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[www.cleweb.org](http://www.cleweb.org)

reply to:

99 Chauncy Street  
Suite 402  
Boston, MA 02111  
617-451-0855

[kboundy@cleweb.org](mailto:kboundy@cleweb.org)

1875 Connecticut Ave., NW  
Suite 510  
Washington, D.C. 20009  
202-986-3000

## ED's Regulations on 2% Counted for Performance Based on Modified Assessments

Setting modified or lower standards for assessing certain students with disabilities inevitably means that most of those students will not be taught those skills and bodies of knowledge expected for all students, at the levels expected for all students. (The lower standards set for these students will set the ceiling of their education as they are incorporated in their IEPs and their overall instruction.) This is clearly a violation of Section 504, at the least in those cases where there is not *irrefutable evidence* that giving any such student the same access to the same level is pointless. It is also most likely that racial and ethnic minority students and ELL students with disabilities will be disproportionately represented in this 2% subgroup.

Recommendation: Revisit as inconsistent with the mandate of Title I/NCLB, and the Fourteenth Amendment of the U.S. Constitution and Section 504 and the ADA, the U.S. Department of Education's regulations pertaining to the 2% policy that allow certain students with disabilities, who cannot be defined and delineated without error, to be assessed on the basis of "modified" achievement standards.

It is important to recognize and affirm that the purpose of the assessment system under Title I and IDEA is, in fact, to determine whether the student has received high quality instruction in the first place. State accountability systems are expected to make schools and school districts accountable to parents and students, not subject students to reduced standards of learning when the school/school district have failed to effectively educate the student to meet grade level proficiency. The US Department of Education is failing to ensure that State assessments have adequate and sufficient evidence of validity and reliability to support the inference that a particular student with a disability is precluded by the nature of that disability from achieving grade-level proficiency. A student's performance on the State assessment may as likely reflect that the student has not received adequate or effective instruction by a highly qualified teacher in the core subject area being assessed or the obstacle to achievement may be the assessment instrument.

As a civil rights issue, students with disabilities must be protected from being subject to overbroad criteria, without adequate justification, and which on their face, sweep in more students than fit the underlying standard the Department seeks to establish, such as: the conclusion that 3% of the overall student population (or 30% of students with disabilities) are simply incapable of mastering the regular standards applicable to other students, even with high-quality instruction; different criterion that provides for students being subject to modified standards because their IEP team is "reasonably certain" that they cannot master the regular standards, even with high-quality education – which means that students can and will be effectively limited to being taught to lower standards even if they would have at least a one-in-four chance, one-in-three chance, or even 49% chance of mastering the higher standards if properly taught (even assuming that our concerns, articulated in the point immediately above, about the basis for that conclusion, were not valid). In the aggregate, this thus sweeps in good numbers of students who, in fact, *would* achieve full proficiency (e.g., one out of every four students who has a 25% chance), even applying the questionable assumptions made in the Department's regulations.

The assumption that allowing up to 3% of students with proficient scores on reduced standards is consistent with and narrowly tailored to focusing on the 3% of students who are purported incapable of mastering (or to a reasonable certainty, incapable of mastering) the higher standards applicable to other students is flawed. In fact, this permits, and is currently resulting in, much more than 3% of all students assessed to be subject to the lower standards, because it allows up to 3% of the total scores to consist of students who score *proficient* on the lower

standards, which means that the total of students who are measured against the lower standards for AYP purposes will consist of that 3% *plus* all the students who score *below* proficient on the modified or alternate standards.

Setting lower standards for certain students with disabilities will inevitably mean that most of the selected students will not be taught the skills and bodies of knowledge expected for all students, at the levels expected for all students, to the extent that level of knowledge and skills are not included in the same form, depth, and rigor in the modified standards. Rather, the lower standards will set the ceiling of their education as the standards are incorporated into their IEPs and their overall instruction. Such a result violates Section 504, at least in those cases where there is not irrefutable proof that giving any such student the same access to the same level is utterly pointless.

The regulations promulgated by the Department that authorize the development and use of an alternate assessment based on modified achievement standards for certain students with disabilities set up the conditions for turning NCLB on its head and in violation of students' civil rights. While for all other students the core structure of NCLB creates a presumption that their failure to demonstrate proficient or advanced performance in relation to the full range of state standards indicates that the quality of their instruction needs to be improved in order to get them to proficient and advanced levels, for students with disabilities subject to the 2% modified assessment, that presumption is non-operative. Rather, the conclusion is drawn that the reason they are not fully mastering the standards is that they are simply incapable of doing so – and the assessment results are themselves used to justify that very divergent conclusion.

Key findings in NCEO's Eleventh Survey of States (October 2008) include that "[m]ore than half of the states are considering developing an alternate assessment based on modified academic achievement standards." (p. vii). Perhaps, even more disturbing is that only 16 states track the performance of students with disabilities who consistently perform poorly on the state's regular assessment. Presumably, such information is relevant to informing which students are making gains or are not making gains and why, and to improve instruction and assessments.