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Memorandum

TO: Superintendents, Special Education Directors and Testing Coordinators

FROM: Sam Howarth, State Director of Special Education

RE: No Child Left Behind—December 9, 2003, Final Rule (1% Rule)

On December 9, 2003, Education Secretary Rod Paige announced the release of the amended regulations to NCLB. These amended regulations are necessary in order to carry out the accountability requirements for students with the *most significant cognitive disabilities* who participate in alternate assessments. The purpose of this memorandum is to provide a summary of key provisions of the new regulations and their potential impact on New Mexico schools and districts. In addition, this memorandum is intended to provide districts and schools with definitions of key terminology related to this subject.

In order to provide a summary of the key provisions of the amended regulations to the NCLB, it is first necessary to define key terms, which may be utilized throughout this memorandum.

Alternate Assessment—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. The United States Department of Education now considers out-of-level assessments to be alternate assessments.

Alternate Achievement Standard—an expectation of performance that differs in complexity from a grade-level achievement standard. Alternate achievement standards are appropriate only for students with the most significant cognitive disabilities.

Adequate Yearly Progress—a process of evaluating school, district, and state academic performance that applies the same high standards of academic achievement to all students, is statistically valid and reliable, and results in continuous and substantial academic improvement.

Key Provisions

The 1.0 percent rule

The new NCLB regulations allow states to develop and use alternate achievement standards for students with the most significant cognitive disabilities for the purposes of calculating adequate yearly progress (AYP) of districts and schools, provided certain criteria are met. This enables states, districts, and schools to count proficient and advanced scores on alternate assessments toward the calculation of adequate yearly progress (AYP). However, the amended regulations set a cap on the number of proficient and advanced scores that may be counted in the calculation of AYP as overall proficient and advanced scores. 34 CFR Sec. 200.13 (c) (1) (ii) of the NCLB reads as follows:

“In calculating adequate yearly progress for schools, LEAs, and the State, a State may include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in §200.1 (d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics.”

It is important to emphasize that the requirements of 34 CFR Sec. 200.13 (c) (1) (ii) **do not** limit in any way the number of students allowed to **participate** in an alternate assessment. The manner in which a student with a disability participates in statewide assessments remains an Individualized Education Program (IEP) team decision. The amended regulations only limit the number of proficient and advanced scores from an alternate assessment that can count as proficient and advanced scores in the calculation of adequate yearly progress (AYP). It is also important to emphasize that the 1.0 percent cap applies only at the district and state level and does not apply at the school level. The Background section that precedes the amended regulations reads as follows:

In consideration of schools that, for example, are small schools or provide special services to students with the most significant cognitive disabilities, the numerical cap of 1.0 percent does not apply at the school level. This does not mean, however, that the use of alternate assessments aligned with alternate achievement standards is unlimited at the school level...In general, the [United States] Department [of Education] expects that no more than 9.0 percent of students with disabilities will participate in an assessment based on alternate achievement standards.

Consistency in use of scores

The amended regulations to the NCLB mandate that states be consistent in their use of alternate assessment scores in the calculation of adequate yearly progress. 34 CFR Sec. 200.13 (c) (4) (i) of NCLB states that

In calculating adequate yearly progress, if the percentage of proficient and advanced scores based on alternate academic achievement standards under §200.1 (d) exceeds the caps in paragraph (c) (1) through (3) of this section at the State or LEA level, the State must do the following:

- (i) Consistent with §200.7 (a), include all scores of students with the most significant cognitive disabilities.
- (ii) Count as non-proficient the proficient and advanced scores above the caps in paragraph (c) (1) through (3) of this section.
- (iii) Determine which proficient scores to count as non-proficient in schools and LEAs responsible for students who take an alternate assessment based on alternate achievement standards.
- (iv) Include those non-proficient scores in each applicable subgroup at the school, LEA, and State level.
- (v) Ensure that parents are informed of the actual academic achievement levels of their students with the most significant cognitive disabilities.

Under the amended regulations to NCLB, districts must include all scores of all students, including those generated by students with the most significant cognitive disabilities. However, only 1.0 percent of those proficient and advanced scores on an alternate assessment can be counted as proficient and advanced performance for the purposes of calculating AYP. If a district exceeds the 1.0 percent cap, the State must determine which proficient and advanced scores to include within the 1.0 cap and which proficient and advanced scores will be included as non-proficient and subject to grade-level standards as opposed to alternate achievement standards. Those proficient and advanced scores that exceed the 1.0 cap and are included in AYP calculations as non-proficient must be included in each applicable subgroup at the school, district, and state level and must be included as non-proficient.

Waiver of the 1.0 percent rule

The NCLB amended regulations do provide an opportunity for districts and states to apply for a waiver or exception to the 1.0 percent cap. A district may submit a request an exception to the 1.0 percent rule. The State may grant the exception to the 1.0 percent rule for a specified period of time if the district can

- document that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the grades assessed;
- explain why the incidence of such students exceeds 1.0 percent of all students in the combined grades assessed, such as school, community, or health programs in the district that have drawn large numbers of families of students with the most significant cognitive disabilities, or such a small overall student population that it would take only a very few students with such disabilities to exceed the 1.0 percent cap;
- document that it is fully and effectively addressing the requirements of 34 CFR Sec. 200.6 (a) (2) (iii).

Requirements of 34 CFR Sec. 200.6 (a) (2) (iii)

34 CFR Sec. 200.6 (a) (2) (iii) of the NCLB requires states and districts to establish clear guidelines for IEP teams to follow in determining whether a student demonstrates a “significant cognitive disability” that warrants participation in an alternate assessment based upon alternate achievement standards. This is also a requirement under the IDEA at 34 CFR Sec. 300.138 (b) (1). On August 27, 2003, the New Mexico Public Education Department’s Special Education Office (SEO) issued a

memorandum to districts that outlined the revised participation criteria for the New Mexico Alternate Assessment. The *Addendum for Determination of Eligibility for the New Mexico Alternate Assessment* serves as the guidance that IEP teams must follow in ensuring that only students with the *most significant cognitive disabilities* are considered for participation in alternate assessments that are based upon alternate achievement standards. The Public Education Department advises districts to instruct IEP teams to refer to the *Addendum for Determination of Eligibility for the New Mexico Alternate Assessment* that replaces the memorandum dated August 27, 2003, when considering the appropriateness of an alternate assessment for a student with a disability (Attached).

A district that is requesting a waiver to the 1.0 percent rule must be able to demonstrate that it informs parents of students with disabilities who are participating in alternate assessments that their child's achievement will be based upon alternate achievement standards as opposed to grade level achievement standards. The district must be able to demonstrate that, to the extent possible, students with the most significant cognitive disabilities are included in the general curriculum and in assessments that measure a student's mastery of the general curriculum.

The district must also comply with the reporting requirements of 34 CFR Sec. 200.3 (a) (2) (iii). Districts must report the number and percentage of students with disabilities

- taking alternate assessments based upon alternate academic achievement standards defined under §200.1 (d)
- taking alternate assessments based upon academic achievement standards defined under §200.1 (c); and
- regular assessments, including those administered with appropriate accommodations.

The district must show that it is promoting the use of appropriate accommodations in order to increase the number of students with the most significant cognitive disabilities in general assessments that are based upon grade-level academic achievement standards. The SEO recently released guidance on this issue in its technical assistance manual titled, *Participation of Students with Disabilities in the New Mexico Statewide Assessment Program*. This technical assistance manual is available on the SEO website at <http://www.sde.state.nm.us>. In addition, SEO presented this new manual at the February 2004 Special Education Directors' Quarterly Meeting. Districts are encouraged to share the manual and the information provided from the training to school staff.

The final requirement of 34 CFR Sec. 200.3 (a) (2) (iii) is that regular and special education staff is trained on how to administer statewide assessments and are trained on the use of accommodations for students with the most significant cognitive disabilities. Again, the SEO advises district and school staff to refer to its technical assistance manual, *Participation of Students with Disabilities in the New Mexico Statewide Assessment Program*, for guidance on selecting appropriate accommodations.

AYP Calculations

Districts are encouraged to begin collecting data on the number of students who meet participation criteria for alternate assessments long before the testing sessions begin. By doing so, districts will be able to determine whether or not they will exceed the 1.0 percent limit described above. Districts will then be able to make the determination as to whether or not they will submit a request for a waiver or exception to the 1.0 percent limit to the State. States must release AYP results as required under NCLB, with sufficient time for parents to exercise school choice options. The initial release of AYP results will be considered preliminary pending the receipt of requests for waivers or exceptions from districts. If the state approves a district's request, it will be approved for a specified period of time and

AYP will be recalculated. If it is not approved, the AYP ratings for that district and its schools will stand.

Next Steps for Public Education Department

The Public Education Department is working toward developing a process for districts to follow in submitting written requests for a waiver or exception to the 1.0 percent rule. Guidance from OSEP about such a process is still required. Once specific guidance is obtained, the Public Education Department will inform districts of the steps they need to take in order to expedite this process.

The previous version of the NCLB regulations, released March 20, 2003, defined the term “students with the most significant cognitive disability” as “students with disabilities under the IDEA and whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean.” The final regulations, released December 9, 2003, remove that definition and now require state education agencies to determine what constitutes a “most significant cognitive disability.” The Public Education Department’s SEO will work in the coming months to develop further guidance to support IEP teams in making this determination. The SEO may further revise its *Addendum for Determination of Eligibility for the New Mexico Alternate Assessment* to reflect new guidance. Please keep in mind that the definition of “most significant cognitive disability” is not a separate or new category of disability under the IDEA. According to OSEP, “the term...includes that small number of students who are (1) within one or more of the 13 existing categories of disability and (2) whose cognitive impairments may prevent them from attaining grade-level achievement standards, even with the very best instruction.”

The Public Education Department will work to keep districts informed of any new developments or requirements in light of these new requirements. The December 9, 2003, NCLB regulations are posted on the Federal Register and can be accessed at the following web address: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-30092.pdf>. If you have any questions regarding the contents of this memorandum, please call the SEO and ask to speak with Lisa Chacón-Kedge or Dan Farley at (505) 827-6541.

Cc: Dr. Kurt Steinhaus, Deputy Secretary of Education
Dr. Don E. Watson, Assistant Secretary, Accountability and Assessment
SEO Consultants