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NAEP and Testing Students with Disabilities and English Language Learners

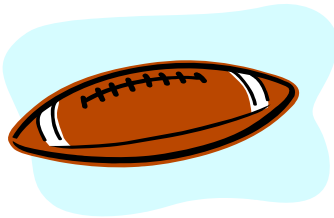
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National Assessment Governing Board (NAGB)

20th Anniversary Conference

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March 4, 2009



The fact that NAGB included this session in its 20th anniversary conference speaks volumes about the concerns it raises. Including students with disabilities (SD) and English language learners (ELL) in the NAEP (National Assessment of Educational Progress), and, since 1996, the use of accommodations and ‘exclusions,’ have proven to be challenging. Yet, it is a necessary challenge, as testing these students appropriately can provide important data. I focus my remarks on SD^{1/} and thank NAGB for the opportunity to participate in this milestone.

NAGB’s current policies do not conform to legal requirements and are too complex, confusing, and nuanced. As a result, NAEP data’s validity, reliability, comparability, and dependability have come under scrutiny. No one benefits from an erosion of confidence in NAEP. NAGB should adopt legal requirements and clarify policies and procedures.

^{1/} These students are served under the (IDEA) Individuals with Disabilities Education Improvement Act or (Section 504) Section 504 of the Rehabilitation Act of 1973. SD served under the **IDEA** are entitled to an **IEP** (an Individualized Education Program), designed to meet their unique needs. Under **Section 504**, it is common practice to provide SD with ‘**504 plans**,’ though these are not mandated in law, as are IEPs. Teams develop IEPs or ‘504 plans’ in public schools. Please see acronyms in the Appendix.

Let us focus on **six issues** from the legal perspective to bring policies in compliance with the legal requirements and reduce confusion and complexity. In this national testing program, confusion and exceptions are bad; clarity and mission-driven purpose are good.

1. First, what is the mission: why do we have NAEP?

NAGB’s website states: “As the Nation’s Report Card, NAEP is America’s principal source of dependable, representative information on student achievement in elementary and secondary schools.” [Emphasis added]. NAEP is designed to tell us what students know and can do on the standards and frameworks developed by NAGB. Such data—when valid and reliable—helps educators, parents, and others understand and plan educational programming for our nation. It benefits everyone.

A review of NAGB’s authorizing statute focuses on key testing concepts, including validity, reliability, fairness and accuracy, and tests based on a representative sampling of students that conform to “relevant widely accepted professional assessment standards.”ⁱ Specifically, the statute states that NAGB is to “Design the methodology of the assessment to ensure that assessment items are **valid and reliable**, in consultation with appropriate technical experts in measurement and assessment, content and subject matter; sampling, and other technical experts who engage in large-scale survey.” As well, the NAEP “must be developed in a **valid and reliable** manner and to follow “widely accepted professional testing standards.”

“The purpose of the NAEP 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.”

NAGB should 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.**” [Emphasis added]

2. Next, let us acknowledge that in testing SD, current policies have strayed from the mission.

Unfortunately, the basic legal concepts highlighted in the law are not obvious in NAGB’s Inclusion Policy (Policy)ⁱⁱ and practices. For evidence of consistency between the law and Policy, let us compare language in the statute and Policy. Such exercise is appropriate because the agency (NAGB) authorized to develop policy to implement a law should create policy that is consistent with that law. **Words matter.**

First, we review some key words in the law and the number of times they appear. Next, let us review the Policy, again focusing on several key words.

We ask, is the Policy consistent with the law? Does it do what it is supposed to do?

**Words in law matter: Title III—National Assessment of Educational Progress
P.L. 107-279, Sec. 301-305**

The law includes these words:

Reliable	9 times
Valid	12 times
Valid and reliable	8 times
Valid and reliable manner	4 times
Voluntary	4 times
Widely accepted professional assessment standards	3 times

The law does NOT include these words:

Accommodation	0 times
Inclusion	0 times
Meaningfully participate/ participating meaningfully	0 times

**Words in the Policy matter: NAEP Inclusion Policy:
nces.ed.gov/nationsreportcard/about/inclusion.asp**

The policy includes these words (up to ‘NAEP Research about Inclusion’ below it):

Accommodation	75 times
Exclusion	4 times
Inclusion	5 times
Meaningfully participate/ participating meaningfully	2 times

The policy does NOT include these words in the policy:

Reliable	0 times
Valid	0 times
Valid and reliable	0 times
Voluntary	0 times
Widely accepted professional assessment standards	0 times

This informal review of the use of specific words is stunning. It seems to answer the questions set out above in the negative. The law and Policy appear to head in **opposite** directions on issues we discuss today. The Policy appears to bypass the law’s focus on validity, reliability, dependability and the need for comparability across the nation. It also ignores these realities:

- **It is confusing because it does not define terms: accommodations, validity, or reliability.** I believe that this lack of definition has harmed the effort as it confuses educators, parents, and policymakers. Quickly, let’s define key terms. An accommodation is any change that a SD needs in how a test is administered AND that does not fundamentally alter the test. Test validity means that the test actually measures

what it purports to measure. Test reliability refers to the need for test accuracy, dependability, and consistency. Thus, appropriate accommodations are those that are necessary, change a test but not fundamentally, AND do maintain validity and reliability. In contrast, changes in a test that do fundamentally alter it are called ‘modifications.’ With modifications, the test is no longer valid or reliable; in effect, it becomes a different test.

- **Inclusion of SD in testing without validity and reliability is meaningless.** It is specifically barred by the IDEA (see below and 20 USC 1412 and 34 CFR 300.160).
- **Inclusion without a dependable and comparable representative sampling of students, including SD, defies the purpose of NAEP and its authorizing statute.**
- **NAEP’s job is to provide data.** According to Dr. Shariff Shakrani, NAEP functions as a ‘thermometer.’ Its job is to give information—not to improve education.ⁱⁱⁱ A thermometer can no more end illness than NAEP can improve schools or provide “meaningful participation.”
- **“Meaningful participation” is a Policy add-on in, not found in the statute.** I believe it is inconsistent with NAGB’s mission.

To get valid data about the skills and knowledge that SD have, NAGB should create and implement policy that is consistent with the law.

3. We need to get back to legal basics. For SD, that means the interplay between NAEP, the IDEA, Section 504, and NCLB (No Child Left Behind Act).

The timing is excellent for NAGB’s policy review, as the U.S. Department of Education (ED) recently (2007) issued a regulation again clarifying accommodations use.

34 CFR 300.160 of the IDEA, which incorporates the NCLB, and through that, NAEP for 4th and 8th grade language arts and mathematics, affirms the fact that only appropriate (valid) accommodations are allowed on tests that are reported for accountability.

The ED explained: “Tests administered with accommodations that do not maintain test validity are not measuring academic achievement and functional performance. Therefore, providing these accommodations would be inconsistent with [the law].”^{iv}

LRP Publications summarized: “Under the IDEA and Section 504, [the test maker; e.g., a state, district, or NAGB] is the **ultimate arbiter** of when an accommodation will be appropriate for use with a particular assessment instrument and **bounds the team’s discretion in these matters.**”^v [Emphasis added].

Thus, the IDEA and NCLB require a test maker, such as NAGB, to:

A. Develop guidelines for appropriate accommodations that do not fundamentally alter NAEP.

- B. Identify and allow only those accommodations that maintain test validity.
- C. Instruct IEP or 504 Teams to select, on a test-by-test basis, only accommodations that do not invalidate a score.
- D. Use terms—especially “accommodations” and “modifications” — with precision. Educators, parents, students, and citizens need that clarity.

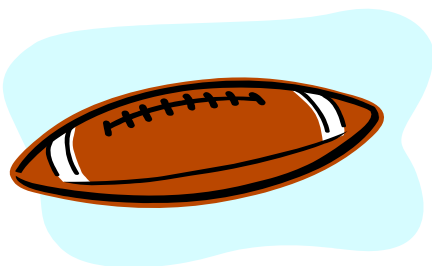
A useful way to “get it” is to separate the WHAT from the WHO. NAGB’s job to clarify what the NAEP is designed to measure. That is, what the WHAT is. With that knowledge, schools can deal with the WHO: SD and their individual needs, including the use of any appropriate accommodations. **First the WHAT; then the WHO. Not the other way around.** NAGB should not develop policy based on student disability categories, severity, or other descriptors.

IEP or Section 504 Teams need to develop IEPs or 504 plans that are consistent with testing standards. That is, Teams need to specify that SD can use an accommodation on tests, such as NAEP, only if: (1) the accommodation is allowed on NAEP (the WHAT) and (2) the accommodation is included in the student’s IEP or 504 plan. Only when both conditions are met, can SD use the accommodation.

Properly written IEPs or 504 plans are **flexible**—allowing for different tests that may/may not allow certain accommodations. It all depends on the WHAT of those tests. The law is clear: Teams that fail to consider this may develop flawed plans. NAGB should not develop policy that may be based on flawed IEPs or 504 plans and contradicts the IDEA, Section 504, and NCLB. NAGB’s references to a conflict between IEPs and NAEP are wrong.^{vi}

No law requires a test to allow an accommodation that impedes its validity. The laws, numerous court decisions, and ED guidance all uphold valid testing and high standards for all students.^{vii}

An analogy from the world of sports. Different games have different rules. We know that football players can run with the ball, but basketball players cannot. Is this rule unfair to poor runners? Should we change the football rules to meet individual needs? NO. Why not? Because it would no longer be football! Each sport has DIFFERENT goals, rules, and skill sets.



So too in the testing arena. Each test is different. The laws point in the same direction: IEP and 504 Teams are responsible for planning so that SD can participate appropriately in different tests, including the NAEP—sometimes with and sometimes without certain accommodations.

4. Why has it been so challenging to implement NAEP’s mission? Acknowledge the myths!

I take liberty with Mark Twain’s wisdom: “**A lie travels half-way around the world while the truth is still putting on its boots,**” and substitute ‘**a myth**’ for ‘**a lie.**’

NAEP inclusion policies and practices are burdened by many myths that are adamantly held, powerful, and legally wrong. NAGB needs to lead the nation away from these myths in order to refocus on the mission. Of the many myths, I cite just three.

Myths that impede appropriate policies include the following:

1. **MYTH:** IEPs or 504 plans constrain and limit NAGB’s mission and accommodation policy. **The truth is to the contrary.** That is:

THE TRUTH: The IDEA, Section 504, and NCLB require IEP or 504 Teams to build flexibility into IEPs and 504 plans so they are consistent with different tests. Teams need to implement accommodations appropriately and not to allow modifications when scores are to be reported for accountability purposes. See discussion above.

NAGB should not base policy on flawed IEPs or 504 plans and should not contradict the IDEA, Section 504, and NCLB. NAGB’s reference to a conflict between IEPs (and 504 plans) and NAEP is a myth that is wrong.

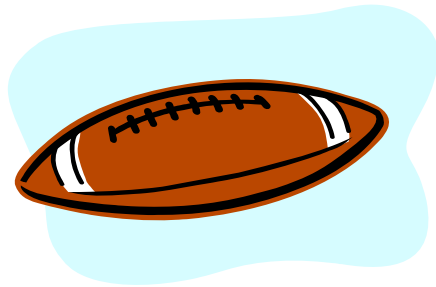
2. **MYTH:** Schools can and/or should exclude SD who cannot use their IEP or 504 plan accommodations on NAEP. A 2007 federal study, found that “local decision makers typically believe that administering NAEP without accommodations would ‘constitute a violation of the student’s rights.’”^{viii} **The truth is to the contrary.**^{ix}

THE TRUTH: It is a violation to give a student an invalid test. It is not a violation of a student’s rights to disallow modifications and administer a valid test. In fact, to allow modifications and create an invalid test for SD is unfair. Further, the law does NOT mandate exclusions. See discussion below.

3. **MYTH:** NAGB should align its accommodation policy with state testing programs and practices.^x This myth continues in spite of NAGB’s own FAQ, which indicates that the purpose and topics of state testing differs from NAEP: “[State tests] are tied to the curriculum and academic standards of each test, rather than to a national model [as is the NAEP].” **The truth is to the contrary. State tests are not a relevant factor.**

THE TRUTH: NAGB needs to implement its own testing program based on NAEP's own mission and needs. Thus, the Decision Tree, included in the 2009 NAEP Students with Disabilities Background Questionnaire starts at the wrong place and proceeds down the wrong path.^{xi} It begins with questions about how students take **state** tests. The Decision Tree should, instead, begin with NAEP and how SD take that test, which accommodations it allows, etc.

Another sports analogy is apt. Recall the 2009 Super Bowl. Teams from Arizona and Pennsylvania played in Florida. So, which state rules applied? Florida's? Arizona's? Pennsylvania's? Of course, none of the above. The two teams and referees used the national standard, the rules of the National Football League.



So too with NAEP. NAGB must establish and enforce national rules so NAEP has a chance to be the gold standard we need.

In summary, decisions about how SD take NAEP should begin with NAEP itself (the WHAT), not with the student (the WHO) or with the 50+ different state tests (IRRELEVANT). Once NAGB articulates WHAT NAEP measures, it's up to schools to provide accommodations that are consistent with NAEP. **Not the other way around! What states do on their own tests is not relevant. Who SD are, is not outcome determinative.**

To correct these myths will take commitment and political will. Old habits and beliefs may die hard. Yet, we must do so.

5. NAGB should end the practice of excluding SD (beyond those who take alternate assessments under the IDEA and NCLB).

The NAGB law speaks of voluntary testing and is silent about 'exclusions.'^{xii}

Voluntary

Voluntary participation. "Participation in any assessment authorized under this section shall be voluntary for students, schools and local educational agencies."

State participation. "Participation in assessments authorized under this section, other than reading and mathematics in grades 4 and 8, shall be voluntary."

Exclusions A term used in the Policy and NAGB practices, though not in the statute. NAGB allows schools to exclude some SD from participating in NAEP (by practice, in widely varying numbers across the country).

For example, the U.S. Government Accountability Office (GAO) reported that in NAEP's 2005 reading tests, 35% of SD were not tested.^{xiii}

Massachusetts excluded 9 % of SD from the 8th grade math test, while California excluded 2%.

In the fourth grade reading test, Houston excluded 23%, Austin 20%, Los Angeles 6%, New York City 6%, and Atlanta 4%.

The law allows **voluntary** participation by parents, schools, and states (except for the mandated 4th and 8th grade language and mathematics tests). The law is silent on the notion (apparently common practice) that schools get to choose which SD not to test. To the contrary, the law requires a representative sample of ALL students, allowing for voluntary participation.

'Voluntariness' (chosen by the person or entity given that choice) and exclusion (chosen by an outside entity) are inherently different. One wonders how they became merged.

At its most troubling, NAGB policy combines accommodations AND exclusions. See this FAQ: Exclusions. "Where NAEP does not allow a particular accommodation, such as having the reading exam read aloud to students or permitting calculators on all parts of the math exam, students may be excused from participation in NAEP."^{xiv}

This practice contradicts the law. All students are entitled to take tests (in fact, federal law through the NCLB now mandates that they do so). This practice is also bad public policy; as it may lead schools or states to condone flawed IEPs, provide too many accommodations, or otherwise game the system.

The challenge for NAGB appears to be in getting compliance from states. While NAGB may have no capacity to change school practices, it may have other means to apply external pressure, such as sanctions, public scrutiny, rejecting state or city reports that do not conform to NAGB requirements, or other actions. The right approach is NOT to tinker with valid tests in the name of "inclusion" or "meaningful participation."

Once a school, city, or state volunteers to participate in NAEP, it should NOT have the option to exclude specific SD, beyond the exception noted above. NAGB should stop assisting schools to exclude SD by cherry picking among them, based on IEPs, severity of need, current accommodations, or whatever.

6. To get back on track, NAGB should consider the following:

- A. NAGB is the ultimate arbiter of what NAEP is designed to measure and can limit IEP or 504 Teams' discretion in these matters. NAGB must inform states and schools about what it measures, what **accommodations** are allowed, what **modifications** are not allowed, and mandate consistency across America.

The laws and regulations confirm that NO conflict exists between the IDEA, Section 504,

NCLB, IEPs and valid NAEP testing. Educators must develop IEPs to be consistent with test requirements—**not the other way around as per Myth # 1.**

- B. NAGB must instruct the states, and through them, IEP and 504 Teams, to select only accommodations that do not invalidate the NAEP. NAGB policy should bind and instruct Teams that develop IEPs and 504 plans—**not the other way around as per Myth # 3.**
- C. NAGB should report scores only if they are not tainted by the use of invalidating accommodations.
- D. NAGB should end its exclusion policies and practices.

Any confusion that may have existed before the 2007 regulation discussed above about testing SD should have dissipated by now. NAGB should follow IDEA and NCLB requirements relating to SD, especially on NAEP's 4th and 8th grade language and mathematics tests that are mandated as NCLB benchmarks. **The NCLB and IDEA already mandate that SD be tested in a valid and reliable manner. Why not NAGB?**

Conclusions

To set the policy aright:

1. **NAGB should reaffirm NAEP's mission:** to provide a representative-sample survey that produces valid, comparable data on academic achievement of large groups of students in the nation's elementary and secondary schools. NAEP's mission is to assess as many students as possible in the representative samples, including SD.
2. **NAGB should inform states and schools what the NAEP tests and implement rules to assure results are fair and accurate.**
3. **NAGB should allow only appropriate accommodations** that do not invalidate the NAEP. SD may use accommodations if they are (1) allowed by the NAEP and (2) included in their IEPs or 504 plans. SD are entitled to the same tests, not watered down or otherwise modified, as other students take. That is only fair.
4. **NAGB should not permit exclusion of SD (besides the exception noted above).** Parents (and in some cases, schools) may opt not to participate in NAEP. While some SD may not have (and may miss) accommodations they use routinely in school, NAGB promotes wide participation to serve NAEP's public purpose—to provide dependable data to inform our nation what a representative sample of students knows and can do.

NAGB's current responses to the challenges posed by testing SD do not conform to legal requirements and are too complicated and unworkable. NAGB should not create policy based on **myths** and flawed IEPs or 504 plans. America does not benefit from an erosion of confidence in the NAEP. Confusion, flawed policies, and wide variations in exclusions are pervasive and damaging. They raise concerns about the fairness, accuracy, and comparability of NAEP results and undermine its credibility. Ultimately, they may tarnish NAEP's 'gold standard' status. That would not be good for America. Instead, America needs a NAEP that is mission-driven, fair, and accurate. I urge NAGB to amend its policies to meet this challenge.

APPENDIX

Key provisions of the law enacting the NAGB and the NAEP:

P.L. 107-279, Sec. 301-305,302(a), states that its Assessment Board is to “formulate policy **guidelines**” for the NAEP (carried out under Section 303). [Emphasis added]. **Guidelines**, of course, can be easily amended by the NAGB, and do not need legislative or outside action.

Key provisions in this law include:

Sec. 302 (e)(1)(E). *Design the methodology of the assessment to ensure that assessment items are **valid and reliable**, in consultation with appropriate technical experts in measurement and assessment, content and subject matter; sampling, and other technical experts who engage in large-scale survey;*

Sec. 302 (e)(B) and (C) states that the NAEP must be developed in a valid and reliable manner and to follow “widely accepted professional testing standards.”

Section 303 (b)(1) *The purpose of the NAEP 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.*

Sec. 303 (b)(2)(A). *...uses 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;*

Authority: 20 U.S.C. 1412(a)(16). 72 FR 17781, Apr. 9, 2007.

Selected sections of the IDEA:

34 CFR Sec. 300.320(a)(6)(i).

A student’s IEP must include:

“a statement of any **individual appropriate accommodations** that are necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments consistent with [20 USC 1412 (a)(16).”

34 CFR Sec. 300.160 Participation in assessments.

(a) General. A State must ensure that all children with disabilities are included in all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.

(b) Accommodation guidelines.

(1) A State (or, in the case of a district-wide assessment, an LEA)^{xv} must develop guidelines for the provision of appropriate accommodations.

(2) The State's (or, in the case of a district-wide assessment, the LEA's) guidelines must—

(i) Identify only those accommodations for each assessment that do not invalidate the score; and

(ii) Instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate the score.

(f) Reports. An SEA (or, in the case of a district-wide assessment, an LEA) must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(1) The number of children with disabilities participating in regular assessments, **and the number of those children who were provided accommodations (that did not result in an invalid score)** in order to participate in those assessments. [Emphasis added]

Selected comments by the ED when enacting this regulation:

“To ensure a coordinated administration of the IDEA and Title I programs, the final IDEA regulations on assessment in Sec. 300.160, which are included in this regulations package.... In addition, the final IDEA regulations provide that a State's (or in the case of a district-wide assessment, an LEA's^{xvi}) guidelines must require each child to be **validly assessed** and must identify, for each assessment, **accommodations that would result in an invalid score.**”

Consistent with Title I, these final regulations also provide in Sec. **300.160(f)(1)** that **“a student taking an assessment with an accommodation that invalidates the score** would not be reported as a participant under the IDEA. **This coordination of the regulations for the IDEA and Title I programs** should avoid confusion among parents, teachers, and administrators, **and reinforce IDEA's and Title I's shared** goal of high expectations and accountability for all students.” [Emphasis added]

The ED explained in comments to 34 CFR 300.160(b): **Tests administered with accommodations that do not maintain test validity are not measuring academic achievement and functional performance. Therefore, providing these accommodations would be inconsistent** with [34 CFR 300.320(a)(b)(i) and 20 U.S. C. 1414 (d)(1)(A)(i)(VI)(aa). 72 Fed. Reg. 17,700 (2007)]. [Emphasis added]

Acronyms and other terminology

ED	U.S. Department of Education
ELL	English language learners, also called LEP, Limited English Proficient learners
GAO	Government Accountability Office
IDEA	Individuals with Disabilities Education Improvement Act of 2004
IEP	Individualized Education Program
LEA	Local educational agency (usually a school district or charter school)
NAEP	National Assessment of Educational Progress
NAGB	National Assessment Governing Board
NCLB	No Child Left Behind Act of 2002
OCR	Office for Civil Rights
OSEP	Office of Special Education Programs
OSERS	Office of Special Education and Rehabilitative Services
<u>Policy</u>	NAGB's <u>Inclusion Policy</u>
Section 504	Section 504 of the Rehabilitation Act of 1973
SD	Students with disabilities under the IDEA or Section 504.

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- i P.L. 107-279, Sec. 301-305.
- ii <http://nces.ed.gov/nationsreportcard/about/inclusion.asp>.
- iii “On the Nature of Testing and Assessment—An Interview with Shariff Shakrani,” New Educator, College of Education, Michigan State University, Spring 2002.
- iv 20 U.S.C. 1412(a)(16). 72 Fed. Reg. 17,700 (2007).
- v www.Specialedconnection.com October 17, 2008.
- vi See several FAQs on NAGB website, Policy Options it put out for public comment recently, and Education Week, “Testing Officials Again Tackle Accommodations and Exclusions for Special Student Populations,” Sean Cavanaugh, July 16, 2008.
- vii See, e.g., North Carolina (NC) Department of Public Instruction, 43 IDELR 229 (OCR 2005). Even extended time, the most common accommodation provided by schools, is not allowed if the test is measuring a student’s ability in a timed situation. Ann Arbor (MI) Public School District, 30 IDELR 405 (OCR 1998).
- viii Education Week, July 16, 2008.
- ix The Office for Special Education (OSEP), Office for Special Education and Rehabilitative Services (OSERS), and Office for Civil Rights OCR) have offered much guidance on this matter. IEP teams must assure that the tests given to students for accountability purposes are valid and reliable. I am happy to provide examples of these.
- x See, e.g., in its FAQs: “Accommodations and exclusion rates on NAEP vary because state-to-state differences in demography, school policies, and testing practices.”...“For students designated by their schools as disabled, NAEP generally provides the same testing accommodations or non-standard administration as state exams.” <http://nagb.org/faqs.htm>. Both of these statements are inconsistent with legal requirements and testing standards.
- xi http://nces.ed.gov/nationsreportcard/pdf/bgq/sch-sdlep/BQ09_NAEP_SD.pdf.
- xii Title III, Sec. 303 (d).
- xiii “GAO Revises Estimates of Students Excluded from NAEP,” Education Week, November 9, 2005.
- xiv <http://nagb.org/faqs.htm>.
- xvi LEA is the local educational agency; usually a school district or charter school.