether students with disabilities are to be assessed with alternate assessments remain with IEP teams based on State criteria.) The 1.0 percent cap may be exceeded in cases where States and districts can provide appropriate justifications.
- The Department’s previously proposed *definition of “students with the most significant cognitive disabilities”* (which was based on whether performance was “three or more standard deviations below the mean”) has been removed. More flexibility is provided for States to establish criteria for identifying these students as part of the IEP process.

¹ All quotations reference ED’s final regulations and commentary, 68 Fed. Reg. 68698 (Dec. 9, 2003).

- **Note:** The Department also explains its existing regulation regarding the use of *multiple test administrations* for AYP. Commentary to the final regulations clarifies that existing flexibility permits States to “bank” student scores of proficient or higher on tests administered prior to the State’s “first administration” of an assessment, defined as the assessment occurring at the time “the State expects the student to have achieved proficiency” in the grade or subject tested.

SUMMARY AND ANALYSIS OF FINAL REGULATIONS

Background. The NCLB requires that States determine AYP for every public school and district, based primarily on State assessment systems. Among the central provisions of the law are the requirements that all students, regardless of background, be included in the statewide assessment systems and that statewide assessments be aligned to the same high standards for all students.

The final regulations address the rules affecting students with the most significant cognitive disabilities for whom certain exceptions to the general accountability rules of NCLB may apply. The final regulations are premised upon the need to ensure that “all students with disabilities [are] included in the measurement of AYP toward meeting the State’s standards” and the recognition that there are a limited number of students with the most significant cognitive disabilities for whom alternate achievement standards may be appropriate. Thus, with some limitations, States and districts may include in their AYP determinations the performance of students with the most significant cognitive disabilities as measured by alternate assessments aligned to alternate achievement standards.

“Students with the most significant cognitive disabilities.” Students with the most significant cognitive disabilities, to whom the final regulations apply, are defined as including “that small number of students” who are students with disabilities within the meaning of the Individuals with Disabilities Education Act [“IDEA”] and “whose cognitive impairments may prevent them from attaining grade-level achievement standards, even with the very best instruction.” The final regulations do not “create a separate category of disability.”

The prior proposed definition—that students with the most significant cognitive disabilities were “students with disabilities under the IDEA whose intellectual functioning and adaptive behavior [were] three or more standard deviations below the mean”—has been rejected because of its “implicit reliance on IQ test scores” and inconsistency with the 1.0 percent cap. As a consequence, a student “may be appropriately assessed on the basis of alternate achievement standards even if the child’s intellectual functioning and adaptive behavior are fewer than three standard deviations from the mean.”

Alternate achievement standards. States may develop one or more “alternate academic achievement standards” (also referred to as “alternate achievement standards”) for students with the most significant cognitive disabilities. “An alternate achievement standard is an expectation of performance that differs in complexity from a grade-level achievement standard.” At the same time, it should “embody challenging academic expectations appropriate for those students who are assessed against them.”

States are “not required to use alternate achievement standards,” but if they do, certain conditions apply. Alternate academic achievement standards must:

- Be aligned with the State’s academic content standards;
- Promote access to the general curriculum; and
- Reflect professional judgment of the highest learning standards possible for the group of students with the most significant cognitive disabilities.

In practice, the *requirement of alignment* means that “the State has defined clearly the connection between the instructional content appropriate for non-disabled students and the related knowledge and skills that may serve as a basis for a definition of proficient achievement for students with the most significant cognitive disabilities.” (As the purpose of alternate assessments under the NCLB is to “measure the progress of schools in increasing the percentage of students who reach or exceed the proficient level on State academic performance standards,” functional life skill assessments are “not required” and are “beyond the scope” of the final regulations.) The *inclusion requirement* implicates the need for States to document that “students with the most significant cognitive disabilities are included in the general curriculum to the extent possible and are participating in assessments aligned with the curriculum.” The *requirement of the use of the “highest learning standards possible”* reflects that alternate achievement standards “should be no less challenging for students with the most significant cognitive disabilities than the standards set for all other students.”

Alternate assessments. “Alternate assessments may be needed for students who have a broad variety of disabling conditions.” An alternate assessment is defined in the final regulations as “an assessment designed for the small number of students with disabilities who are unable to participate in the regular State assessment, even with appropriate accommodations.” Thus, alternate assessments may include assessments that are “scored against grade-level standards, or, in the case of students with the most significant cognitive disabilities, against alternate achievement standards.”

To meet NCLB standards, alternate assessments “must be aligned with state content standards, must yield results separately in both reading/language arts and mathematics, and must be designed and implemented in a manner that supports use of the results as an indicator of AYP.” Alternate assessments must also satisfy the requirements for high technical quality applicable to other NCLB-compliant assessments, including requirements relating to validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

Reversing previous ED guidance, the final regulations provide that out-of-level assessments “that are administered to students with the most significant cognitive disabilities and that meet [the legal requirements for alternate assessments] may be considered to be alternate assessments aligned with alternate achievement standards for the purposes of calculating AYP.”

The final regulations also emphasize that under IDEA, a student’s IEP team “is responsible for determining how that student participates in a State assessment of student achievement.” At the same time, IEP teams “do not have complete discretion regarding the assessment of students with disabilities.” States are responsible for establishing academic content and achievement standards against which all students will be assessed, as well as for providing “guidelines regarding eligibility for alternate assessments.” Thus, the IEP team decides “how a student participates, not whether the student participates in the assessment at all.” “The IEP team is [also] charged with determining whether accommodations for assessments required under [NCLB] are needed by each individual student to participate in the assessment.” If the team determines that the student will not participate in the State’s regular assessment (or any part thereof), it must “identify why the assessment is not appropriate for the child and how the child will be assessed,” including through the use of alternate assessments aligned to alternate achievement standards.

AYP and the one percent cap. States are “permitted to use alternate achievement standards to evaluate the performance of students with the most significant cognitive disabilities and to give equal weight to proficient and advanced performance based on the alternate standards in calculating . . . AYP, *provided that the number of proficient and advanced scores based on the alternate achievement standards does not exceed 1.0 percent of all students in the grades tested at the State or LEA level.*” (Emphasis added.) Consequently, nothing in the final regulations restricts the number of students who may take alternate

assessments that are aligned with alternate achievement standards. Rather, the final regulations “only address the inclusion of scores [from those assessments] for AYP calculations.”

The 1.0 percent cap:

- Is “applied to the number of proficient and advanced scores that may be included in AYP determinations, rather than the number of students taking an assessment against alternate achievement standards;”
- Does not apply at the school level (although “the use of alternate assessments aligned with alternate standards is [not] unlimited at the school level”); and
- Is calculated, based on the number of students enrolled in the grade[s] tested.

Stated differently, the 1.0 percent cap is the “limit on the number of proficient [and] advanced scores based on alternate achievement standards that may count as proficient or advanced for accountability purposes at the State and [district] levels.” For example, if 1.0 percent of the total number of students tested in a district “equals 200 students and 400 students are assessed with an alternate assessment based on alternate achievement standards, but only half of the students assessed are ‘proficient,’ the [district] would not exceed the cap.”

The 1.0 percent cap may be exceeded if the State or district (as applicable) “establishes that the incidence of students with the most significant cognitive disabilities exceeds the limit and if the agency documents circumstances that explain the higher percentage.” In particular, *ED may provide States* with an exception to the cap “for a specified period of time” if the State: [1] documents that the number of students with the most significant disabilities exceeds 1.0 percent of all students in the grades assessed; [2] sufficiently explains the overage; and [3] documents that it is addressing relevant procedural requirements contained in the final regulations. Correspondingly, *States may provide districts* with an exception to the 1.0 percent cap based on “conditions consistent with” those established for the award of exceptions to States. ED has explained that “factors beyond the control” of a State or district that may cause the number of students with the most severe cognitive disabilities to exceed the 1.0 cap include: the existence of programs in the State or district that “have drawn large numbers of families of students with the most significant cognitive disabilities;” and very small overall student populations in districts such that a few students have a significant impact.

Finally, States may not exclude the scores of students who exceed the percentage cap from their AYP calculations. States must count as non-proficient the scores of any student who exceeds percentage limitations when calculating AYP and for whom no exception is granted. In such circumstances, States are required to “determine which scores are counted as non-proficient in the [districts] and schools responsible for students who took alternate assessments aligned to alternate achievement standards.” Thus, although States have some flexibility in determining how to count these scores, they must assign these scores and ensure that they are counted “as not proficient in [all] the other subgroups to which they belong.” In addition, each student’s score “used for calculating AYP must remain the same at each level of the educational system—school, district and State.”

Reporting results. Regardless of the way in which student scores may be calculated for AYP purposes, parents must be informed if their children “will be assessed based on alternate achievement standards,” as well as of the “actual achievement level” that their children attain. In addition, States are required to “report on the number and percentage of students with disabilities taking regular assessments, . . . alternate assessments based on grade-level achievement standards, and alternate assessments based on

alternate achievement standards.” Reports about the types of assessment used for students with disabilities “are only required at the State level.”

Additional State obligations. States that choose to use alternate assessments aligned with alternate achievement standards are obligated, among other things, to:

- Define alternate achievement standards “through a documented and validated standards-setting process;”
- “Establish and ensure implementation of clear and appropriate guidelines” for IEP teams to apply when determining whether alternate assessments based on alternate academic achievement standards are appropriate for specific students;
- Disseminate information and “promote the use” of appropriate accommodations, in an effort to “increase the number of students with the most significant cognitive disabilities who are tested against grade-level academic achievement standards;” and
- “Ensure that regular and special education teachers and other appropriate staff know how to administer assessments, including making appropriate use of accommodations for students with the most significant cognitive disabilities.”

Additional district obligations. School districts are “responsible for managing [the] process” relating to the 1.0 percent cap in three ways. In particular, they should:

- “[P]rovide information to school personnel and IEP teams about the state assessment, the use of accommodations, and assessment[s] against alternate achievement standards;”
- “[E]nsure [that] appropriate staff receive training to support sound IEP decisions about which students participate in alternate assessments based on alternate achievement standards;” and
- “[M]onitor implementation of assessments based on alternate achievement standards in schools throughout the district to ensure that [those standards] are being used in a manner consistent with the best instructional practices known for students with the most significant cognitive disabilities.”

Note: Multiple test administrations. As a more general matter, the final regulations clarify ED’s rules regarding multiple test administrations. ED regulations provide that if a student takes a State assessment for a particular subject or grade level more than once, “the State must use the student’s results from the first administration to determine AYP.” For these purposes, however, “the first administration” is the “first time an assessment is officially administered to measure a student’s achievement of the State’s content standards in the grade or subject for which the State expects the student to have achieved proficiency of those standards.” Students who have scored at proficient or higher on assessments taken earlier than the first official administration “may ‘bank’ those scores, and would not have to retake the test at a later date.”