

**Inclusion of Special Populations in the National Assessment of Educational Progress:
A Review of Relevant Legislation
Ray Fields**

PURPOSE

This document is intended as a resource on legislation related to the inclusion in NAEP of students with disabilities (SD) and students with limited English proficiency (LEP). (Note: the term limited English proficient is used rather than English language learner for consistency with the terminology used in the cited legislation.)

BACKGROUND

For more than a decade, the National Assessment Governing Board has worked in concert with the National Center for Education statistics (NCES) on policies and procedures to increase the inclusion of students with disabilities and students with limited English proficiency in NAEP.

Addressing inclusion is important for several reasons:

- to ensure that samples are representative of the jurisdictions and student attributes (e.g., nation, regions, states, race/ethnicity) about which NAEP regularly reports and of the school districts participating in the Trial Urban District Assessments
- to support the validity of statements made about student achievement in NAEP reports, including current achievement and achievement over time
- to enable reporting of SD and LEP student achievement
- to ensure that cross-state and cross-district data can be compared

While inclusion rates overall for the total population have improved at the national level (e.g., in 2007: 97% in 4th grade mathematics; 94% in 4th grade reading), they are somewhat variable across states (e.g., in 2007: 86% to 98% in 4th grade reading; 90% to 98% in 8th grade mathematics) and across the participating urban districts, both within and across assessment years. Consequently, the Governing Board and NCES continue to address the challenge of increasing the inclusion rates and of decreasing the variability in inclusion rates across states and districts.

Discussed below are factors affecting inclusion decisions, a number of which are outside the control of NAEP. As work proceeds to increase inclusion rates and develop policies and procedures for reporting, it is hoped that this reference to relevant legislation will prove useful. For example, it may be worthwhile to examine the criteria employed for required participation rates of subgroups under the Elementary and Secondary Education Act of 1965 (ESEA) reauthorization of 2001 (also known as the No Child left Behind Act) and determine their applicability to NAEP, for example, for “flagging” jurisdictions in NAEP reports (see especially principles 9 and 10).

Similarly, it may be worthwhile to examine whether terminology used in ESEA should be employed in NAEP, especially the NAEP Students with Disabilities Background Questionnaire, which is used to collect supplemental information on each student in the sample who has been identified as having a physical or mental disability. For example, ESEA uses the term “most significant cognitive disability” to signify students for whom an alternate assessment may be developed, but that term is not used in the NAEP SD background questionnaire¹ (see principle 10). This raises the question—Could the use of different terminology in NAEP be contributing to the variability in inclusion rates across jurisdictions?

¹ In the NAEP SD Background Questionnaire, response choices available to the question “What is the degree of this student’s disability(ies)?” are Profound/Severe; Moderate; or Mild.

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ORGANIZATION

Presented below are “principles” derived—by the author—from provisions of NAEP and ESEA², respectively. Following each principle are the relevant provision and citation, with applicable text highlighted in bold and underlining (i.e., with the emphasis added by the author), and explanatory text as appropriate. Citations include excerpts from legislation, regulatory documents, and guidance letters from the Department of Education. Codified definitions of SD and LEP are in the Appendix.

Summary of Principles

PRINCIPLES FROM THE NAEP LEGISLATION

1. **The National Assessment shall provide a fair and accurate (a) measurement of student academic achievement and (b) reporting of trends.**
2. **The National Assessment shall produce data that are representative on a national, regional and state basis, and of each district participating in the Trial Urban District Assessment.**
3. **The National Assessment should report on the achievement of students with disabilities and students with limited English proficiency.**
4. **Participation of students in NAEP is strictly voluntary; students may refuse to participate for any reason; and NAEP cannot require any student to participate.**

PRINCIPLES FROM THE ELEMENTARY AND SECONDARY EDUCATION ACT 2001 REAUTHORIZATION (ESEA)

5. **State academic assessments under ESEA shall provide for the inclusion of all students.**
6. **State academic assessments under ESEA shall provide for reasonable and valid adaptations and accommodations for students with disabilities and students with limited English proficiency.**
7. **In general, states should assess reading skills in English of limited English proficient students who have attended school in the United States for three or more consecutive years.**
8. **States are required to assess, annually, the English language proficiency of limited English proficient students.**
9. **For the purpose of assessing Adequate Yearly Progress (AYP) under ESEA, at least 95 percent of each specified subgroup must have taken the state academic assessments.**
10. **In general, for the purpose of assessing Adequate Yearly Progress (AYP) under ESEA, no more than 3.0 percent of students (i.e., who are students with disabilities) are to take other than the regular state academic assessments, with or without accommodations, as appropriate to the individual student.**

² The Elementary and Secondary Education Act of 1965, 2001 reauthorization, is referenced because of its relationship to NAEP. ESEA requires states to participate in NAEP reading and mathematics assessments at grades 4 and 8 once every two years. Further, ESEA and the related final regulations for Title I of the Elementary and Secondary Education Act include provisions states must observe related to the Individuals with Disabilities Education Act and to the assessment of students with limited English proficiency.

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PRINCIPLES FROM THE NAEP LEGISLATION

- 1. The National Assessment shall provide a fair and accurate (a) measurement of student academic achievement and (b) reporting of trends.**

Citation: *Section 303 (b)(1) PURPOSE-* The purpose of this section is to provide, in a timely manner, **a fair and accurate measurement of student academic achievement and reporting of trends** in such achievement in reading, mathematics, and other subject matter as specified in this section.

Discussion: This provision clearly bears on inclusion. In order for the average score and achievement level results of the nation, states, and participating urban districts to be accurate, the data should be based on a sample that represents all of the students enrolled in each of the grades assessed by NAEP. In order for the reporting of trends to be optimally meaningful, the samples that are being compared should be consistently inclusive from administration to administration over time. Fairness and accuracy as intended by the legislation require minimizing exclusions.

- 2. The National Assessment shall produce data that are representative on a national, regional and state basis, and of each district participating in the Trial Urban District Assessment.**

Citation: *Section 303 (b)(2)(A) MEASUREMENT AND REPORTING-* The Commissioner for Education Statistics...shall...use a random sampling process which is consistent with relevant, widely accepted professional assessment standards and that **produces data that are representative on a national and regional basis...**

Citation: *Section 303 (b)(3)(A)(i) STATE ASSESSMENTS-IN GENERAL-* The Commissioner for Education Statistics...**shall conduct biennial State academic assessments of student achievement** in reading and mathematics in grades 4 and 8...

Discussion: This principle and the associated legislative provisions lend further support and elaboration to the first principle (above) on fairness and accuracy. While the requirement is explicit for the representativeness of national and regional samples, it is implicit for samples drawn for states and for districts participating in the Trial Urban District Assessments (TUDA).

- 3. The National Assessment should report on the achievement of students with disabilities and students with limited English proficiency.**

Citation: *Section 303 (b)(2)(G) MEASUREMENT AND REPORTING-* The Commissioner for Education Statistics...**shall include information on special groups**, including, **whenever feasible**, information collected, cross tabulated, compared, and reported by race, ethnicity, socioeconomic status, gender, **disability and limited English proficiency**...

Discussion: The NAEP legislation is clear in expressing the expectation that results will be reported for SD and LEP students. Therefore, the inclusion of these students, whenever feasible, is required.

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- 4. Participation of students in NAEP is strictly voluntary; students may refuse to participate for any reason; and NAEP cannot require any student to participate.**

Citation: Section 303 (d) PARTICIPATION-

(1) *VOLUNTARY PARTICIPATION*- Participation in any assessment authorized under this section shall be **voluntary for students, schools, and local educational agencies.**

(2) *STUDENT PARTICIPATION*- Parents of children selected to participate in any assessment authorized under this section shall be informed before the administration of any authorized assessment, that their **child may be excused from participation for any reason, is not required to finish any authorized assessment, and is not required to answer any test question.**

Discussion: These provisions limit the degree to which NAEP policies about inclusion can affect inclusion decisions. The decision about whether to include a child is made at the school level, by school personnel and in the case of SD, involves the student's Individualized Education Program (IEP), which has legal standing. This decision is not made by NAEP staff or by NAEP contractors. NAEP staff and contractors, presumably, provide information about the content, difficulty, and available accommodations that may be taken into account by school staff making the decision and the child's parents. The expectation is that states and schools have sufficiently similar procedures for identifying, classifying, and treating SD and LEP students such that students of like circumstances in different locales would be treated similarly. However, this is not necessarily the case. Further, these decisions and procedures are local matters completely outside of NAEP's authority. The issue for resolution then, is the degree to which the variability in participation rates across jurisdictions and within jurisdictions over time is due to NAEP policies and test administration procedures or due to local decisions and procedures over which NAEP has no control, and the degree to which any NAEP policy or procedure can affect the variability that exists.

PRINCIPLES FROM THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA)

- 5. State academic assessments under ESEA shall provide for the inclusion of all students.**

Citation: Title I ESEA, Section 1111(b)(3)(C)(ix)(I)

*SEC. 1111. STATE PLANS. (b) ACADEMIC STANDARDS, ACADEMIC ASSESSMENTS, AND ACCOUNTABILITY. (3) ACADEMIC ASSESSMENTS— (C) REQUIREMENTS- **Such assessments shall—(ix) provide for—(I) the participation in such assessments of all students;***

Discussion: Under ESEA, states are required to include in their assessment programs all students in grades 3-8 and in one grade at the high school level in reading and mathematics and, beginning in 2007, science. "All students" includes students with disabilities and students with limited English proficiency.

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- 6. State academic assessments under ESEA shall provide for reasonable and valid adaptations and accommodations for students with disabilities and students with limited English proficiency.**

Citation: Title I ESEA, Section 1111(b)(3)(C)(ix)(II); Section 1111(b)(3)(C)(ix)(III)

SEC. 1111. STATE PLANS. (b) ACADEMIC STANDARDS, ACADEMIC ASSESSMENTS, AND ACCOUNTABILITY. (3) ACADEMIC ASSESSMENTS— (C) REQUIREMENTS- Such assessments shall—(ix) provide for

*(II) the **reasonable adaptations³ and accommodations for students with disabilities** (as defined under section 602(3) of the Individuals with Disabilities Education Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and*

*(III) **the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments** administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7);*

Citation: Excerpt from Summary of Title I Regulations [Federal Register: April 9, 2007 (Volume 72, Number 67, Page 17750)]

Guidelines for IEP Teams. Title I requires a State to administer assessments that are valid and reliable for the purposes for which they are used. Accordingly, students, including students with disabilities, who are assessed with assessments that are not valid and reliable are not "participants" for purposes of calculating participation rates in determining AYP. **The final IDEA regulations that are included in these regulations provide that a State's (or in the case of district-wide assessments, an LEA's) guidelines require each child to be validly assessed and identify, for each assessment, any accommodations that would result in an invalid score.** Consistent with Title I, a student with disabilities must receive a valid score in order to be counted as a participant under the IDEA.

Discussion: While accommodations are to be provided SD and LEP students in state academic assessments, they must not invalidate the construct being measured. This is equally true for NAEP. There are indications that accommodations deemed appropriate in one state might not be permitted in others. For example—the "read-aloud" accommodation on reading assessments is permitted in some states but is not offered universally, nor is it permitted on NAEP. The read-aloud accommodation appears to be one source of the variability in inclusion rates on the NAEP state reading assessments. More needs to be studied about the rigor with which states determine that the accommodations they employ do not invalidate student scores. And similar periodic examinations of the accommodations permitted in NAEP may be in order as well, including accommodations for both SD and LEP students.

³ Note: Adaptations are never used in IDEA (per communication of May 28, 2008 from Alexa Posny, Kansas Commissioner of Education and former Director of the Office of Special Education Programs, U.S. Department of Education).

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7. **In general, states should assess reading skills in English of limited English proficient students who have attended school in the United States for three or more consecutive years.**

Citation: Title I ESEA, Section 1111(b)(3)(C)(x)

SEC. 1111. STATE PLANS. (b) ACADEMIC STANDARDS, ACADEMIC ASSESSMENTS, AND ACCOUNTABILITY. (3) ACADEMIC ASSESSMENTS— (C) REQUIREMENTS- Such assessments shall—[provide for]

*(x) ... **the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years,** except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;*

Discussion: Generally, LEP students who have attended school in the United States for less than three consecutive years are not required to take state reading assessments in English, but are required to do so if they have. Under procedures in place as of the date of the preparation of this paper, inclusion in NAEP of LEP students is encouraged if that student (a) participated in the regular state academic assessment in the subject being tested, and (b) if that student can participate in NAEP with the accommodations NAEP allows. Even if the student did not participate in the regular state assessment, or if he/she needs accommodations NAEP does not allow, school staff are asked whether that student could participate in NAEP with the allowable accommodations.

8. **States are required to assess, annually, the English language proficiency of limited English proficient students.**

Citation: Title I ESEA, Section 1111(b)(7)

*SEC. 1111. STATE PLANS. (b) ACADEMIC STANDARDS, ACADEMIC ASSESSMENTS, AND ACCOUNTABILITY. (7) ACADEMIC ASSESSMENTS OF ENGLISH LANGUAGE PROFICIENCY- **Each State plan shall** demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, **provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency** in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.*

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Discussion: Each state is required to measure the English language proficiency of LEP students each year. It is conceivable that there are state-to-state differences in the assessments and in the standards against which English language proficiency is measured. While on the one hand, this may explain some of the variability in NAEP state participation rates, on the other hand, these assessments may be useful in informing the decision about whether a student would be able to participate in NAEP. It may be important for NAEP to have more information about these state English language proficiency assessments.

9. For the purpose of assessing Adequate Yearly Progress (AYP) under ESEA, at least 95 percent of each specified subgroup must have taken the state academic assessments.

Citation: *Title I ESEA, Section 1111(b)(2)(I)(ii)*—**not less than 95 percent of each group of students described in subparagraph (C)(v)**⁴ who are enrolled in the school **are required to take the assessments**, consistent with ... accommodations, guidelines, and alternative assessments provided in the same manner as those provided under section 612(a)(17)(A) of the Individuals with Disabilities Education Act and paragraph (3)⁵, on which adequate yearly progress is based (except that the 95 percent requirement described in this clause shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student).

Discussion: In a letter to states from Secretary of Education Rod Paige dated July 24, 2002, the “95 percent rule” is explained further:

Schools must report all student results by subgroup. The number of students in a subgroup must be of sufficient size to produce statistically reliable results for the 95% requirement to affect AYP. In other words, if the number of students in a subgroup is too small to produce statistically reliable results, the State need not, on the basis of the 95% requirement, identify the school as not making AYP, even if fewer than 95% of the students in that subgroup take the State's assessment. (Source: Department of Education website <http://www.ed.gov/policy/elsec/guid/secletter/020724.html>)

It appears that, while all students are to be assessed under ESEA, at least 95 percent must have participated in testing for state academic assessment results to be considered for purposes of determining AYP. Adequate Yearly Progress is not a factor that bears on NAEP. However, the “95 percent rule” regarding the level of participation of each subgroup for AYP calculation purposes may provide some hints at a criterion for NAEP to consider in reporting results (e.g., “flagging” jurisdictions not meeting the criterion).

⁴ “Subparagraph (C)(v)” refers to economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and students with limited English proficiency.

⁵ “Paragraph 3” refers to section 1111(b)(3) of Title I, which describes the requirements for state academic assessments.

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- 10. In general, for the purpose of assessing Adequate Yearly Progress (AYP) under ESEA, no more than 3.0 percent of students (i.e., who are students with disabilities) are to take other than the regular state academic assessments, with or without accommodations, as appropriate to the individual student.**

Citation: Excerpts from—Summary of Title I--Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA); Final Rule. [Federal Register: April 9, 2007 (Volume 72, Number 67)].

...Title I regulations permit a State to **develop alternate academic achievement standards for students with the most significant cognitive disabilities** and to **include those students' proficient and advanced scores on alternate assessments based on alternate academic achievement standards** in measuring adequate yearly progress (AYP), **subject to a cap of 1.0 percent of all students assessed at the State and district levels**...

...**in addition** to students with the most significant cognitive disabilities, **there is a small group of students whose disability has precluded them from achieving grade-level proficiency and** whose progress is such that they **will not reach grade-level achievement standards in the same time frame as other students**. Currently, these students must take either a grade-level assessment or an alternate assessment based on alternate academic achievement standards. Neither of these options provides an accurate assessment of what these students know and can do...

...These regulations permit States to develop an assessment that is appropriately challenging for this group of students as part of their State accountability and assessment systems under Title I...**The final regulations in Sec. 200.13(c)(2)(ii) provide that up to 2.0 percent (approximately 20 percent of students with disabilities) of the proficient and advanced scores from alternate assessments based on modified academic achievement standards may be included in calculating AYP**...

Discussion: The Title I/IDEA regulation permits, in the calculation of AYP, no more than 1.0 percent of all students assessed in a state—those with the most significant cognitive disabilities—and an additional 2.0 percent of all students—**those whose disability precludes them from achieving grade-level proficiency within the same time frame as other students**—to be assessed using alternate assessments based, respectively, on alternate academic achievement standards and modified academic achievement standards. This is explained in detail in the summary and the regulations. It suggests that there is an expectation that the remaining students with disabilities would be assessed according to the general academic standards and assessments in the state. As with the “95 percent rule” above, this, too, may provide some ideas for a criterion for NAEP to consider with respect to reporting results (e.g., “flagging” jurisdictions not meeting the criterion).

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Appendix: Definitions

Elementary and Secondary Education Act of 1965

SEC. 9101(25) LIMITED ENGLISH PROFICIENT- The term 'limited English proficient', when used with respect to an individual, means an individual —

- (A) who is aged 3 through 21;
- (B) who is enrolled or preparing to enroll in an elementary school or secondary school;
- (C)
 - (i) who was not born in the United States or whose native language is a language other than English;
 - (ii)
 - (I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and
 - (II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or
 - (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and
- (D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual —
 - (i) the ability to meet the State's proficient level of achievement on State assessments described in section 1111(b)(3);
 - (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or
 - (iii) the opportunity to participate fully in society.

Individuals with Disabilities Education Act

SEC. 602.(3) Child with a disability.--

- (A) In general.--The term 'child with a disability' means a child--
 - (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
 - (ii) who, by reason thereof, needs special education and related services.
- (B) Child aged 3 through 9.--The term 'child with a disability' for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child--
 - (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and
 - (ii) who, by reason thereof, needs special education and related services.