

**DEPARTMENT OF EDUCATION****34 CFR Part 200**

RIN 1820-AB55

**Title I—Improving the Academic Achievement of the Disadvantaged**

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations governing programs administered under Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). These proposed regulations would implement statutory provisions regarding State, local educational agency (LEA), and school accountability for the academic achievement of limited English proficient (LEP) students and are needed to implement changes to Title I of the ESEA made by the No Child Left Behind Act of 2001 (NCLB Act).

**DATES:** We must receive your comments on or before August 9, 2004.

**ADDRESSES:** Address all comments about these proposed regulations to Jacquelyn C. Jackson, Ed.D., Acting Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W230, FB-6, Washington, DC 20202-6132. The Fax number for submitting comments is (202) 260-7764.

If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: [www.regulations.gov](http://www.regulations.gov).

or you may send your Internet comments to us at the following address: [TitleIrulemaking@ed.gov](mailto:TitleIrulemaking@ed.gov).

You must include the term “proposed rule” in the subject line of your electronic message.

**FOR FURTHER INFORMATION CONTACT:** Jacquelyn C. Jackson, Ed.D. Telephone: (202) 260-0826.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

**Invitation To Comment**

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 3W202, FB-6, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Background**

These proposed regulations are designed to provide State educational agencies (SEAs) with expanded flexibility in assessing LEP students against State content standards and in counting the performance of LEP students as a group in measuring whether a school and LEA are meeting adequate yearly progress (AYP) goals. Specifically, the proposed regulations would allow a State to exempt “recently arrived” LEP students from one administration of the State’s reading/language arts assessment. Recently arrived students are students with limited English proficiency who have attended schools in the United States (not including Puerto Rico) for less than 10 months before the test is administered. In addition, the proposed regulations would allow a State not to

count in AYP determinations the scores of the recently arrived students who do take the reading/language arts and the mathematics assessments during that period.

These proposed regulations are needed to implement statutory provisions regarding State, LEA, and school accountability for the academic achievement of recently arrived students with limited English language proficiency. As a diverse Nation, we educate students from many different countries. There are approximately 5.5 million students in U.S. schools who do not have English as their first language. Some States report that as many as 120 languages are represented in their schools. Often, the recently arrived students have difficulty demonstrating their knowledge through State content assessments in English due to language barriers or schooling experiences in their native country. Students need time to become acclimated to their new community and to schooling in the United States. Several researchers have reported the isolation and confusion newcomer students feel in their schools upon arrival and sometimes well into the first year.<sup>1</sup> This creates a challenge for the many States that do not offer native language assessments for all students, and available accommodations generally would not provide a real opportunity for newly arrived LEP students to demonstrate their mastery of a content area in English. The proposed regulations would allow approximately one year for schools and LEAs to provide intensified language instruction programs well aligned with the State’s English language proficiency (ELP) standards and linked with State academic content and student academic achievement standards.

These proposed regulations also would allow a State to include “former LEP” students within the LEP category in making AYP determinations for up to two years after they no longer meet the

<sup>1</sup> See L. Cheng, *Challenges for Asian/Pacific American Children and their Teachers*, ERIC Digest (ERIC Clearinghouse on Urban Education) (1999); J. Dufresne & S. Hall, *LEAP English Academy: An alternative high school for newcomers to the United States*, MINNE-WI TESOL Journal 14 (1997); R. Gonzalez, *Title VII Newcomer Program: Final report 1993-1994*, (Austin Independent School District, Texas, Office of Research and Evaluation) (1994); C. Moran, J. Stobbe, J. Villamil Tinajero & I. Tinajero, *Developing Literacy: Strategies for working with overage students*, reprinted with permission for distribution at the Symposium on the Education of Over-age LEP Students with Interrupted Formal Schooling (1997); L. Olsen, *Learning English and learning America: Immigrants in the center of a storm*, Theory into Practice 39, 196-202 (Autumn 2000); L. Olsen, A. Jaramillo, Z. McCall-Perez, & J. White, *Igniting change for immigrant students: Portraits of three high schools*, Oakland, CA: California Tomorrow (1999).

State's definition for limited English proficiency. The LEP subgroup is a subgroup whose membership can change from year to year, as students who have acquired English language proficiency exit and recently arrived students enter the subgroup. Because LEP students exit the LEP category once they attain English language proficiency, school assessment scores may not reflect gains that the LEP student subgroup has made in academic achievement.

In order to ensure that no child is left behind, Title I requires schools, LEAs, and States to be accountable for the achievement of LEP students and other subgroups of students, including students with disabilities, economically disadvantaged students and students from major racial and ethnic groups. The purpose of subgroup accountability is to ensure that districts and schools address the needs of all of their students and are held accountable for the achievement of all students, and that achievement for the school or LEA as a whole does not mask a school's or LEA's inability to ensure the progress of all significant subgroups of students. There are significant aspects of the law that provide a measure of flexibility in how schools and LEAs demonstrate whether their LEP students are making AYP. Several of these areas were addressed in a letter the Secretary sent to the Chief State School Officers dated February 20, 2004. Notwithstanding this existing flexibility, the Secretary has determined that additional flexibility with regard to recently arrived LEP students and former LEP students is needed. Accordingly, his February 20 letter authorized, on a transitional basis pending the issuance of final regulations, the elements of flexibility contained in these proposed regulations.

### Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

#### *Section 200.6 Inclusion of All Students*

*Statute:* Under Section 1111(b)(3) of Title I, each State is required to assess the reading/language arts and mathematics proficiency of LEP students in a valid and reliable manner, using reasonable accommodations or, when practicable, native language assessments. States must assess, in English, a LEP student's achievement in reading/language arts if the student has been in schools in the United States (except Puerto Rico) for three or more

consecutive years, although students may be assessed in reading/language arts in their native language beyond this point for two additional years if the LEA determines, on a case-by-case basis, that assessment in the native language would likely yield more accurate and reliable information on what the student knows and can do. States must also annually assess a LEP student's English language proficiency (that is, a student's reading, writing, speaking, and listening skills in English) in grades K–12.

*Current Regulations:* The current regulations essentially repeat the statutory requirements.

*Proposed Regulations:* The proposed regulations would provide a new assessment option for a subset of LEP students—recently arrived LEP students who have attended schools in the United States (not including Puerto Rico) for less than 10 months. Under proposed § 200.6(b)(4), a State would be able to exempt recently arrived LEP students from one administration of the State's reading/language arts assessment. Recently arrived students would still be required to participate in the State's mathematics assessment and the ELP assessment.

The proposed regulations also make clear that, in determining the amount of time before a LEP student must take the State's reading/language arts assessment in English, this "transitional year" must be counted as the first of the three years in which a LEP student may take the reading/language arts assessment in his or her native language, even though the student does not, in fact, take the reading/language arts assessment at all.

*Reasons:* In proposing these amendments to § 200.6, we recognize that taking a State's reading/language arts assessment, even with accommodations, requires a certain level of English language expertise. This expertise is essential for LEP students to participate meaningfully in the reading/language arts assessment and to receive a valid and reliable assessment score. Absent native language assessments (which in many cases are not practicable to create) and without this flexibility, recently arrived LEP students would be required to take a reading/language arts test that does not produce useful information. This is a different situation than a mathematics assessment, for which accommodations are available, to enable recently arrived LEP students to demonstrate content mastery in mathematics. With this new flexibility regarding participation in a State's reading/language arts assessment, recently arrived LEP students will be able to participate in the State's assessment system in a

manner that makes sense given their educational experiences and English language skills.

In developing the proposed regulation, the Department considered several options, including the possibility of linking eligibility for the one-time exemption to a State's determination that a student is non-English proficient (NEP) based on the State's definition. However, we concluded that linking the exemption to the period a LEP student has attended U.S. schools was more appropriate. The intent of the proposed regulation is to ensure that recently arrived LEP students receive instruction in U.S. schools for a period roughly equivalent to a school year prior to including their assessment results in AYP calculations. Linking the exemption to a determination that a student is NEP would potentially include a much wider range of students for an indefinite period of time.

#### *Section 200.20 Making Adequate Yearly Progress*

*Statute:* Under Section 1111(b)(2) of Title I, each State must define AYP in a manner that measures the achievement of each of various student groups, including LEP students. When determining which subgroups to consider in a school, LEA, or State accountability decision, the State must identify the minimum number of students in a category that is sufficient for making statistically valid and reliable decisions. In addition to ensuring that each subgroup meets or exceeds State objectives in reading/language arts and mathematics achievement, each school and LEA must demonstrate that not less than 95 percent of each student subgroup takes the reading/language arts and mathematics assessment in order to make AYP.

*Current Regulations:* The current regulations clarify how a school or LEA makes AYP by specifying how to determine whether the school or LEA met its goals for reading/language arts and mathematics achievement and how to calculate participation rates. The current regulations explain that a State must determine the number of students in a group that is required in order for the assessment scores of the group to yield statistically reliable information.

*Proposed Regulations:* The proposed regulations in § 200.20(f) would change the requirements for how SEAs are to include the following students in AYP determinations: (1) Recently arrived LEP students, and (2) students who were LEP but who have attained English proficiency and exited the LEP category

as the State defines that category (*i.e.*, former LEP students).

For recently arrived LEP students, a State would not be required to include their results from the mathematics or (if taken) reading/language arts assessments in AYP decisions, even if the student has been enrolled for a full academic year as defined by the State. If recently arrived LEP students take either the ELP assessment or the State's reading/language arts assessment, § 200.20(f)(1)(i) of the proposed regulations would allow the State to count these students as participants toward meeting the 95 percent participation requirement for AYP determinations in reading/language arts. Similarly, § 200.20(f)(1)(i) of the proposed regulations would allow recently arrived LEP students to be counted as participants for AYP determinations in mathematics when they take the mathematics assessment.

Under proposed § 200.20(f)(2), in determining AYP for the LEP subgroup, a State also may include the assessment scores from the reading/language arts and mathematics assessments for students who were LEP but who have exited the LEP category during the last two years. The proposed regulations would not, however, require a State to include these former LEP students in counts to determine whether a school or LEA has a sufficient number of LEP students to yield statistically reliable information under § 200.7(a), nor do they count for Title III funding. When reporting the achievement results on State and LEA report cards, as required under section 1111(h)(1)(C), § 200.20(f)(2)(iii) of the proposed regulations would not allow results of former LEP students to be included as part of the LEP subgroup because there is a difference between data used for system accountability and data used for providing information to parents.

*Reasons:* In proposing amendments to § 200.20, we are addressing concerns about the instructional needs of students in the LEP subgroup. If recently arrived LEP students take the reading/language arts assessment, a State would not be required to include results from that assessment in AYP calculations. The purpose of this proposal is to provide maximum flexibility in a State's assessment and accountability policies. A State that wants recently arrived LEP students to participate in the reading/language arts assessment may have them do so without having their results affect a school's or LEA's AYP rating. Similarly, when recently arrived LEP students take the mathematics assessment, the State is not required to include those results in

AYP calculations. This approach ensures that States and LEAs may make individual assessment decisions for the benefit of these recently arrived LEP students (*e.g.*, whether a student takes the reading/language arts assessment or not) without affecting a school's or LEA's AYP rating.

The LEP subgroup is one whose membership can change from year to year as English proficient students exit and new students enter the LEP subgroup. Because LEP students exit the LEP subgroup once they attain English language proficiency, school assessment results may not reflect the gains that LEP students have made in academic achievement. Therefore, these regulations address such concerns by allowing States additional flexibility when making AYP decisions, particularly with respect to LEP students.

#### **Executive Order 12866**

##### *1. Potential Costs and Benefits*

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from existing statutory and regulatory requirements. Both the statute and existing regulations require States to include LEP students in assessments and AYP calculations. There are no additional costs associated with the proposed regulations. There are benefits because the proposed regulations provide additional flexibility for assessing recently arrived LEP students and for including in AYP calculations both recently arrived LEP students and LEP students who have become English proficient and have exited the LEP category. The costs and benefits of the underlying provisions were discussed in the Title I final regulations published in the **Federal Register** on December 2, 2002 (67 FR 71717).

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

##### *2. Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interfere with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 200.13 Adequate yearly progress in general.)
- Could the description of the proposed regulations in the "Supplementary Information" section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

#### **Regulatory Flexibility Act Certification**

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

These provisions require States and LEAs to take certain actions to improve student academic achievement. The Department believes that these activities will be financed through the appropriations for Title I and other Federal programs and that the responsibilities encompassed in the law and regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal resources.

#### **Paperwork Reduction Act of 1995**

These proposed regulations do not contain any information collection requirements.

#### **Intergovernmental Review**

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

#### **Electronic Access to This Document**

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(Catalog of Federal Domestic Assistance Number: 84.010 Improving Programs Operated by Local Educational Agencies)

### List of Subjects in 34 CFR Part 200

Administrative practice and procedure, Adult education, Children, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family-centered education, Grant programs—education, Indians—education, Infants and children, Institutions of higher education, Juvenile delinquency, Local educational agencies, Migrant labor, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies.

Dated: June 21, 2004.

**Rod Paige,**

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 200 of title 34 of the Code of Federal Regulations as follows:

### PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

1. The authority citation for part 200 continues to read as follows:

**Authority:** 20 U.S.C. 6301 through 6578, unless otherwise noted.

2. Amend § 200.6 as follows:

A. Revise the introductory text in both § 200.6 and paragraph (b)(1)(i); and  
B. Add a new paragraph (b)(4).

The revisions and addition read as follows:

#### § 200.6 Inclusion of all students.

A State's academic assessment system required under § 200.2 must provide for

the participation of all students in the grades assessed in accordance with this section.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Consistent with paragraphs (b)(2) and (b)(4) of this section, the State must assess limited English proficient students in a valid and reliable manner that includes—

\* \* \* \* \*

(4) *Recently arrived students with limited English proficiency.* (i) A recently arrived student is a student with limited English proficiency who has attended school in the United States (not including Puerto Rico) for less than ten months.

(ii)(A) A State may exempt a recently arrived student from one administration of the State's reading/language arts assessment under § 200.2.

(B) If the State does not assess a recently arrived student on the State's reading/language arts assessment, the State must count this year as the first of the three years in which the student may take the State's reading/language arts assessment in a native language under section 1111(b)(3)(C)(x) of the Act.

(iii) A State must assess a recently arrived student using—

(A) An assessment of English language proficiency under paragraph (b)(3) of this section; and

(B) The State's mathematics assessment under § 200.2.

\* \* \* \* \*

3. Amend § 200.20 as follows:

A. Revise the introductory text of paragraphs (a)(1), (b), and (c)(1); and  
B. Add a new paragraph (f).

The revisions and addition read as follows:

#### § 200.20 Making adequate yearly progress.

\* \* \* \* \*

(a)(1) A school or LEA makes AYP if, consistent with paragraph (e) of this section—

\* \* \* \* \*

(b) If students in any group under § 200.13(b)(7) in a school or LEA do not meet the State's annual measurable objectives under § 200.18, the school or

LEA makes AYP if, consistent with paragraph (f) of this section—

\* \* \* \* \*

(c)(1) A school or LEA makes AYP if, consistent with paragraph (f) of this section—

\* \* \* \* \*

(f)(1) In including recently arrived students, as defined under § 200.6(b)(4), in determining AYP, a State may—

(i) Count recently arrived students as participants under paragraph (c)(1)(i) of this section if they take—

(A) Either an assessment of English language proficiency under § 200.6(b)(3) or the State's reading/language arts assessment under § 200.2; and

(B) The State's mathematics assessment under § 200.2; and

(ii) Choose not to include recently arrived students' scores on either or both the mathematics or reading/language arts assessment in determining AYP under paragraph (a) or (b) of this section, even if these students have been enrolled in the same school or LEA for a full academic year as defined by the State.

(2)(i) In determining AYP for the subgroup of limited English proficient students, a State may include, for up to two years, students who were limited English proficient but who no longer meet the State's definition.

(ii) If the State counts students under paragraph (f)(2)(i) of this section, the State is not required to—

(A) Count those students in the limited English proficient subgroup to determine if the number of students is sufficient to yield statistically reliable information under § 200.7(a);

(B) Assess those students' English language proficiency under § 200.6(b)(3); or

(C) Provide English language services to those students.

(iii) If the State counts students under paragraph (f)(2)(i) of this section, the State may not report those students in the limited English proficient subgroup under section 1111(h)(1)(C)(i) and (h)(2)(B) (reporting achievement data by subgroup on State and LEA report cards) of the Act.

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