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34 CFR Part 462

Measuring Educational Gain in the National Reporting System for Adult Education; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 462

RIN 1830–ZA06

Measuring Educational Gain in the National Reporting System for Adult Education

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary establishes procedures for determining the suitability of tests for use in the National Reporting System for Adult Education (NRS). These final regulations also include procedures that States and local eligible providers must follow when using suitable tests for NRS reporting.

DATES: These regulations are effective February 13, 2008.

The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of February 13, 2008. However, affected parties do not have to comply with the information collection requirements in §§ 462.10, 462.11, 462.12, 462.13, and 462.14 until the Department of Education publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Mike Dean, U.S. Department of Education, 400 Maryland Avenue, SW., Room 11152, Potomac Center Plaza, Washington, DC 20202–7240. Telephone: (202) 245–7828 or via Internet: *Mike.Dean@ed.gov.*

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SUPPLEMENTARY INFORMATION: These final regulations further the Department's implementation of section 212 of the Adult Education and Family Literacy Act (Act), 20 U.S.C. 9201 *et seq.*, which establishes a system to assess the effectiveness of eligible agencies in achieving continuous improvement of adult education and literacy activities.

On October 18, 2006, the Secretary published a notice of proposed rulemaking (NPRM) for 34 CFR part 462 in the **Federal Register** (71 FR 61580). In the preamble to the NPRM, the Secretary discussed on pages 61581 and 61582 the significant proposed regulations. As a result of public comment, these final regulations contain several significant changes from the NPRM. While we fully explain these changes in the *Analysis of Comments and Changes* section elsewhere in these regulations, they are summarized as follows:

- Rather than immediately establishing, in § 462.4, a deadline for State and local eligible providers to stop using tests that are currently listed in the Implementation Guidelines: Measures and Methods for the National Reporting System for Adult Education (Guidelines), the Secretary will announce a deadline in a notice published in the **Federal Register** after reviewing the first group of tests submitted under these regulations.
- On April 14, 2008, the Secretary will provide test publishers the first opportunity to submit tests for review under these final regulations. In subsequent years, in accordance with § 462.10(b), test publishers must submit applications to the Secretary by October 1 of each year.
- We have revised several sections of the regulations to distinguish between (1) traditional tests, which use items that have been generated before the test is administered, and (2) computerized tests, which use an algorithm to select test items while the test is being administered. The changes affect §§ 462.3(b) regarding the definition of *test*, 462.11 regarding the information that must be included in a test publisher's application, 462.12 and 462.13 regarding the Secretary's review of tests, and 462.41 regarding the administration of tests.
- Section 462.12(e) has been revised to clarify that test publishers can request that the Secretary reconsider a decision to revoke a determination that a test is suitable before the Secretary makes a final determination about the test's suitability for measuring educational gain for the NRS.

Through these final regulations, we formalize the process for the review and approval of tests for use in the NRS. We believe that the uniform process in these regulations will facilitate test publishers' submissions of tests to the Department for review and will help strengthen the integrity of the NRS as a critical tool for measuring State performance on accountability measures. This process also will provide a means for examining tests that are currently approved for use in the NRS, but that have not been updated recently and, therefore, need to be reassessed for their continuing validity.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 13 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We group and discuss issues under the sections of the regulations to which they pertain, with the appropriate sections of the regulations referenced in parentheses. Generally, we do not address technical and minor changes—and suggested changes the law does not authorize the Secretary to make.

General Comment

Comments: A commenter stated that, because each State uses its own curriculum frameworks, the validity of a particular test may vary to the extent that the test aligns with a State's curricula. The commenter, therefore, stated that the Department could not approve a test for use in all States without evaluating its validity for each State that uses it.

Discussion: We agree that not all States can use any single test. States are expected to select a suitable test or tests that best align with their particular curricula. If a State's curriculum is not aligned with an existing test, the State will need to develop its own test aligned with the State curriculum and submit the test to the Department for review under these final regulations.

Changes: None.

Definitions

Adult Education (§ 462.3)

Comments: A commenter stated that the proposed regulations incorrectly defined *adult education.* The commenter noted that the regulations refer to students ''who are not enrolled in secondary school'' while the Act refers to students ''who are not enrolled or required to be enrolled in secondary school under State law.'' The commenter recommended using the definition in the Act.

Discussion: Section 462.3(a) indicates that certain terms used in the regulations, including *adult education,* are defined in section 203 of the Act. The language the commenter quotes is from the definition of *adult education population* in § 462.3(b), which is not defined in the Act. Nevertheless, we agree that the two definitions should be consistent.

Changes: We have modified the definition of *adult education population* to include individuals who are not required to be enrolled in secondary school under State law in order to make it consistent with the definition of *adult education* in the Act.

Content domains and skill areas (§ 462.3)

Comments: One commenter stated that the term *skill areas* should be used consistently throughout the regulations, instead of the regulations using this term interchangeably with the terms *content domain* and *content specifications.*

Discussion: In drafting the proposed regulations, we used the terms *content domain* and *content specifications* in the sections of the regulations applicable to test publishers because those are terms of art in the test publishing industry. Likewise, the term *NRS skill areas* is used in the sections of the regulations that are applicable to States and local eligible recipients because this is a term of art in the adult education program. Although we used the term *content specifications* in the proposed regulations, we did not include it as a defined term. We think it is appropriate to do so in the final regulations because the term has the same meaning as the terms *content domains* and *NRS skill areas.*

Changes: We have modified the defined term, *content domains or NRS skill areas,* in proposed § 462.3 to also include the term *content specifications.*

Test publisher (§ 462.3)

Comments: A few commenters expressed concern that the definition of *test publisher* might be too restrictive and could prevent the review of some tests. Commenters recommended expanding the definition to include universities; adult education programs; other entities that possess sufficient expertise and capacity to develop, document, and defend assessments; entities in the process of copyrighting a test; and entities holding an unregistered copyright to a test. One commenter agreed that the Secretary should review only tests from test publishers owning a registered copyright.

Discussion: The proposed regulations did not prohibit universities, adult education programs, or other legitimate test developers from submitting a test for review. We explained in the preamble to the NPRM that entities submitting tests for the Secretary's review must be knowledgeable about the test, be able to respond to technical questions the Secretary raises during the review process, and have the legal right to submit the test for review. With regard to the recommendation to have the Secretary approve other entities who can submit a test for review, it would be inappropriate and counter-productive for the Secretary to determine the suitability of a test submitted for review without the permission of the rightful owner of a registered copyright of the test or the entity licensed by the copyright holder to sell or distribute the test.

Changes: None.

June 30, 2008, deadline for transitioning to suitable tests (§ 462.4)

Comments: Several commenters expressed concern that States might not have adequate time by the June 30, 2008, deadline to change assessment instruments, particularly if the Secretary determines that a test is no longer suitable for use in the NRS. The commenters stated that States need time to rewrite assessment policies, select replacement tests, retrain personnel, purchase materials, modify complex data systems, and, possibly, hire special contractors to assist with modifying those data systems. A different commenter stated that it might take two years to implement a change in State assessment instruments. Commenters recommended that the regulations permit a State to negotiate a practical transition timeline with the Secretary.

Commenters also recommended that, because transitioning from unsuitable tests places a burden on States' financial resources and professional development capabilities, the regulations should be deferred until the amount of funds available for State leadership becomes 15 percent of the Federal allocation. One commenter indicated that local programs often pay the significant cost of purchasing assessment instruments and that replacing an entire assessment system in a single budget year could devastate a local budget.

Discussion: Proposed § 462.4 would have permitted States and local eligible providers to continue to measure educational gain using a test that was identified in the Guidelines until June 30, 2008. However, we specifically asked for comments on whether this deadline would provide sufficient time for States and local eligible recipients to make the transition to suitable tests because we recognized that changing tests significantly affects a State's accountability system. Our intention in proposing the June 30, 2008, deadline was to ensure that States stop using unsuitable tests on a date certain but still provide enough time for (1) the Secretary to complete one review of tests and (2) States and local eligible recipients to transition from unsuitable tests to suitable tests. We also intended to impose a deadline that would result in the efficient removal of unsuitable tests from use in the NRS. Once the Secretary determines that a test is unsuitable for use in the NRS, permitting States to continue using it for long periods of time would be inconsistent with the Secretary's intent to improve data quality.

While we understand the desire to defer implementation of the regulations because of cost factors and timing constraints, improving the quality of State accountability systems and the data reported by the NRS is of immediate importance and should not be unduly delayed. Adult Education and Family Literacy Programs, like other Federal programs, must report on progress made, achievements, and overall program effectiveness using valid and reliable measures of performance. The regulations are designed to improve the reliability and validity of data used to report the educational gains of students, and thereby improve the reliability and validity of data on overall program effectiveness.

In light of the commenters' concerns, and to accommodate States' needs to make system revisions, provide training, and acquire tests, we will not specify a date in these regulations by which States and local eligible providers must cease using unsuitable tests; instead, we have provided for the Secretary to announce this deadline in a notice published in the **Federal Register**.

Changes: We have revised § 462.4 to provide that the Secretary will announce, through a notice in the **Federal Register**, a deadline by which States and local eligible providers must stop using tests that are currently listed in the Guidelines and that the Secretary has determined not to be suitable for use in the NRS under these final regulations.

Deadline for submitting tests for review by the Secretary (§ 462.10(b))

Comments: One commenter agreed that the regulations should provide an annual deadline for test publishers to submit tests to the Secretary for review. Other commenters requested clarification on when the review cycle begins and ends. Another commenter asked if the first opportunity to submit tests would be in 2007 or in 2008. Yet another commenter suggested that the date for submission of tests be no sooner than two months and no later than four months after the effective date of the final regulations.

Discussion: We are establishing April 14, 2008 as the first date by which test publishers must submit tests for review under these regulations. In subsequent years, test publishers must submit applications to the Secretary by October 1 of each year. However, because we cannot predict the number of tests that will be submitted for review nor the amount of time it will take to review the tests, it is not possible to predict how long the process will take from year to year. We, therefore, do not think it is appropriate to establish a date on which we will announce the results of the Secretary's review. We will publish the list of suitable tests well before the program year in which they might be used.

Changes: None.

Content of an application—General (§ 462.11)

Comments: A commenter responded positively to the regulations' specific delineation of what an application for test review must include. Another commenter asked whether test publishers must use a form in addition to submitting the information outlined in proposed § 462.11(b) through (j). Another commenter stated that it may be too constraining to require test publishers to arrange application information in the order established by proposed § 462.11(b) through (j).

Discussion: To facilitate the review process, the regulations in § 462.11 describe the specific requirements for the contents of an application. A test publisher is not required to submit any form or information except as required in § 462.11. We believe that organizing the information in the application in the order presented in § 462.11(b) through (j) will help to ensure that information about a test is easily available to and reviewable by the educational testing and assessment experts who will review the tests; however, to provide test publishers with some flexibility in organizing their applications, we will permit them to include in their applications a table of contents that identifies the location of the information requested in § 462.11(b) through (j).

Changes: We have revised § 462.11(a)(3)(ii) to permit test publishers to include a table of contents in their applications as an alternative to presenting information in the application in the order described in § 462.11(b) through (j).

Content of an application—Involvement of the adult education population (§ 462.11)

Comments: A commenter stated that proposed § 462.11 would generally require a test publisher to demonstrate that adult educators have been involved in a test's development and maintenance, and that some publishers would not meet that requirement easily. The commenter also stated that compliance with the regulations would require customized tests developed specifically for use in adult education, which would increase the cost and exclude some quality assessments.

Discussion: The regulations do not require a test publisher to demonstrate that adult educators have been involved in a test's development and maintenance. We realize that tests developed for other populations might not be suitable for use in the NRS because they were not developed with the adult education population in mind and do not readily measure the educational functioning levels used in the NRS. The regulations are clear that the Secretary reviews tests to determine their suitability for use in the NRS. For instance, § 462.13(a) indicates that, in order for the Secretary to consider a test suitable for use in the NRS, the test must measure the NRS educational functioning levels of members of the adult education population. Accordingly, § 462.11(c)(1)(ii) requires information that demonstrates the extent to which the adult education population was used to develop and evaluate a test, which is appropriate because the tests will be used with that population.

Changes: None.

Content of an application—Motivation of examinees (§ 462.11(c)(1)(iii))

Comments: Two commenters were concerned that test publishers would have to include information in the application on the motivation of examinees used in the development of a test. One commenter indicated that ''there is no generally accepted method for identifying and classifying the degree and level of motivation of examinees.'' The commenter stated that a test publisher could make some assumptions about motivation, but indicated that the assumptions would be subjective and not scientifically valid. The second commenter requested clarification of the expectation that examinees would be motivated.

Discussion: The regulations only require test publishers to provide in their applications information on the steps, if any, taken to ensure that examinees were motivated while responding to the test. The regulations do not require test publishers to take steps to ensure that examinees were motivated while responding to the test. Further, if a test publisher were to take such steps, the test publisher would not be required to use any particular methodology for doing so.

Changes: None.

Content of an application—Item development (§ 462.11(c))

Comments: A commenter noted that the proposed regulations did not require test publishers to include in their applications information on item selection or form development for the test under review.

Discussion: The commenter's observation is correct and calls attention to the need for the regulations to require test publishers to include this information in their applications and for the regulations to clarify the distinction between traditional tests, which use items that have been generated before the test is administered, and those that use a computerized algorithm to select test items while the test is being administered.

Changes: We added a new paragraph (3) to § 462.11(c) to require test publishers to describe in their applications the procedures used to assign items (1) to forms, for tests that are constructed prior to being administered to examinees, or (2) to examinees, for adaptive tests in which items are selected in real time.

Content of an application—Maintenance: history of test use (§ 462.11(d)(4))

Comments: A few commenters recommended that the regulations require test publishers to include in their applications additional information on the history of the test's use.

Discussion: The regulations require test publishers to provide documentation of how a test is maintained, including a history of the test's use. We are particularly interested in information on how many times the test forms have been administered. This information is useful in gauging how much the test forms have been exposed and the likelihood of test items being compromised.

Changes: We have revised § 462.11(d)(4) to clarify that information submitted in the application regarding the history of a test's use must include information on the number of times the test has been administered.

Content of an application—Maintenance (§ 462.11(d)(5))

Comments: A commenter recommended that the regulations require test publishers to include in their applications the procedures used for computerized adaptive tests to select

subsets of items for administration, determine the starting point and termination conditions, score the tests, and control item exposure.

Discussion: We agree that requiring test publishers to provide the recommended information will help experts to better assess the suitability of computerized adaptive tests for use in the NRS.

Changes: We added a new paragraph (5) to § 462.11(d) to require test publishers to include in their applications for computerized adaptive tests the information recommended by the commenter.

Content of an application—Match of content to the NRS educational functioning levels (content validity) (§ 462.11(e)(2) and (4))

Comments: A few commenters asked if proposed § 462.11(e)(2) and (4) were requesting the same information, and sought clarification regarding the difference between the paragraphs.

Discussion: The paragraphs are requesting the same information.

Changes: We have removed § 462.11(e)(4) to eliminate the duplicate information requirement and renumbered the remaining paragraphs.

Content of an application—Procedures for matching scores to NRS educational functioning levels (§ 462.11(f)(2))

Comments: A commenter stated that requiring the judgments of subject-matter experts to translate an examinee's performance to the examinee's standing with respect to the NRS educational functioning levels might not prove fruitful and would substantially increase the cost of test development. The commenter stated that determination of score ranges and their fit to the existing NRS levels can be made based on an analysis of skills being assessed and an intimate knowledge of the assessment tools being used.

Discussion: Section 462.11(f) does not require the use of subject matter experts. It requires test publishers to document the procedure they use to translate the performance of an examinee to the examinee's standing with respect to the NRS educational functioning levels. A test publisher can choose the procedure it thinks is best. However, if a test publisher chooses to use judgment-based procedures to translate performance, the regulations require the publisher to provide information on that procedure, including information concerning the subject matter experts the test publisher used. Requiring this information is consistent with accepted professional test development and standard-setting procedures in the 1999 edition of the *Standards for Educational and Psychological Testing* and will help test publishers demonstrate the suitability of their tests for measuring educational gain for the NRS.

Test scores are only useful in this context if they can accurately classify individuals according to NRS levels. Therefore, it is necessary for test publishers to demonstrate how the range of test scores map onto the NRS levels and do so in a reliable and valid fashion. In the test development process, developers need to show that the range of test scores produced on their tests covers the range of skills depicted in the NRS levels, and more importantly, shows which range of scores corresponds to a specific NRS level.

Changes: None.

Content of an application—Reliability (§ 462.11(g))

Comments: A commenter noted that in discussing reliability the proposed regulations used the phrase ''the correlation between raw or number correct scores.'' The commenter noted that this phraseology is not applicable to tests that use an adaptive structure or a multi-parameter item response theory model. The commenter stated that, in such situations, the particular items answered correctly, not the number of items answered correctly, determine the score.

Discussion: We agree with the commenter that the phrase in the regulations is not applicable to computerized adaptive tests.

Changes: We revised § 462.11(g)(1) to require that, in the case of computerized adaptive tests, test publishers document in their applications the correlation between raw (or scale) scores across alternate administrations of the test.

Comments: With regard to proposed § 462.11(g)(2), a commenter suggested that information about the number of individuals classified into NRS levels would only provide useful data if the information were submitted after the Department approved a test's scores-to-NRS-levels crosswalk. The commenter stated that requiring this information prior to test approval could produce information that is not meaningful. Another commenter responded positively to the requirement for ''inclusion of information about decision/classification consistency.''

Discussion: We do not agree that the Department should approve the rules a test publisher uses to transform the scores of a test into estimates of examinees' NRS educational functioning levels prior to the test publisher providing evidence that the transformation rules result in reliable, i.e., consistent, educational functioning level classifications. We believe that, when an application is submitted, a test publisher should be able to provide documentation of the degree of consistency in performance across different forms of the test, particularly regarding which examinees are classified into the same NRS educational functioning levels across different forms of the test. By demonstrating that a test can consistently classify individuals into the same NRS educational functioning levels across different forms of the test, the test publisher assures the Department that assessments of educational gain are the result of instruction and other interventions to improve literacy, not measurement error. Without this demonstration of classification consistency, reports of educational gain are uninterpretable. This information is very important to determinations about the suitability of a test and whether the test measures the NRS educational functioning levels as required in § 462.13(a).

Changes: None.

Content of an application—Construct validity (§ 462.11(h))

Comments: A commenter expressed concern that proposed § 462.11(h) would have required the results of several studies on the adult education population in connection with other tests designed to assess educational gain, which can be useful and meaningful, but also time-consuming and expensive. The commenter indicated that imposing this requirement after, not before, test approval would permit test publishers to collaborate and conduct the studies in a more cost-effective manner. Further, the commenter stated that the requirement could exclude some qualified assessments. The commenter recommended that the regulations be rewritten so that (1) these studies would only be required of tests that have been approved and (2) a five-year period could be provided for conducting the studies.

Discussion: We do not agree that a test should be approved for use in the NRS prior to the test publisher providing documentation of the appropriateness of a test for measuring educational gain for the NRS, i.e., documentation that the test measures what it is intended to measure. Section 462.11(h) is consistent with the 1999 edition of the *Standards for Educational and Psychological Testing,* which stresses the importance of gathering evidence of the test's

construct validity. The Secretary cannot determine whether a test is suitable for use in the NRS without having evidence of the test's construct validity.

Changes: None.

Content of an application—Construct validity (§ 462.11(h)(1))

Comments: A commenter expressed concern that proposed § 462.11(h)(1) would have required test publishers to document the appropriateness of a given test for measuring educational gain in the NRS, including the correlation between the NRS test results and the results of other tests that assess educational gain in the same adult education population. The commenter stated that this comparison could lead to faulty conclusions if the other test is not an accurate measure of the construct.

Discussion: We believe that it is appropriate to look at test correlations as one criterion for evaluating construct validity. Generally, a test should correlate with other tests known to measure the same construct, and it should not correlate (or have a very low correlation) with tests known to measure different constructs. This latter relationship depends upon the nature of the comparison constructs. To the extent that the two constructs are theoretically related, a correlation that approximates their theoretical relationship is expected.

Changes: None.

Content of an application—Construct validity (§ 462.11(h)(2))

Comments: Two commenters stated that proposed § 462.11(h)(2) should be reconsidered because ''hours of instruction'' is not a variable that correlates highly with test scores.

Discussion: Proposed § 462.11(h)(2) would have required test publishers to document that a test measures what it is intended to measure, including the extent to which the raw or scale scores are related to other relevant variables, such as hours of instruction or other important process or outcome variables. While we are aware of data establishing the relationship between Adult Basic Education (ABE) test scores and hours of instruction, the reference to ''hours of instruction'' in § 462.11(h)(2) was only intended to provide an example of a possibly relevant variable.

Changes: We have revised § 462.11(h)(2) to clarify that ''hours of instruction'' is an example of possibly relevant variables.

Content of an application—Other information (§ 462.11(i)(1))

Comments: A commenter requested clarification of the phrase ''an analysis of the effects of time on performance'' used in proposed § 462.11(i)(1). The commenter thought the phrase meant ''the effects of the time it takes to administer the test or for a student to complete it.''

Discussion: The commenter is correct. Section 462.11(i)(1) requires an application to include a description of the manner in which test administration time was determined and an analysis of the speededness of the test. The term ''speededness'' as used in § 462.11(i)(1) refers to the effects on test performance that result from the time it takes to administer or to complete the test.

Changes: We have revised § 462.11(i)(1) to clarify that we require both information on the manner in which test administration time was determined and an analysis of the speededness of the test.

Content of an application—Other information (§ 462.11(i)(5))

Comments: A commenter requested clarification of the term ''retesting procedures'' used in proposed § 462.11(i)(5). The commenter asked if the term referred to ''pre- and post-testing.''

Discussion: The term ''retesting'' as used in § 462.11(i)(5) refers to the re-administration of a test that might be necessary because of problems in the original administration (e.g., the test taker becomes ill during the test and cannot finish, there are external interruptions during testing, or there are administration errors).

Changes: We have revised § 462.11(i)(5) to clarify that ''retesting'' refers to the re-administration of a test that might be necessary because of problems in the original administration such as, the test taker becomes ill during the test and cannot finish, there are external interruptions during testing, or there are administration errors.

Content of an application—Other information (§ 462.11(i)(6))

Comments: A commenter noted that proposed § 462.11(i)(6) would require test publishers to provide such other evidence as the Secretary determines is necessary to establish the test's compliance with the criteria and requirements in proposed § 462.13. The commenter requested clarification regarding what that evidence would be.

Discussion: While § 462.11 includes the information we anticipate the Secretary will need to determine whether a test is suitable for use in the NRS, we recognize that the Secretary can require a test publisher to provide additional information to establish a test's compliance with the criteria and requirements in § 462.13. Section 462.11(i)(6) merely alerts test publishers to this possibility.

Changes: None.

Content of an application—Previous tests (§ 462.11(j))

Comments: A commenter asked if a test publisher submitting an application for a test that is currently approved for use in the NRS would have to provide the information in proposed § 462.11(b) through (i) or would have to provide only documentation of periodic review of the content and specifications of the test as specified in proposed § 462.11(j)(1).

Discussion: As indicated in § 462.11(a)(1), a test publisher must include with its application information listed in paragraphs (b) through (i) as well as the applicable information in paragraph (j). All applications must, therefore, include the information in § 462.11(b) through (i).

Changes: None.

Comments: A commenter requested clarification of the term ''periodic review'' used in proposed § 462.11(j)(1) and (2) with regard to the documentation that must be submitted for a previous test to ensure that it continues to reflect NRS educational functioning levels. The commenter asked if annual or bi-annual reviews constitute a ''periodic review,'' and suggested that the regulations use the term ''current review'' and specify the intervals for the reviews.

The commenter also suggested that the regulations address the possibility that the NRS educational functioning levels might change. The commenter stated that realigning tests to revised NRS educational functioning levels would cause a burden for test publishers, and that test publishers need at least one year advance notice of any proposed changes in the NRS educational functioning levels.

Discussion: Section 462.11(j) requires test publishers to provide specific information about currently used tests to ensure that the tests continue to reflect NRS educational functioning levels. The shorter the period of time between reviews of a test, the more relevant the results would be in determining the test's content validity with regard to NRS educational functioning levels. However, we are reluctant to specify a time-frame for reviews because we do not want to create an additional burden for test

publishers by requiring reviews more frequently than a test publisher typically would perform.

With regard to providing advance notice to test publishers about changes in the NRS educational functioning levels, in the past we have customarily provided notice to all concerned parties, including test publishers, well in advance of any changes to the NRS educational functioning levels by posting notices on the Internet at *http://www.nrsweb.org.* We intend to continue that practice and, because the educational functioning levels are included in § 462.44 of these final regulations, will publish a notice of proposed rulemaking in the **Federal Register** requesting comment on any proposed changes to § 462.44.

Changes: None.

Comments: A commenter asked if the phrase ''previous tests used in the NRS'' in proposed § 462.11(j)(1) referred only to those tests previously listed in the NRS Implementation Guidelines.

Discussion: The ''previous tests'' discussed in § 462.11(j)(1) are tests that were listed in the Guidelines and used to measure educational gain in the NRS before the effective date of these final regulations.

Changes: None.

Comments: A commenter requested clarification of the requirement in proposed § 462.11(j)(3) for test publishers to submit ''new data'' for tests that have not changed in the seven years since the Secretary determined the tests were suitable for use in the NRS.

Discussion: The intent of § 462.11(j) is to ensure that a test publisher provides specific information about a test that has been in use for years, but that has not changed in the seven years since the Secretary determined the test was suitable for use in the NRS. In this circumstance, the regulations require test publishers to provide new, i.e., updated, data that support the validity of the test.

Changes: We have revised § 462.11(j)(3) to clarify that test publishers must provide updated data to support test validity.

Computerized tests (§§ 462.3, 462.11(c)(3), 462.12(a)(2)(iii), 462.13(e), and 462.41(c)(3))

Comments: A commenter acknowledged that the proposed regulations attempted to distinguish between traditional paper-based tests and computerized tests. However, the commenter recommended that the regulations be modified to clarify that the term ''parallel forms'' refers to ''paper-based tests or computerized tests that do not involve an item selection algorithm, such as computerized adaptive tests, multistage adaptive tests, or linear on-the-fly tests.'' The commenter suggested specifically changing the proposed regulatory language from ''and have two or more secure, parallel, equated forms'' to ''and have two or more secure, parallel forms if the test is produced before it is administered to a learner (e.g., paper-based tests). If the test uses a computerized algorithm for administering items in real time, the size of the item pool and the method of item selection must ensure negligible overlap in items across pre- and post-test.'' Another commenter also emphasized the importance of recognizing computerized tests.

Discussion: As we have discussed elsewhere in this notice, we agree that the regulations should clarify the distinction between (1) traditional tests, which use items that are generated before the test is administered, and (2) computerized tests, which use an algorithm to select test items while the test is being administered.

Changes: We have revised §§ 462.3 (the definition of *test*), 462.11(c)(3), 462.12(a)(2)(iii), 462.13(e), and 462.41(c)(3) to provide the clarification recommended by the commenters.

Tests that measure some, but not all, educational functioning levels (§§ 462.12(a)(2)(iv) and 462.13(b))

Comments: A commenter requested clarification on whether the Secretary will review tests that currently measure only some, but not all, educational functioning levels.

Discussion: The regulations provide for the Secretary to review tests that measure some, but not all, educational functioning levels. Sections 462.12(a)(2)(iv) and 462.13(b) indicate that the Secretary reviews and determines the suitability of a test if an application includes a test that samples one or more of the major content domains of the NRS educational functioning levels of Adult Basic Education (ABE), Adult Secondary Education (ASE), or English-As-A-Second Language (ESL) with sufficient numbers of questions to represent adequately the domain or domains. Further, § 462.12(b)(2) provides flexibility for the Secretary to determine that a test or a sub-test is suitable for use in the NRS if it measures the content domain of some, but not all, of the NRS educational functioning levels.

Changes: None.

Procedures the Secretary uses to review the suitability of tests (§ 462.12(b))

Comments: A commenter asked if the results of the Secretary's review of a test would be posted for public review. Another commenter suggested that the regulations should provide that test publishers be notified at least 30 days before the Secretary notifies States and local eligible providers that a test is unsuitable for use in the NRS. With regard to tests that the Secretary determines are unsuitable, a different commenter recommended that the regulations provide a time-frame by which the Secretary would review any additional information submitted by the test publisher and make a final determination.

Discussion: In accordance with § 462.12(c)(2), the Secretary will annually notify the public through a notice published in the **Federal Register** and posted on the Internet at *http://www.nrsweb.org* of tests that are suitable for use in the NRS. Under § 462.12(e)(5), the Secretary will follow the same procedure to notify the public when a test that was previously determined suitable is determined to be unsuitable. However, the Secretary will not post for public review the Secretary's determination regarding a test that has not been previously reviewed and that the Secretary determines to be unsuitable. We do not believe this is necessary because the Secretary's determination regarding these tests will not have an impact on the public, States, or local eligible providers.

Proposed § 462.12(d) provided that a test publisher would have 30 days to request that the Secretary reconsider the decision that a test is unsuitable. Therefore, it will be after this 30-day period that the Secretary will notify the public of a decision regarding a test.

Because it is impossible to anticipate the complexities that might be involved in decisions regarding a test that was initially determined to be unsuitable, we do not believe it would be appropriate to limit the time the Secretary takes to review additional information provided by a test publisher and make a final determination regarding the suitability of a test. However, we intend to conduct the review as expeditiously as possible.

Changes: None.

Publishing the list of suitable tests (§ 462.12(c))

Comments: A commenter suggested that if tests must be submitted for review by October 1 of each year, the test publisher and adult education programs should be informed of which

tests are approved no later than February 1 of the following year.

Discussion: Within a reasonable time-frame, the Secretary will review tests, notify test publishers of the results of the review, and provide States and local eligible providers with a list of suitable tests. However, because we cannot predict the number of tests that will be submitted for review nor the amount of time it will take to review the tests, it is not possible to predict how long the process will take from year to year. We, therefore, do not think it is appropriate to establish a date by which we will announce the results of the Secretary's review. We will publish the list of suitable tests well before the program year in which they can be used.

Changes: None.

Revocation of determination that a test is suitable (§ 462.12(e))

Comments: A commenter suggested that test publishers be notified of the Secretary's decision to revoke a determination that a test is suitable before the Secretary notifies the general public. The commenter stated that test publishers should be given sufficient time to address the Secretary's concerns before the Secretary revokes the determination that the test is suitable. This would provide a process comparable to the process proposed for a test that the Secretary determines is unsuitable.

Discussion: We agree that test publishers should have an opportunity to address the Secretary's decision to revoke a determination that a test is suitable before that determination becomes a final decision.

Changes: We have revised § 462.12(e) to give test publishers an opportunity to request that the Secretary reconsider a decision to revoke a determination that a test is unsuitable.

Comments: A commenter stated that proposed § 462.14(b) was unclear concerning the reasons a test's seven-year approval status might be revoked.

Discussion: Section 462.12(e), not § 462.14(b), establishes the reasons for which the Secretary can revoke the determination regarding the suitability of a test. In the proposed regulation, we stated that the Secretary can revoke the determination if the Secretary determines that the information submitted as a basis for the Secretary's review of the test was inaccurate. In proposed § 462.14(b), however, we implied that the Secretary also could revoke a determination regarding the suitability of a test if the test is substantially revised—for example, by changing its structure, number of items, content specifications, item types or sub-tests.

The proposed regulations were, therefore, unclear as to whether the Secretary could revoke a determination about the suitability of a test if the test had been substantially revised. We intended that revision of a test would be a valid reason for revoking a determination about test suitability.

Changes: We have revised § 462.12(e) to clarify that substantial changes to a test is one of the reasons the Secretary can revoke a determination regarding the suitability of a test.

Criteria and requirements for determining test suitability (§ 462.13(c)(1), (d), and (f)(3) (proposed (g)(3))

Comments: A commenter noted that *The Standards for Educational and Psychological Testing* referenced in § 462.13(c) provides specific guidelines for the technical documentation, including evidence of validity that should be made available to interested parties. The commenter recommended clarifying that publishers should provide the Secretary with information regarding test development and validity.

Discussion: In proposed § 462.13(c)(1), we indicated that, in order for a test to be determined suitable for use in the NRS, the test would have to meet all applicable and feasible standards for test construction provided in *The Standards for Educational and Psychological Testing.* We did not intend this language to imply that the Secretary would review only information that is related to test development. We agree with the commenter that validity is an important factor in test evaluation and make it clear in § 462.11(e) through (g), that test publishers must include in their applications information on content validity, reliability, and construct validity. However, we think adding the reference to ''validity'' in § 462.13(c)(1) will reinforce the importance of test publishers providing information on validity.

Changes: We have revised § 462.13(c)(1) to require a test to meet all applicable and feasible standards for test construction and validity that are provided in the *Standards for Educational and Psychological Testing.*

Comments: A commenter noted that many factors influence the appropriate time between testing and retesting, including intensity of instruction, frequency and length of class meetings, and class size. The commenter wanted to ''decrease the emphasis on a single protocol for post-testing'' and suggested that, when discussing the time between test-taking, the regulations use the term ''publisher's recommendations'' instead of the term ''publisher's guidelines'' that was used in proposed §§ 462.13(d) and 462.40(c)(3)(ii).

Discussion: We do not agree that the term ''publisher's guidelines'' emphasizes the use of a single protocol when determining when to administer a post-test. State and local eligible providers, like the commenter, are aware that many factors influence the appropriate time between pre-testing and post-testing. These factors are taken into consideration by test administrators at the local level. However, because tests differ, test administrators rely on the guidelines, developed during test construction and validation and provided by test publishers, to help ensure that a sufficient amount of time has passed before a post-test is given in order to optimize the measurement of educational gains.

Changes: None.

Comments: A commenter requested clarification of § 462.13(f)(3) (proposed § 462.13(g)(3)), which requires the publisher of a test modified for an individual with a disability to recommend educational functioning levels based on the previous performance of test-takers who are members of the adult education population of interest to the NRS in order for the Secretary to consider a test suitable for use.

Discussion: In order for the Secretary to consider a test that has been modified for individuals with disabilities suitable for use in the NRS, test publishers must (1) demonstrate that adult education students with disabilities were included in the pilot or field test referred to in § 462.11(c)(1); (2) match scores to the NRS educational functioning levels based on the information obtained from adult education students with the disability who participated in the pilot or field test and for whom the test has been adapted; and (3) provide in the application, as required in § 462.11(f), documentation of the adequacy of the procedure used to translate the performance of adult education students with the disability for whom the test has been modified to an estimate of the examinees' standing with respect to the NRS educational functional levels.

Changes: In response to the comment, we changed § 462.13(f)(3) to clarify that the Secretary considers a test modified for individuals with disabilities suitable for use in the NRS if test publishers (1) recommend educational functioning levels based on the information obtained from adult education students who participated in the pilot or field test and who have the disability for

which the test has been adapted and (2) provide documentation of the adequacy of the procedure used to translate the performance of adult education students with the disability for whom the test has been modified to an estimate of the examinees' standing with respect to the NRS educational functional levels.

Subpart D—General (§§ 462.40–462.44)

Comments: Several commenters noted that the Department currently provides non-regulatory guidance to States on the NRS. The commenters asked why the Department is issuing regulations when most States comply with and are successfully implementing the non-regulatory guidance and the guidance provides each State with needed flexibility. The commenters stated that ''as long as States are complying with guidelines and meeting performance standards, we understand that the Federal role is to limit regulations and allow the States to continually increase their capabilities to improve program services.'' The commenters, therefore, recommended that subpart D be removed from the final regulations and that the Secretary provide technical assistance and resources to the few States that are having difficulty creating effective assessment and data procedures. Additionally, one of these commenters stated that while guidance is valued, regulations sometimes seem arbitrary, intrusive, and unnecessary.

Discussion: It is the Department's policy to regulate only when essential to promote quality, and then in the most flexible, most equitable, and least burdensome way possible. We believe these regulations comply with that policy. While the regulations in subpart D are legally binding, they largely codify the guidance provided in the Guidelines and the ''State Assessment Policy Guidance.'' Although States have made significant progress, there remains variability in the quality of State processes and procedures in the collection and reporting of data on student assessment and performance. These regulations, like the Guidelines, technical assistance activities, and other efforts the Department has supported to improve data quality, provide a significant tool to create a standard level of quality among all States and thereby strengthen the integrity of the NRS as a critical tool for measuring State performance and the impact of adult education.

Changes: None.

Meaning of the term ''placement'' (§§ 462.40(c)(4), (c)(6) and (c)(10), 462.41(c)(3) (proposed), 462.42(a), (b)(2), and (c)(1), (d)(1), and (d)(2), and 462.43(a)(2) and (b))

Comments: A few commenters stated that using the term ''placement'' in the regulations to mean the ''assignment of a student to the appropriate NRS educational functioning level'' is confusing because the traditional meaning of placement is ''placing a student in a particular class or other instructional offering.'' Commenters noted that tests designed for placement are different from those used to measure educational gain.

Discussion: The regulations, like the Guidelines currently used by States, use the terms ''place'' and ''placement'' as terms of art to refer to the placement of students in NRS educational functioning levels in order to measure and then report on educational gain in the NRS. It is only within this context that the terms are used, and no other meaning should be inferred.

Changes: None.

Placing students (§ 462.42(d)(1) and (2))

Comments: A commenter stated that placing a student in an NRS educational functioning level using the lowest test score could result in programs providing instruction in skill areas that are not most relevant to the student. Further, the commenter stated that programs (1) should not place students based on one test and (2) should be allowed to use multiple placement tools and other pertinent information, such as student goals, to determine placement. Another commenter stated that all scores have some measurement error and that instituting a policy of using the lowest test score might introduce systematic, rather than random, measurement errors. This commenter also indicated that the policy of using the lowest test score could encourage programs to teach students only in an area where gain is to be expected. The commenter stated that a better policy would be either to focus on the learner's primary subject area at pre-test, or evaluate gain based on a composite score across areas.

Discussion: With regard to placing a student using the lowest test score when the student is tested in multiple skill areas, § 462.42(d)(1) and (2) are consistent with the policy in the Guidelines, which indicates: ''States should provide to local programs the criteria for placing students at each educational functioning level, using test scores from the initial assessment. Not all of the skill areas described in the [functioning] level descriptors need to be used to place students, but the skill used should be the areas most relevant to the students' needs and the program's curriculum. If multiple skill areas are assessed and the student has differing abilities in each area, however, NRS policy requires that the program place the student according to the lowest skill area.'' The Department's policy ensures that States use a standardized approach when reporting educational gain, which ensures comparability of data. These regulations use the term ''placement'' as a term of art to refer to the placement of students in NRS educational functioning levels in order to measure and then report on educational gain in the NRS. Placement of a student in an educational functioning level for NRS purposes does not affect placement in an instructional program. States can use a variety of tools when devising an instructional program for students. States and local eligible providers know that using the lowest test score is a convention used for reporting purposes and it is not intended to encourage programs to teach students only in skill areas in which students scored the lowest on tests or only in skill areas in which gain is expected. The policy also is not intended to restrict the number or type of assessments used to identify a student's needs and to customize an instructional program to meet those needs. In fact, programs are expected to teach students in multiple areas depending on the students' needs and the programs' curricula.

We do not agree with the commenter that using the lowest test score might introduce systematic, rather than random, measurement error. Using the lowest test score in order to operationalize educational gain in a consistent manner across States for reporting purposes is error free. If tests have met the standards established in these regulations, they should be able to assess skills at any level with minimum error.

Changes: None.

Measuring educational gain (§ 462.43)

Comments: A commenter suggested the Department measure significant gain as determined by test developers. The commenter thought this approach would be the most accurate measure of gain. The commenter opposed the approach in proposed § 462.43, stating that it would only capture learning gain when a learner completes an educational functioning level by crossing artificial cut points regardless of the starting level. Another commenter stated that the approach for measuring gain in § 462.43 is ''too coarse, is likely

to capture only extreme gain, and will miss very significant educational gains that occur within an EFL [educational functioning level].'' The commenter suggested that the Department consider using other options for demonstrating educational gain such as ''achieving a gain score that is beyond chance expectations (using a scale score, which is more reliable than a proficiency classification).'' Another commenter stated that ''awarding only one educational gain to students completing more than one educational functioning level to a high degree misrepresents and under reports the effectiveness and accomplishment of both adult teacher and learner.'' This commenter also stated that the current NRS policy of reporting an educational gain for obtaining a General Educational Development (GED) diploma by learners in ASE II, but not to those in ABE or ASE I, misrepresents and under-reports accomplishments. A different commenter suggested that attainment of a GED diploma should be recognized as an educational gain.

Discussion: The approach for measuring educational gain in § 462.43 is well established and accepted by the field. Over a two-year period, the Department consulted with States and convened a statutorily mandated panel in order to develop a performance accountability system for the adult education program. During that time, consensus was reached on defining the performance measures, including how to measure educational gain. States and other participating entities agreed that the approach in § 462.43 is the most effective means of obtaining accurate, reliable, and valid information on student performance.

Changes: None.

High Advanced ESL (§ 462.44)

Comments: Some commenters opposed proposed § 462.44 because it, like the Guidelines, eliminated the ''High Advanced ESL'' literacy level from the Functioning Level Table. The commenters noted that the change means that State and local agencies will no longer be able to report educational gain for adult English language learners above the ''Advanced ESL'' literacy level or Student Performance Level (SPL) 6. The commenters stated that, based on communications with the Department's Office of Vocational and Adult Education (OVAE), the change also means that programs can no longer provide ''High Advanced ESL'' instruction in adult education programs. The commenters indicated that OVAE has suggested that students who would have received ''High Advanced ESL'' instruction should now complete their preparation by moving from ESL classes to either adult basic education or adult secondary education classes. The commenters expressed their belief that OVAE's suggestion is pedagogically problematic and, more importantly, would prevent programs from adequately addressing the learning needs of ESL learners. Further, the commenters opposed stopping ESL instruction at the ''Advanced ESL'' literacy level or SPL 6 because they believe students at that level do not have language and literacy skills that are sufficient to transition successfully to postsecondary education or to meet the demands of the workplace—two of the purposes for adult education that are cited in the Act. Commenters noted that the regulations do not place this same restriction on native English speakers and recommended that the ''High Advanced ESL'' literacy level be restored to the Functioning Level Table. Finally, the commenters recommended that the regulations provide States with flexibility and not limit program services.

Discussion: Commenters are correct in that proposed § 462.44 would codify a change in the Guidelines by eliminating the ''High Advanced ESL'' literacy level from the Functioning Level Table. The change was made in 2006 as part of the information collection request for the Guidelines. However, before the change was made, (1) OVAE consulted with Adult Education State Directors and (2) the Office of Management and Budget (OMB) provided interested Federal agencies and the public, including States and local eligible providers, an opportunity to comment on the information collection request, which included the removal of the ''High Advanced ESL'' literacy level from the Functioning Level Table. We received no negative comments regarding our intent to eliminate the ''High Advanced ESL'' literacy level, and therefore, changed the Functioning Level Table in the Guidelines and in the proposed regulations.

The change in the Functioning Level Table does not mean that adult education programs can no longer provide services to ''High Advanced ESL'' students. These regulations are consistent with the Act, which authorizes services below the postsecondary level, and do not change who can be served by adult education programs. The educational functioning levels largely serve to classify students for reporting purposes and should not be viewed as the standard for establishing the type of instruction that can be provided. Placement of a student in an educational functioning level for NRS purposes does not affect placement in an instructional program. A student who scores above an SPL 6 might still be served in adult education programs if he or she has an educational need below the postsecondary level. States have the flexibility to determine how programs are structured, how students are placed in programs, and how instruction is delivered.

Changes: None.

Student Performance Levels (SPL) (§ 462.44)

Comments: A commenter requested clarification of the relationship between the NRS literacy levels and SPLs in the Functioning Level Table. The commenter indicated that no exact definition of SPL levels is provided and, therefore, their relationship to the NRS levels is unclear.

Discussion: The SPLs were developed by the Center for Applied Linguistics to provide a standard description of adult refugees' abilities at a range of levels and a common standard for ESL level descriptions for use by programs nationwide. They are nationally recognized in the adult ESL education community and represent a standard metric for identifying skill levels of adult ESL students in general language ability, listening comprehension, and oral communication. The Functioning Level Table provides educational functioning level descriptors for students at literacy levels in ABE, ASE, and ESL. The literacy levels are divided into equivalent grade levels for ABE and ASE and into SPLs for ESL. The descriptors illustrate the types of skills students functioning at a given level are likely to have. The descriptors do not provide a complete or comprehensive delineation of all the skills at a particular level, but instead, provide examples to guide assessment and instruction.

Changes: None.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations,

we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We discussed the potential costs and benefits of these final regulations in the preamble to the NPRM under the headings *Significant Proposed Regulations* (pages 61581 and 61582), *Regulatory Flexibility Act Certification* (pages 61582 and 61583), and *Paperwork Reduction Act of 1995* (page 61583).

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. With the exception of §§ 462.10 through 462.14, we display the valid OMB control number assigned to the collection of information in these final regulations at the end of the affected sections of the regulations.

Intergovernmental Review

These regulations are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number does not apply.)

List of Subjects in 34 CFR Part 462

Administrative practice, Adult education, Grants program—education, Incorporation by reference, and Reporting and recordkeeping requirements.

Dated: January 7, 2008.

Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations by adding a new part 462 to read as follows:

PART 462—MEASURING EDUCATIONAL GAIN IN THE NATIONAL REPORTING SYSTEM FOR ADULT EDUCATION

Subpart A—General

Sec.

462.1 What is the scope of this part?
462.2 What regulations apply?
462.3 What definitions apply?
462.4 What are the transition rules for using tests to measure educational gain for the National Reporting System for Adult Education (NRS)?

Subpart B—What Process Does the Secretary Use To Review the Suitability of Tests for Use in the NRS?

462.10 How does the Secretary review tests?
462.11 What must an application contain?
462.12 What procedures does the Secretary use to review the suitability of tests?
462.13 What criteria and requirements does the Secretary use for determining the suitability of tests?
462.14 How often and under what circumstances must a test be reviewed by the Secretary?

Subpart C—[Reserved]

Subpart D—What Requirements Must States and Local Eligible Providers Follow When Measuring Educational Gain?

462.40 Must a State have an assessment policy?
462.41 How must tests be administered in order to accurately measure educational gain?
462.42 How are tests used to place students at an NRS educational functioning level?
462.43 How is educational gain measured?
462.44 Which educational functioning levels must States and local eligible providers use to measure and report educational gain in the NRS?

Authority: 20 U.S.C. 9212, unless otherwise noted.

Subpart A—General

§ 462.1 What is the scope of this part?

The regulations in this part establish the—

(a) Procedures the Secretary uses to determine the suitability of standardized tests for use in the National Reporting System for Adult Education (NRS) to measure educational gain of participants in an adult education program required to report under the NRS; and

(b) Procedures States and local eligible providers must follow when measuring educational gain for use in the NRS.

(Authority: 20 U.S.C. 9212)

§ 462.2 What regulations apply?

The following regulations apply to this part:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 74 (Administration of Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations).

(2) 34 CFR part 76 (State-Administered Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(9) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement)).

(10) 34 CFR part 86 (Drug and Alcohol Abuse Prevention).

(11) 34 CFR part 97 (Protection of Human Subjects).

(12) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(13) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 462.

(Authority: 20 U.S.C. 9212)

§ 462.3 What definitions apply?

(a) *Definitions in the Adult Education and Family Literacy Act (Act).* The following terms used in these regulations are defined in section 203 of the Adult Education and Family Literacy Act, 20 U.S.C. 9202 (Act):

Adult education,
Eligible provider,
Individual of limited English proficiency,
Individual with a disability,
Literacy.

(b) *Other definitions.* The following definitions also apply to this part:

Adult basic education (ABE) means instruction designed for an adult whose educational functioning level is equivalent to a particular ABE literacy level listed in the NRS educational functioning level table in § 462.44.

Adult education population means individuals—

(1) Who are 16 years of age or older;

(2) Who are not enrolled or required to be enrolled in secondary school under State law; and

(3) Who—

(i) Lack sufficient mastery of basic educational skills to enable the individuals to function effectively in society;

(ii) Do not have a secondary school diploma or its recognized equivalent, and have not achieved an equivalent level of education; or

(iii) Are unable to speak, read, or write the English language.

Adult secondary education (ASE) means instruction designed for an adult whose educational functioning level is equivalent to a particular ASE literacy level listed in the NRS educational functioning level table in § 462.44.

Content domains, content specifications, or NRS skill areas mean, for the purpose of the NRS, reading, writing, and speaking the English language, numeracy, problem solving, English language acquisition, and other literacy skills as defined by the Secretary.

Educational functioning levels mean the ABE, ASE, and ESL literacy levels, as provided in § 462.44, that describe a set of skills and competencies that students demonstrate in the NRS skill areas.

English-as-a-second language (ESL) means instruction designed for an adult whose educational functioning level is equivalent to a particular ESL literacy level listed in the NRS educational functioning level table in § 462.44.

Guidelines means the *Implementation Guidelines: Measures and Methods for the National Reporting System for Adult Education* (also known as NRS Implementation Guidelines) posted on the Internet at: *http://www.nrsweb.org.* A copy of the Guidelines is also available from the U.S. Department of Education, Division of Adult Education and Literacy, 400 Maryland Avenue, SW., room 11159, Potomac Center Plaza, Washington, DC 20202–7240.

Local eligible provider means an ''eligible provider'' as defined in the Act that operates an adult education program that is required to report under the NRS.

State means ''State'' and ''Outlying area'' as defined in the Act.

Test means a standardized test, assessment, or instrument that has a formal protocol on how it is to be administered. These protocols include, for example, the use of parallel, equated forms, testing conditions, time allowed for the test, standardized scoring, and the amount of instructional time a student needs before post-testing. Violation of these protocols often invalidates the test scores. Tests are not limited to traditional paper and pencil (or computer-administered) instruments for which forms are constructed prior to administration to examinees. Tests may also include adaptive tests that use computerized algorithms for selecting and administering items in real time; however, for such instruments, the size of the item pool and the method of item selection must ensure negligible overlap in items across pre- and post-testing.

Test administrator means an individual who is trained to administer tests the Secretary determines to be suitable under this part.

Test publisher means an entity, individual, organization, or agency that owns a registered copyright of a test or is licensed by the copyright holder to sell or distribute a test.

(Authority: 20 U.S.C. 9202, 9212)

§ 462.4 What are the transition rules for using tests to measure educational gain for the National Reporting System for Adult Education (NRS)?

A State or a local eligible provider may continue to measure educational gain for the NRS using a test that was identified in the Guidelines until the Secretary announces through a notice published in the **Federal Register** a deadline by which States and local eligible providers must use only tests that the Secretary has reviewed and determined to be suitable for use in the NRS under this part.

(Approved by the Office of Management and Budget under control number 1830–0027)

(Authority: 20 U.S.C. 9212)

Subpart B—What Process Does the Secretary Use To Review the Suitability of Tests for Use in the NRS?

§ 462.10 How does the Secretary review tests?

(a) The Secretary only reviews tests under this part that are submitted by a test publisher.

(b) A test publisher that wishes to have the suitability of its test determined by the Secretary under this part must submit an application to the Secretary, in the manner the Secretary may prescribe, by April 14, 2008, and, thereafter, by October 1 of each year.

(Authority: 20 U.S.C. 9212)

§ 462.11 What must an application contain?

(a) *Application content and format.* In order for the Secretary to determine whether a standardized test is suitable for measuring the gains of participants in an adult education program required to report under the NRS, a test publisher must—

(1) Include with its application information listed in paragraphs (b) through (i) of this section, and, if applicable, the information listed in paragraph (j) of this section;

(2) Provide evidence that it holds a registered copyright of a test or is licensed by the copyright holder to sell or distribute a test.

(3)(i) Arrange the information in its application in the order it is presented in paragraphs (b) through (j) of this section; or

(ii) Include a table of contents in its application that identifies the location of the information required in paragraphs (b) through (j) of this section.

(4) Submit to the Secretary three copies of its application.

(b) *General information.* (1) A statement, in the technical manual for the test, of the intended purpose of the test and how the test will allow examinees to demonstrate the skills that are associated with the NRS educational functioning levels in § 462.44.

(2) The name, address, e-mail address, and telephone and fax numbers of a contact person to whom the Secretary may address inquiries.

(3) A summary of the precise editions, forms, levels, and, if applicable, sub-tests and abbreviated tests that the test publisher is requesting that the Secretary review and determine to be suitable for use in the NRS.

(c) *Development.* Documentation of how the test was developed, including a description of—

(1) The nature of samples of examinees administered the test during pilot or field testing, such as—

(i) The number of examinees administered each item;

(ii) How similar the sample or samples of examinees used to develop and evaluate the test were to the adult education population of interest to the NRS; and

(iii) The steps, if any, taken to ensure that the examinees were motivated while responding to the test; and

(2) The steps taken to ensure the quality of test items or tasks, such as—

(i) The extent to which items or tasks on the test were reviewed for fairness and sensitivity; and

(ii) The extent to which items or tasks on the test were screened for the adequacy of their psychometric properties.

(3) The procedures used to assign items to—

(i) Forms, for tests that are constructed prior to being administered to examinees; or

(ii) Examinees, for adaptive tests in which items are selected in real time.

(d) *Maintenance.* Documentation of how the test is maintained, including a description of—

(1) How frequently, if ever, new forms of the test are developed;

(2) The steps taken to ensure the comparability of scores across forms of the test;

(3) The steps taken to maintain the security of the test;

(4) A history of the test's use, including the number of times the test has been administered; and

(5) For a computerized adaptive test, the procedures used to—

(i) Select subsets of items for administration;

(ii) Determine the starting point and termination conditions;

(iii) Score the test; and

(iv) Control for item exposure.

(e) *Match of content to the NRS educational functioning levels (content validity).* Documentation of the extent to which the items or tasks on the test cover the skills in the NRS educational functioning levels in § 462.44, including—

(1) Whether the items or tasks on the test require the types and levels of skills used to describe the NRS educational functioning levels;

(2) Whether the items or tasks measure skills that are not associated with the NRS educational functioning levels;

(3) Whether aspects of a particular NRS educational functioning level are not covered by any of the items or tasks;

(4) The procedures used to establish the content validity of the test;

(5) The number of subject-matter experts who provided judgments linking the items or tasks to the NRS educational functioning levels and their qualifications for doing so, particularly their familiarity with adult education and the NRS educational functioning levels; and

(6) The extent to which the judgments of the subject matter experts agree.

(f) *Match of scores to NRS educational functioning levels.* Documentation of the adequacy of the procedure used to translate the performance of an examinee on a particular test to an estimate of the examinee's standing with respect to the NRS educational functioning levels in § 462.44, including—

(1) The standard-setting procedures used to establish cut scores for transforming raw or scale scores on the test into estimates of an examinee's NRS educational functioning level;

(2) If judgment-based procedures were used—

(i) The number of subject-matter experts who provided judgments, and their qualifications; and

(ii) Evidence of the extent to which the judgments of subject-matter experts agree;

(3) The standard error of each cut score, and how it was established; and

(4) The extent to which the cut scores might be expected to differ if they had been established by a different (though similar) panel of experts.

(g) *Reliability.* Documentation of the degree of consistency in performance across different forms of the test in the absence of any external interventions, including—

(1) The correlation between raw (or scale) scores across alternate forms of the test or, in the case of computerized adaptive tests, across alternate administrations of the test;

(2) The consistency with which examinees are classified into the same NRS educational functioning levels across forms of the test. Information regarding classification consistency should be reported for each NRS educational functioning level that the test is being considered for use in measuring;

(3) The adequacy of the research design leading to the estimates of the reliability of the test, including—

(i) The size of the sample(s);

(ii) The similarity between the sample(s) used in the data collection and the adult education population; and

(iii) The steps taken to ensure the motivation of the examinees; and

(4) Any other information explaining the methodology and procedures used to measure the reliability of the test.

(h) *Construct validity.* Documentation of the appropriateness of a given test for measuring educational gain for the NRS, *i.e.*, documentation that the test measures what it is intended to measure, including—

(1) The extent to which the raw or scale scores and the educational functioning classifications associated with the test correlate (or agree) with scores or classifications associated with other tests designed or intended to assess educational gain in the same adult education population as the NRS;

(2) The extent to which the raw or scale scores are related to other relevant variables, such as teacher evaluation, hours of instruction, or other measures that may be related to test performance;

(3) The adequacy of the research designs associated with these sources of evidence (*see* paragraph (g)(3) of this section); and

(4) Other evidence demonstrating that the test measures gains in educational functioning resulting from adult education and not from other construct-irrelevant variables, such as practice effects.

(i) *Other information.* (1) A description of the manner in which test administration time was determined, and an analysis of the speededness of the test.

(2) Additional guidance on the interpretation of scores resulting from any modifications of the tests for an individual with a disability.

(3) The manual provided to test administrators containing procedures and instructions for test security and administration.

(4) A description of the training or certification required of test administrators and scorers by the test publisher.

(5) A description of retesting (e.g., re-administration of a test because of problems in the original administration such as the test taker becomes ill during the test and cannot finish, there are external interruptions during testing, or there are administration errors) procedures and the analysis upon which the criteria for retesting are based.

(6) Such other evidence as the Secretary may determine is necessary to establish the test's compliance with the criteria and requirements the Secretary uses to determine the suitability of tests as provided in § 462.13.

(j) *Previous tests.* (1) For a test used to measure educational gain in the NRS before the effective date of these regulations that is submitted to the Secretary for review under this part, the test publisher must provide documentation of periodic review of the content and specifications of the test to ensure that the test continues to reflect NRS educational functioning levels.

(2) For a test first published five years or more before the date it is submitted to the Secretary for review under this part, the test publisher must provide documentation of periodic review of the content and specifications of the test to ensure that the test continues to reflect NRS educational functioning levels.

(3) For a test that has not changed in the seven years since the Secretary determined, under § 462.13, that it was suitable for use in the NRS that is again being submitted to the Secretary for review under this part, the test publisher must provide updated data supporting the validity of the test for use in classifying adult learners with respect to the NRS educational functioning levels and the measurement of educational gain as defined in § 462.43 of this part.

(4) If a test has been substantially revised—for example by changing its structure, number of items, content specifications, item types, or sub-tests—from the most recent edition reviewed by the Secretary under this part, the test publisher must provide an analysis of the revisions, including the reasons for the revisions, the implications of the revisions for the comparability of scores on the current test to scores on the previous test, and results from validity, reliability, and equating or standard-setting studies undertaken subsequent to the revisions.

(Authority: 20 U.S.C. 9212)

§ 462.12 What procedures does the Secretary use to review the suitability of tests?

(a) *Review.* (1) When the Secretary receives a complete application from a test publisher, the Secretary selects experts in the field of educational testing and assessment who possess appropriate advanced degrees and experience in test development or psychometric research, or both, to advise the Secretary on the extent to which a test meets the criteria and requirements in § 462.13.

(2) The Secretary reviews and determines the suitability of a test only if an application—

(i) Is submitted by a test publisher;

(ii) Meets the deadline established by the Secretary;

(iii) Includes a test that—

(A) Has two or more secure, parallel, equated forms of the same test—either traditional paper and pencil or computer-administered instruments—for which forms are constructed prior to administration to examinees; or

(B) Is an adaptive test that uses computerized algorithms for selecting and administering items in real time; however, for such an instrument, the size of the item pool and the method of item selection must ensure negligible overlap in items across pre- and post-testing;

(iv) Includes a test that samples one or more of the major content domains of the NRS educational functioning levels of ABE, ESL, or ASE with sufficient numbers of questions to represent adequately the domain or domains; and

(v) Includes the information prescribed by the Secretary, including the information in § 462.11 of this part.

(b) *Secretary's determination.* (1) The Secretary determines whether a test meets the criteria and requirements in § 462.13 after taking into account the advice of the experts described in paragraph (a)(1) of this section.

(2) For tests that contain multiple sub-tests measuring content domains other than those of the NRS educational functioning levels, the Secretary determines the suitability of only those sub-tests covering the domains of the NRS educational functioning levels.

(c) *Suitable tests.* If the Secretary determines that a test satisfies the criteria and requirements in § 462.13 and, therefore, is suitable for use in the NRS, the Secretary—

(1) Notifies the test publisher of the Secretary's decision; and

(2) Annually publishes in the **Federal Register** and posts on the Internet at *http://www.nrsweb.org* a list of the names of tests and the educational functioning levels the tests are suitable to measure in the NRS. A copy of the list is also available from the U.S. Department of Education, Office of Vocational and Adult Education, Division of Adult Education and Literacy, 400 Maryland Avenue, SW., room 11159, Potomac Center Plaza, Washington, DC 20202–7240.

(d) *Unsuitable tests.* (1) If the Secretary determines that a test does not satisfy the criteria and requirements in § 462.13 and, therefore, is not suitable for use in the NRS, the Secretary notifies the test publisher of the Secretary's decision and of the reasons why the test does not meet those criteria and requirements.

(2) Within 30 days after the Secretary notifies a test publisher that its test is not suitable for use in the NRS, the test publisher may request that the Secretary reconsider the Secretary's decision. This request must be accompanied by—

(i) An analysis of why the information and documentation submitted meet the criteria and requirements in § 462.13, notwithstanding the Secretary's earlier decision to the contrary; and

(ii) Any additional documentation and information that address the Secretary's reasons for determining that the test was unsuitable.

(3) The Secretary reviews the additional information submitted by the test publisher and makes a final determination regarding the suitability of the test for use in the NRS.

(i) If the Secretary's decision is unchanged and the test remains unsuitable for use in the NRS, the Secretary notifies the test publisher, and this action concludes the review process.

(ii) If the Secretary's decision changes and the test is determined to be suitable for use in the NRS, the Secretary follows the procedures in paragraph (c) of this section.

(e) *Revocation.* (1) The Secretary's determination regarding the suitability of a test may be revoked if the Secretary determines that—

(i) The information the publisher submitted as a basis for the Secretary's review of the test was inaccurate; or

(ii) A test has been substantially revised—for example, by changing its structure, number of items, content specifications, item types, or sub-tests.

(2) The Secretary notifies the test publisher of the—

(i) Secretary's decision to revoke the determination that the test is suitable for use in the NRS; and

(ii) Reasons for the Secretary's revocation.

(3) Within 30 days after the Secretary notifies a test publisher of the decision to revoke a determination that a test is suitable for use in the NRS, the test publisher may request that the Secretary reconsider the decision. This request must be accompanied by documentation and information that address the Secretary's reasons for revoking the determination that the test is suitable for use in the NRS.

(4) The Secretary reviews the information submitted by the test publisher and makes a final determination regarding the suitability of the test for use in the NRS.

(5) If the Secretary revokes the determination regarding the suitability of a test, the Secretary publishes in the **Federal Register** and posts on the Internet at *http://www.nrsweb.org* a notice of that revocation along with the date by which States and local eligible providers must stop using the revoked test. A copy of the notice of revocation is also available from the U.S. Department of Education, Office of Vocational and Adult Education, Division of Adult Education and Literacy, 400 Maryland Avenue, SW., room 11159, Potomac Center Plaza, Washington, DC 20202–7240.

(Authority: 20 U.S.C. 9212)

§ 462.13 What criteria and requirements does the Secretary use for determining the suitability of tests?

In order for the Secretary to consider a test suitable for use in the NRS, the test or the test publisher, if applicable, must meet the following criteria and requirements:

(a) The test must measure the NRS educational functioning levels of members of the adult education population.

(b) The test must sample one or more of the major content domains of the NRS educational functioning levels of ABE, ESL, or ASE with sufficient numbers of questions to adequately represent the domain or domains.

(c)(1) The test must meet all applicable and feasible standards for test construction and validity provided in the 1999 edition of the *Standards for Educational and Psychological Testing,* prepared by the Joint Committee on Standards for Educational and Psychological Testing of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education incorporated by reference in this section. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the American Psychological Association, Inc., 750 First Street, NE., Washington, DC 20002. You may inspect a copy at the Department of Education, room 11159, 550 12th Street, SW., Washington, DC 20202 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(2) If requested by the Secretary, a test publisher must explain why it believes that certain standards in the 1999 edition of the *Standards for Educational and Psychological Testing* were not applicable or were not feasible to meet.

(d) The test must contain the publisher's guidelines for retesting, including time between test-taking, which are accompanied by appropriate justification.

(e) The test must—

(1) Have two or more secure, parallel, equated forms of the same test—either traditional paper and pencil or computer administered instruments—for which forms are constructed prior to administration to examinees; or

(2) Be an adaptive test that uses computerized algorithms for selecting and administering items in real time; however, for such an instrument, the size of the item pool and the method of item selection must ensure negligible overlap in items across pre- and post-testing. Scores associated with these alternate administrations must be equivalent in meaning.

(f) For a test that has been modified for individuals with disabilities, the test publisher must—

(1) Provide documentation that it followed the guidelines provided in the Testing Individuals With Disabilities section of the 1999 edition of the *Standards for Educational and Psychological Testing;*

(2) Provide documentation of the appropriateness and feasibility of the modifications relevant to test performance; and

(3)(i) Recommend educational functioning levels based on the information obtained from adult education students who participated in the pilot or field test and who have the disability for which the test has been modified; and

(ii) Provide documentation of the adequacy of the procedures used to translate the performance of adult education students with the disability for whom the test has been modified to an estimate of the examinees' standing with respect to the NRS educational functioning levels.

(Authority: 20 U.S.C. 9212)

§ 462.14 How often and under what circumstances must a test be reviewed by the Secretary?

(a) The Secretary's determination that a test is suitable for use in the NRS is in effect for a period of seven years from the date of the Secretary's written notification to the test publisher, unless otherwise indicated by the Secretary. After that time, if the test publisher wants the test to be used in the NRS, the test must be reviewed again by the Secretary so that the Secretary can determine whether the test continues to be suitable for use in the NRS.

(b) If a test that the Secretary has determined is suitable for use in the NRS is substantially revised—for example, by changing its structure, number of items, content specifications, item types, or sub-tests—and the test publisher wants the test to continue to be used in the NRS, the test publisher must submit, as provided in § 462.11(j)(4), the substantially revised test or version of the test to the Secretary for review so that the Secretary can determine whether the test continues to be suitable for use in the NRS.

(Authority: 20 U.S.C. 9212)

Subpart C—[Reserved]

Subpart D—What Requirements Must States and Local Eligible Providers Follow When Measuring Educational Gain?

§ 462.40 Must a State have an assessment policy?

(a) A State must have a written assessment policy that its local eligible providers must follow in measuring educational gain and reporting data in the NRS.

(b) A State must submit its assessment policy to the Secretary for review and approval at the time it submits its annual statistical report for the NRS.

(c) The State's assessment policy must—

(1) Include a statement requiring that local eligible providers measure the educational gain of all students who receive 12 hours or more of instruction in the State's adult education program with a test that the Secretary has determined is suitable for use in the NRS;

(2) Identify the pre- and post-tests that the State requires local eligible providers to use to measure the educational gain of ABE, ESL, and ASE students;

(3)(i) Indicate when, in calendar days or instructional hours, local eligible providers must administer pre- and post-tests to students; and

(ii) Ensure that the time for administering the post-test is long enough after the pre-test to allow the test to measure educational gains according to the test publisher's guidelines;

(4) Specify the score ranges tied to educational functioning levels for placement and for reporting gains for accountability;

(5) Identify the skill areas the State intends to require local eligible providers to assess in order to measure educational gain;

(6) Include the guidance the State provides to local eligible providers on testing and placement of an individual with a disability or an individual who is unable to be tested because of a disability;

(7) Describe the training requirements that staff must meet in order to be qualified to administer and score each test selected by the State to measure the educational gains of students;

(8) Identify the alternate form or forms of each test that local eligible providers must use for post-testing;

(9) Indicate whether local eligible providers must use a locator test for guidance on identifying the appropriate pre-test;

(10) Describe the State's policy for the initial placement of a student at each NRS educational functioning level using test scores;

(11) Describe the State's policy for using the post-test for measuring educational gain and for advancing students across educational functioning levels;

(12) Describe the pre-service and in-service staff training that the State or local eligible providers will provide, including training—

(i) For staff who either administer or score each of the tests used to measure educational gain;

(ii) For teachers and other local staff involved in gathering, analyzing, compiling, and reporting data for the NRS; and

(iii) That includes the following topics:

(A) NRS policy, accountability policies, and the data collection process.

(B) Definitions of measures.

(C) Conducting assessments; and

(13) Identify the State or local agency responsible for providing pre- and in-service training.

(Approved by the Office of Management and Budget under control number 1830–0027)

(Authority: 20 U.S.C. 9212)

§ 462.41 How must tests be administered in order to accurately measure educational gain?

(a) *General.* A local eligible provider must measure the educational gains of students using only tests that the Secretary has determined are suitable for use in the NRS and that the State has identified in its assessment policy.

(b) *Pre-test.* A local eligible provider must—

(1) Administer a pre-test to measure a student's educational functioning level at intake, or as soon as possible thereafter;

(2) Administer the pre-test to students at a uniform time, according to its State's assessment policy; and

(3) Administer pre-tests to students in the skill areas identified in its State's assessment policy.

(c) *Post-test.* A local eligible provider must—

(1) Administer a post-test to measure a student's educational functioning level after a set time period or number of instructional hours;

(2) Administer the post-test to students at a uniform time, according to its State's assessment policy;

(3)(i) Administer post-tests with a secure, parallel, equated form of the same test—either traditional paper and pencil or computer-administered instruments—for which forms are constructed prior to administration to examinees to pre-test and determine the initial placement of students; or

(ii) Administer post-tests with an adaptive test that uses computerized algorithms for selecting and administering items in real time; however, for such an instrument, the size of the item pool and the method of item selection must ensure negligible overlap in items across pre- and post-testing; and

(4) Administer post-tests to students in the same skill areas as the pre-test.

(d) *Other requirements.* (1) A local eligible provider must administer a test using only staff who have been trained to administer the test.

(2) A local eligible provider may use the results of a test in the NRS only if the test was administered in a manner that is consistent with the State's assessment policy and the test publisher's guidelines.

(Approved by the Office of Management and Budget under control number 1830–0027)

(Authority: 20 U.S.C. 9212)

§ 462.42 How are tests used to place students at an NRS educational functioning level?

(a) A local eligible provider must use the results of the pre-test described in § 462.41(b) to initially place students at the appropriate NRS educational functioning level.

(b) A local eligible provider must use the results of the post-test described in § 462.41(c)—

(1) To determine whether students have completed one or more educational functioning levels or are progressing within the same level; and

(2) To place students at the appropriate NRS educational functioning level.

(c)(1) States and local eligible providers are not required to use all of the skill areas described in the NRS educational functioning levels to place students.

(2) States and local eligible providers must test and report on the skill areas most relevant to the students' needs and to the programs' curriculum.

(d)(1) If a State's assessment policy requires a local eligible provider to test a student in multiple skill areas and the student will receive instruction in all of the skill areas, the local eligible provider must place the student in an educational functioning level that is equivalent to the student's lowest test score for any of the skill areas tested under § 462.41(b) and (c).

(2) If a State's assessment policy requires a local eligible provider to test a student in multiple skill areas, but the student will receive instruction in fewer than all of the skill areas, the local eligible provider must place the student in an educational functioning level that is equivalent to the student's lowest test score for any of the skill areas—

(i) Tested under § 462.41(b) and (c); and

(ii) In which the student will receive instruction.

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(Authority: 20 U.S.C. 9212)

§ 462.43 How is educational gain measured?

(a)(1) Educational gain is measured by comparing the student's initial educational functioning level, as measured by the pre-test described in § 462.41(b), with the student's educational functioning level as measured by the post-test described in § 462.41(c).

Example: A State's assessment policy requires its local eligible providers to test students in reading and numeracy. The student scores lower in reading than in numeracy. As described in § 462.42(d)(1), the local eligible provider would use the student's reading score to place the student in an educational functioning level. To measure educational gain, the local eligible provider would compare the reading score on the pre-test with the reading score on the post-test.

(2) A student is considered to have made an educational gain when the student's post-test indicates that the student has completed one or more educational functioning levels above the level in which the student was placed by the pre-test.

(b) If a student is not post-tested, then no educational gain can be measured for that student and the local eligible provider must report the student in the same educational functioning level as initially placed for NRS reporting purposes.

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(Authority: 20 U.S.C. 9212)

§ 462.44 Which educational functioning levels must States and local eligible providers use to measure and report educational gain in the NRS?

States and local eligible providers must use the NRS educational functioning levels in the following functioning level table:

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Table to §462.44—Functioning Level Table

EDUCATIONAL FUNCTIONING LEVEL DESCRIPTORS—ADULT BASIC EDUCATION LEVELS			
Literacy Level	Basic Reading and Writing	Numeracy Skills	Functional and Workplace Skills
Beginning ABE Literacy Grade level 0–1.9	Individual has no or minimal reading and writing skills. May have little or no comprehension of how print corresponds to spoken language and may have difficulty using a writing instrument. At the upper range of this level, individual can recognize, read, and write letters and numbers but has a limited understanding of connected prose and may need frequent re-reading. Can write a limited number of basic sight words and familiar words and phrases; may also be able to write simple sentences or phrases, including very simple messages. Can write basic personal information. Narrative writing is disorganized and unclear, inconsistently uses simple punctuation (e.g., periods, commas, question marks), and contains frequent errors in spelling.	Individual has little or no recognition of numbers or simple counting skills or may have only minimal skills, such as the ability to add or subtract single digit numbers.	Individual has little or no ability to read basic signs or maps and can provide limited personal information on simple forms. The individual can handle routine entry level jobs that require little or no basic written communication or computational skills and no knowledge of computers or other technology.
Beginning Basic Education Grade level 2–3.9	Individual can read simple material on familiar subjects and comprehend simple and compound sentences in single or linked paragraphs containing a familiar vocabulary; can write simple notes and messages on familiar situations but lacks clarity and focus. Sentence structure lacks variety, but individual shows some control of basic grammar (e.g., present and past tense) and consistent use of punctuation (e.g., periods, capitalization).	Individual can count, add, and subtract three digit numbers, can perform multiplication through 12, can identify simple fractions, and perform other simple arithmetic operations.	Individual is able to read simple directions, signs, and maps, fill out simple forms requiring basic personal information, write phone messages, and make simple changes. There is minimal knowledge of and experience with using computers and related technology. The individual can handle basic entry level jobs that require minimal literacy skills; can recognize very short, explicit, pictorial texts (e.g., understands logos related to worker safety before using a piece of machinery); and can read want ads and complete simple job applications.
Low Intermediate Basic Education Grade level 4–5.9	Individual can read text on familiar subjects that have a simple and clear underlying structure (e.g., clear main idea, chronological order); can use context to determine meaning; can interpret actions required in specific written directions; can write simple paragraphs with a main idea and supporting details on familiar topics (e.g., daily activities, personal issues) by recombining learned vocabulary and structures; and can self and peer edit for spelling and punctuation errors.	Individual can perform with high accuracy all four basic math operations using whole numbers up to three digits and can identify and use all basic mathematical symbols.	Individual is able to handle basic reading, writing, and computational tasks related to life roles, such as completing medical forms, order forms, or job applications; and can read simple charts, graphs, labels, and payroll stubs and simple authentic material if familiar with the topic. The individual can use simple computer programs and perform a sequence of routine tasks given direction using technology (e.g., fax machine, computer operation). The individual can qualify for entry level jobs that require following basic written instructions and diagrams with assistance, such as oral clarification; can write a short report or message to fellow workers; and can read simple dials and scales and take routine measurements.

Table to §462.44—Functioning Level Table (Continued)

EDUCATIONAL FUNCTIONING LEVEL DESCRIPTORS—ADULT BASIC EDUCATION LEVELS			
Literacy Level	Basic Reading and Writing	Numeracy Skills	Functional and Workplace Skills
High Intermediate Basic Education Grade level 6–8.9	Individual is able to read simple descriptions and narratives on familiar subjects or from which new vocabulary can be determined by context and can make some minimal inferences about familiar texts and compare and contrast information from such texts but not consistently. The individual can write simple narrative descriptions and short essays on familiar topics and has consistent use of basic punctuation but makes grammatical errors with complex structures.	Individual can perform all four basic math operations with whole numbers and fractions; can determine correct math operations for solving narrative math problems and can convert fractions to decimals and decimals to fractions; and can perform basic operations on fractions.	Individual is able to handle basic life skills tasks such as graphs, charts, and labels and can follow multistep diagrams; can read authentic materials on familiar topics, such as simple employee handbooks and payroll stubs; can complete forms such as a job application and reconcile a bank statement. Can handle jobs that involve following simple written instructions and diagrams; can read procedural texts, where the information is supported by diagrams, to remedy a problem, such as locating a problem with a machine or carrying out repairs using a repair manual. The individual can learn or work with most basic computer software, such as using a word processor to produce own texts, and can follow simple instructions for using technology.
EDUCATIONAL FUNCTIONING LEVEL DESCRIPTORS—ADULT SECONDARY EDUCATION LEVELS			
Literacy Level	Basic Reading and Writing	Numeracy Skills	Functional and Workplace Skills
Low Adult Secondary Education *Grade level 9–10.9*	Individual can comprehend expository writing and identify spelling, punctuation, and grammatical errors; can comprehend a variety of materials such as periodicals and nontechnical journals on common topics; can comprehend library reference materials and compose multiparagraph essays; can listen to oral instructions and write an accurate synthesis of them; and can identify the main idea in reading selections and use a variety of context issues to determine meaning. Writing is organized and cohesive with few mechanical errors; can write using a complex sentence structure; and can write personal notes and letters that accurately reflect thoughts.	Individual can perform all basic math functions with whole numbers, decimals, and fractions; can interpret and solve simple algebraic equations, tables, and graphs and can develop own tables and graphs; and can use math in business transactions.	Individual is able or can learn to follow simple multistep directions and read common legal forms and manuals; can integrate information from texts, charts, and graphs; can create and use tables and graphs; can complete forms and applications and complete resumes; can perform jobs that require interpreting information from various sources and writing or explaining tasks to other workers; is proficient using computers and can use most common computer applications; can understand the impact of using different technologies; and can interpret the appropriate use of new software and technology.
High Adult Secondary Education *Grade level 11–12*	Individual can comprehend, explain, and analyze information from a variety of literacy works, including primary source materials and professional journals, and can use context cues and higher order processes to interpret meaning of written material. Writing is cohesive with clearly expressed ideas supported by relevant detail, and individual can use varied and complex sentence structures with few mechanical errors.	Individual can make mathematical estimates of time and space and can apply principles of geometry to measure angles, lines, and surfaces and can also apply trigonometric functions.	Individual is able to read technical information and complex manuals; can comprehend some college level books and apprenticeship manuals; can function in most job situations involving higher order thinking; can read text and explain a procedure about a complex and unfamiliar work procedure, such as operating a complex piece of machinery; can evaluate new work situations and processes; and can work productively and collaboratively in groups and serve as facilitator and reporter of group work. The individual is able to use common software and learn new software applications; can define the purpose of new technology and software and select appropriate technology; can adapt use of software or technology to new situations; and can instruct others, in written or oral form, on software and technology use.

Table to §462.44—Functioning Level Table (Continued)

EDUCATIONAL FUNCTIONING LEVEL DESCRIPTORS—ENGLISH AS A SECOND LANGUAGE LEVELS			
Literacy Level	Listening and Speaking	Basic Reading and Writing	Functional and Workplace Skills
Beginning ESL Literacy SPL 0–1	Individual cannot speak or understand English, or understands only isolated words or phrases.	Individual has no or minimal reading or writing skills in any language. May have little or no comprehension of how print corresponds to spoken language and may have difficulty using a writing instrument.	Individual functions minimally or not at all in English and can communicate only through gestures or a few isolated words, such as name and other personal information; may recognize only common signs or symbols (e.g., stop sign, product logos); can handle only very routine entry-level jobs that do not require oral or written communication in English. There is no knowledge or use of computers or technology.
Low Beginning ESL SPL 2	Individual can understand basic greetings, simple phrases and commands. Can understand simple questions related to personal information, spoken slowly and with repetition. Understands a limited number of words related to immediate needs and can respond with simple learned phrases to some common questions related to routine survival situations. Speaks slowly and with difficulty. Demonstrates little or no control over grammar.	Individual can read numbers and letters and some common sight words. May be able to sound out simple words. Can read and write some familiar words and phrases, but has a limited understanding of connected prose in English. Can write basic personal information (e.g., name, address, telephone number) and can complete simple forms that elicit this information.	Individual functions with difficulty in social situations and in situations related to immediate needs. Can provide limited personal information on simple forms, and can read very simple common forms of print found in the home and environment, such as product names. Can handle routine entry level jobs that require very simple written or oral English communication and in which job tasks can be demonstrated. May have limited knowledge and experience with computers.
High Beginning ESL SPL 3	Individual can understand common words, simple phrases, and sentences containing familiar vocabulary, spoken slowly with some repetition. Individual can respond to simple questions about personal everyday activities, and can express immediate needs, using simple learned phrases or short sentences. Shows limited control of grammar.	Individual can read most sight words, and many other common words. Can read familiar phrases and simple sentences but has a limited understanding of connected prose and may need frequent re-reading. Individual can write some simple sentences with limited vocabulary. Meaning may be unclear. Writing shows very little control of basic grammar, capitalization and punctuation and has many spelling errors.	Individual can function in some situations related to immediate needs and in familiar social situations. Can provide basic personal information on simple forms and recognizes simple common forms of print found in the home, workplace and community. Can handle routine entry level jobs requiring basic written or oral English communication and in which job tasks can be demonstrated. May have limited knowledge or experience using computers.

Table to §462.44—Functioning Level Table (Continued)

EDUCATIONAL FUNCTIONING LEVEL DESCRIPTORS—ENGLISH AS A SECOND LANGUAGE LEVELS			
Literacy Level	Listening and Speaking	Basic Reading and Writing	Functional and Workplace Skills
Low Intermediate ESL SPL 4	Individual can understand simple learned phrases and limited new phrases containing familiar vocabulary spoken slowly with frequent repetition; can ask and respond to questions using such phrases; can express basic survival needs and participate in some routine social conversations, although with some difficulty; and has some control of basic grammar.	Individual can read simple material on familiar subjects and comprehend simple and compound sentences in single or linked paragraphs containing a familiar vocabulary; can write simple notes and messages on familiar situations but lacks clarity and focus. Sentence structure lacks variety but shows some control of basic grammar (e.g., present and past tense) and consistent use of punctuation (e.g., periods, capitalization).	Individual can interpret simple directions and schedules, signs, and maps; can fill out simple forms but needs support on some documents that are not simplified; and can handle routine entry level jobs that involve some written or oral English communication but in which job tasks can be demonstrated. Individual can use simple computer programs and can perform a sequence of routine tasks given directions using technology (e.g., fax machine, computer).
High Intermediate ESL SPL 5	Individual can understand learned phrases and short new phrases containing familiar vocabulary spoken slowly and with some repetition; can communicate basic survival needs with some help; can participate in conversation in limited social situations and use new phrases with hesitation; and relies on description and concrete terms. There is inconsistent control of more complex grammar.	Individual can read text on familiar subjects that have a simple and clear underlying structure (e.g., clear main idea, chronological order); can use context to determine meaning; can interpret actions required in specific written directions; can write simple paragraphs with main idea and supporting details on familiar topics (e.g., daily activities, personal issues) by recombining learned vocabulary and structures; and can self and peer edit for spelling and punctuation errors.	Individual can meet basic survival and social needs, can follow some simple oral and written instruction, and has some ability to communicate on the telephone on familiar subjects; can write messages and notes related to basic needs; can complete basic medical forms and job applications; and can handle jobs that involve basic oral instructions and written communication in tasks that can be clarified orally. Individual can work with or learn basic computer software, such as word processing, and can follow simple instructions for using technology.
Advanced ESL SPL 6	Individual can understand and communicate in a variety of contexts related to daily life and work. Can understand and participate in conversation on a variety of everyday subjects, including some unfamiliar vocabulary, but may need repetition or rewording. Can clarify own or others' meaning by rewording. Can understand the main points of simple discussions and informational communication in familiar contexts. Shows some ability to go beyond learned patterns and construct new sentences. Shows control of basic grammar but has difficulty using more complex structures. Has some basic fluency of speech.	Individual can read moderately complex text related to life roles and descriptions and narratives from authentic materials on familiar subjects. Uses context and word analysis skills to understand vocabulary, and uses multiple strategies to understand unfamiliar texts. Can make inferences, predictions, and compare and contrast information in familiar texts. Individual can write multi-paragraph text (e.g., organizes and develops ideas with clear introduction, body, and conclusion), using some complex grammar and a variety of sentence structures. Makes some grammar and spelling errors. Uses a range of vocabulary.	Individual can function independently to meet most survival needs and to use English in routine social and work situations. Can communicate on the telephone on familiar subjects. Understands radio and television on familiar topics. Can interpret routine charts, tables and graphs and can complete forms and handle work demands that require non-technical oral and written instructions and routine interaction with the public. Individual can use common software, learn new basic applications, and select the correct basic technology in familiar situations.

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