DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AB01

[Docket ID ED–2008–OESE–0003]

Title I—Improving the Academic Achievement of the Disadvantaged

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

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing programs administered under Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended, to clarify and strengthen current Title I regulations in the areas of assessment, accountability, public school choice, and supplemental educational services.

DATES: These regulations are effective November 28, 2008.

FOR FURTHER INFORMATION CONTACT: Zollie Stevenson, Jr., Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W230, Washington, DC 20202–6132. Telephone: (202) 260–1824.

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SUPPLEMENTARY INFORMATION: These regulations amend regulations in 34 CFR part 200, implementing certain provisions of Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), which are designed to help disadvantaged children meet high academic standards. On April 23, 2008, the Secretary published a notice of proposed rulemaking (NPRM) for the Title I, Part A program in the **Federal Register** (73 FR 22020).

These final regulations reflect an effort to respond to the results of six years of implementation of the reforms introduced into the ESEA by NCLB. The accountability reforms implemented during that time—including annual testing in reading and mathematics, school and local educational agency (LEA) accountability for the achievement of all students (including students in certain subgroups), the measurement of school performance and identification for improvement where necessary, and the provision of public school choice and supplemental educational services (SES) options to parents and their children—have resulted in fundamental changes in the way that States and LEAs approach the challenge of educating all students to high standards. Parents and educators now have more information and data than ever before on how our schools are performing and where schools and LEAs need to make changes. Superintendents, principals, and teachers are hard at work developing and implementing strategies for raising student achievement and improving school performance, including by fundamentally restructuring chronically poor-performing schools. Nearly all States are reporting increases in student achievement, as measured by their own assessments in reading and mathematics in grades 3 through 8 and high school, and all States have put in place comprehensive plans for ensuring that all students are proficient in reading and mathematics by 2014.

These final regulations build on and strengthen the advances States have made with their assessment and accountability systems. We believe a small number of significant regulatory changes can make a real difference in sustaining and advancing the reforms brought about by NCLB, pending reauthorization of the ESEA. The final regulations reflect careful consideration of comments we received on our proposed regulations and include a number of changes made in response to those comments, while remaining consistent with the policy goals of the NPRM.

The most far-reaching change in these regulations is in how States, LEAs, and schools are held accountable for graduating students from high school. We believe that establishing a uniform and more accurate measure of calculating graduation rate that is comparable across States is a critical and essential step forward in improving high school accountability. New requirements governing the provision of SES and public school choice will help ensure that parents and students are informed of their options in a timely and effective manner and that LEAs make effective use of their funds to provide public school choice and SES. The changes to the regulations regarding SES will also help ensure that SES providers offer high-quality services. Changes addressing the inclusion of student subgroups in school and LEA adequate yearly progress (AYP) determinations will ensure greater accountability for the achievement of all groups of students. Amendments to the regulations governing restructuring of schools in improvement will help ensure that LEAs take significant reform actions to improve chronically underperforming schools, as required by the statute. Requiring the inclusion of State data from the National Assessment of Educational Progress (NAEP) on State and local report cards will provide parents and the public with additional important information about the performance of the students in their State.

The other provisions of these final regulations make important clarifications or technical changes to existing policies. The regulations permit all States to request authority to include measures of student growth in their AYP determinations so long as States' growth proposals meet certain criteria. The regulations also codify the creation of the National Technical Advisory Council (National TAC) and the Department's current policy regarding the identification of schools and LEAs for improvement. Amendments to the assessment regulations clarify that the term ''multiple measures'' in the statute means that States may use single or multiple question formats, or multiple assessments within a subject area. Lastly, technical changes to the definition of ''highly qualified teacher'' align the Title I regulations with the Individuals with Disabilities Education Act (IDEA).

In the absence of reauthorization, we believe these final regulations are necessary to further the interests of parents and children and to improve the implementation of NCLB in order to continue progress toward the goal of 100 percent student proficiency in reading and mathematics by 2014.

Major Changes in the Regulations

The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NRPM. (The rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section elsewhere in this preamble.)

- In § 200.7(a)(2)(iii) (disaggregation of data), the final regulations require each State to submit its revised Consolidated State Application Accountability Workbook (Accountability Workbook), which would include any changes to its minimum group size and other components of AYP, to the Department for peer review in time for any changes

to be in effect for AYP determinations based on 2009–2010 assessment results.

• Section 200.11 (participation in NAEP) clarifies the NAEP data that State and LEA report cards must contain: the percentage of students at each achievement level reported on the NAEP, in the aggregate and, for State report cards, disaggregated for each subgroup described in § 200.13(b)(7)(ii); and participation rates for students with disabilities and limited English proficient (LEP) students.

• The final regulations make a number of changes to § 200.19 (other academic indicators). The section is reorganized to separate the requirements for other academic indicators for elementary and middle schools from the requirements for calculating graduation rate (the required ''other academic indicator'' for high schools). The final regulations maintain the current requirements for the other academic indicators for elementary and middle schools; however, they make a number of changes for calculating graduation rate.

—Section 200.19(b)(1)(ii)(A) adds a definition of ''students who transfer into the cohort'' to mean those students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12.

—Section 200.19(b)(1)(ii)(B) makes clear that a student who emigrates to another country may be removed from the cohort and clarifies that a school or LEA must confirm *in writing* that a student transferred out, emigrated to another country, or is deceased.

—Section 200.19(b)(1)(ii)(B)(*1*) clarifies that, to confirm that a student transferred out, the school or LEA must have official written documentation that the student enrolled in another school or educational program that culminates in the award of a regular high school diploma.

—Section 200.19(b)(1)(iii) clarifies that the term ''students who graduate in four years'' means students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year.

—Section 200.19(b)(1)(v) permits a State, in addition to calculating a four-year adjusted cohort graduation rate, to propose to the Secretary for approval an ''extended-year adjusted cohort graduation rate.''

—Section 200.19(b)(1)(v)(A) defines an extended-year adjusted cohort graduation rate as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year adjusted cohort graduation rate, provided that the adjustments account for any students who transfer into the cohort by the end of the year of graduation being considered minus the number of students who transfer out, emigrate to another country, or are deceased by the end of that year.

—Section 200.19(b)(1)(v)(B) permits a State to calculate one or more extended-year adjusted cohort graduation rates.

—The final regulations do not require a State to use the Averaged Freshman Graduation Rate (AFGR) prior to the State's ability to use an adjusted cohort graduation rate.

—Section 200.19(b)(2) permits a State to use a transitional graduation rate before being required to use the four-year adjusted cohort graduation rate, if that transitional rate meets the graduation rate requirements in the current regulations.

—Section 200.19(b)(3)(i) requires a State to set a single graduation rate goal that represents the rate the State expects all high schools in the State to meet and annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the State's graduation rate goal.

—Section 200.19(b)(3)(ii) requires a State to hold any high school or LEA that serves grade 12 and the State accountable for meeting the State's graduation rate goal or targets beginning with AYP determinations based on school year 2009–2010 assessment results.

—Section 200.19(b)(4)(ii) requires a State and its LEAs to report the four-year adjusted cohort graduation rate in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii) beginning with report cards providing results of assessments administered in the 2010–2011 school year. If a State adopts an extended-year adjusted cohort graduation rate, the State and its LEAs must report this rate separately from its four-year rate beginning with the first year for which the State calculates such a rate.

—Section 200.19(b)(5) requires a State, beginning with AYP determinations based on school year 2011–2012 assessment results, to use the four-year adjusted cohort graduation rate to calculate AYP at the school, LEA, and State levels, in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii).

—Prior to calculating AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives) based on school year 2011–2012 assessment results, a State must calculate graduation rate in the aggregate at the school, LEA, and State levels using the four-year adjusted cohort graduation rate or the transitional graduation rate.

—Section 200.19(b)(6) requires a State to revise its Accountability Workbook to include certain information and submit its revisions to the Department for technical assistance and peer review in time for any changes to be in effect for AYP determinations based on 2009–2010 assessment results.

—Section 200.19(b)(7) permits a State that cannot meet the regulatory deadline for reporting a four-year adjusted cohort graduation rate to request an extension of time from the Secretary, provided the State submits, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that it cannot meet that deadline and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, the four-year adjusted cohort graduation rate. Even if a State receives an extension, it must calculate graduation rate at the school, LEA, and State levels both in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii) beginning with AYP determinations based on school year 2011–2012 assessment results.

• Section 200.22(b)(1) (National TAC) makes clear that the National TAC must include members who have knowledge of and expertise in designing and implementing standards, assessments, and accountability systems for all students, including students with disabilities and LEP students.

• Section 200.37(b)(5)(ii)(B) (notice of identification for improvement, corrective action, or restructuring) requires an LEA to indicate, in its notice to parents, those SES providers who are able to serve students with disabilities or LEP students.

• Section 200.39(c)(1) (responsibilities resulting from identification for school improvement) requires an LEA to display certain information regarding public school choice and SES on its Web site in a timely manner to ensure that parents have current information. Paragraph (c)(2) requires an SEA to post on its Web site the required information for any

LEA that does not have its own Web site.

• Section 200.43 (restructuring) contains two changes. First, paragraph (a)(4) makes clear that, if a school begins to implement a restructuring option as a corrective action, the school need not implement a significantly more rigorous and comprehensive reform at the restructuring stage. Second, paragraph (b)(3)(v) clarifies that a major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

• Section 200.44(a)(2) (public school choice) makes clear that an LEA must offer, through the 14-day notice required under § 200.37, the option to parents to transfer their child so that the child may transfer in the school year following the school year in which the LEA administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring.

• Section 200.47 (SEA responsibilities for SES) contains several changes.

—Paragraph (a)(1)(ii)(B) requires an SEA to post on its Web site, for each LEA, the amount of funds the LEA must spend on choice-related transportation and SES and the maximum per-pupil amount the LEA must spend for SES.

—Paragraph (a)(3)(ii) requires an SEA to indicate on its list of approved SES providers those that are able to serve students with disabilities or LEP students.

—Paragraph (b)(2)(ii)(C) requires an LEA to ensure that the instruction a provider gives and the content a provider uses are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children.

• Section 200.48 (funding for choice-related transportation and SES) contains several changes.

—Paragraph (d)(1)(i) no longer requires an LEA to obtain approval from its SEA before spending less than an amount equal to at least 20 percent of its Title I, Part A allocation (the ''20 percent obligation'') on choice-related transportation, SES, and parent outreach and assistance. Instead, revised paragraph (d)(2) requires an LEA that wishes to use unspent choice-related transportation and SES funds for other allowable activities to (1) meet, at a minimum, certain criteria specified in paragraph (d)(2)(i), (2) maintain records demonstrating that it has met those criteria, (3) notify the SEA that it has met the criteria and that it intends to spend the remainder of its 20 percent obligation on other allowable activities, and (4) specify the amount of the remainder.

—Paragraph (d)(3) requires SEAs to ensure an LEA's compliance with the criteria in paragraph (d)(2)(i) through its regular monitoring process. However, in addition to its regular monitoring process, for any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other allowable activities and (2) has been the subject of multiple complaints, supported by credible evidence, regarding its implementation of the Title I public school choice or SES requirements, the SEA must review the LEA's compliance with the criteria in paragraph (d)(2)(i) by the beginning of the next school year.

—Paragraph (d)(4)(i) provides that, if an SEA finds that an LEA has failed to meet any of the criteria in paragraph (d)(2)(i), the LEA must (1) spend an amount equal to the remainder specified in paragraph (d)(2)(iii)(B) in the subsequent school year, in addition to its 20 percent obligation for that year, on choice-related transportation costs, SES, or parent outreach and assistance; or (2) meet the criteria in paragraph (d)(2)(i) and obtain permission from the SEA before using any unspent choice-related transportation and SES funds for other allowable activities in that subsequent school year.

—Under paragraph (d)(4)(ii), an SEA may not grant permission to an LEA to spend less than the amount in paragraph (d)(4)(i)(A) unless the SEA has confirmed the LEA's compliance with the criteria in paragraph (d)(2)(i) for that subsequent school year.

—Paragraph (d)(2)(i)(A) requires an LEA that wishes to use unspent funds from its 20 percent obligation for other allowable activities to partner, ''to the extent practicable,'' with outside groups, such as faith-based organizations, other community-based organizations, and business groups to help inform eligible students and their families of the opportunities to transfer or receive SES.

—Paragraph (d)(2)(i)(B)(*3*) requires an LEA to provide a minimum of two enrollment ''windows,'' at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting supplemental educational services and selecting a provider.

• Section 200.56 (definition of ''highly qualified teacher'') makes clear that a special education teacher is a ''highly qualified teacher'' under the ESEA if the teacher meets the requirements for a ''highly qualified special education teacher'' under the Individuals with Disabilities Education Act (IDEA).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 400 parties submitted comments on the proposed regulations. An analysis of the comments and changes in the regulations since publication of the NPRM follows.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law.

Section 200.2 State Responsibilities for Assessment

Comment: Numerous commenters argued that the definition of multiple measures, as proposed in § 200.2(b)(7), is far too narrow and should be expanded to permit States to include, in their AYP definitions, other measures of student performance such as written and oral presentations and projects, student portfolios, performance assessments, local assessments, teacher-designed assessments, and curriculum-embedded assessments. Other commenters stated that formative and adaptive assessments are widely used at the local level and asked that they be specifically referenced in the regulations. One commenter stated that student learning needs to be assessed throughout the year with several assessments in order to determine how much students learn during the school year. Several commenters recommended that the regulations specifically reference alternate assessments based on grade-level achievement standards as one way to meet the multiple measures requirement.

Discussion: The Secretary's intent in amending § 200.2(b)(7) was to clarify the meaning of ''multiple measures'' in the context of State assessment systems required under section 1111(b)(3) of the ESEA, particularly in light of frequent criticisms that school accountability should not be based only on a single assessment of student achievement. Section 1111(b)(3)(C)(vi) of the ESEA requires that State assessments ''involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding.'' In proposed § 200.2(b)(7), we clarified that this requirement could be met by using

single or multiple question formats that range in cognitive complexity within a single assessment or by using multiple assessments within a subject area. We did not in any way intend to narrow the basic definition of the term or to permit States to use only certain types of assessments.

The requirement that State assessments involve multiple measures of academic achievement is one of a number of requirements in section 1111(b)(3)(C) of the ESEA that *all* State assessments must meet (e.g., that State assessments are used to measure the achievement of all children; that they are aligned with the State's challenging academic content and student academic achievement standards; that they are valid and reliable; and that they are of adequate technical quality for each purpose used). These requirements do not prevent a State from using, in determining AYP, results from other measures of student achievement such as those mentioned by the commenters (e.g., local assessments; curriculum-embedded assessments; performance assessments), provided those measures are submitted for peer review and determined by the Secretary to meet the statutory and regulatory requirements.

The Secretary does not believe it is necessary or appropriate to refer to specific types of assessments, such as formative assessments, adaptive assessments, and portfolio assessments, in § 200.2(b)(7). The key point is not the type of measure but the fact that any assessment used by a State for accountability determinations must meet the requirements in section 1111(b)(3)(C) of the ESEA and be approved by the Secretary.

Changes: None.

Comment: Many commenters recommended that non-test-based measures such as attendance rates, grade-point averages, graduation and dropout rates, in-school retention rates, and the percentage of students taking honors and advanced placement classes be included in AYP determinations.

Discussion: The ESEA and the Department's current regulations already both require and permit States to use non-test-based measures, such as those recommended by the commenters, in AYP determinations. Specifically, both section 1111(b)(2)(C)(vi) of the ESEA and current § 200.19(a)(1) (new § 200.19(a) and (b)) require a State to include at least one other academic indicator in its AYP determinations, which must be the graduation rate for high schools and an academic indicator of the State's choosing for elementary and middle schools. A State may, at its discretion, also include additional academic indicators. Current § 200.19(b) (new § 200.19(c)) provides examples of additional academic indicators that a State may use, which include additional State or local assessments, the percentage of students completing advanced placement courses, and retention rates. As outlined in current § 200.19(c) (new § 200.19(d)), however, a State's other academic indicators must be valid and reliable; consistent with relevant, nationally recognized professional and technical standards, if any; and consistent throughout the State within each grade span. Moreover, under § 200.19(e), a State may not use its other academic indicators to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring.

Changes: None.

Comment: One commenter stated that the Department should provide more flexibility for LEAs to experiment with various assessment systems that are aligned with the State's academic content and student academic achievement standards, but developed with community and local involvement and input.

Discussion: Section 200.3 specifically permits a State to include, in the State assessment system that it uses to determine AYP, a combination of State and local assessments. If a State permits the inclusion of local assessments, however, the State must, among other things, establish technical criteria to ensure that each local assessment meets, for example, the statutory and regulatory requirements for validity, reliability, and technical quality, and demonstrate that the local assessments are equivalent to one another in their content coverage, difficulty, and quality; have comparable validity and reliability with respect to subgroups of students; and provide unbiased, rational, and consistent determinations of the annual progress of schools and LEAs within the State. Moreover, locally developed assessments that are not included as part of the annual State assessment system under section 1111(b)(3) of the ESEA may be used as an additional other academic indicator under current § 200.19(b) (new § 200.19(c)).

Changes: None.

Comment: Numerous commenters supported the proposed changes in § 200.2(b)(7). One of these commenters, however, expressed concern that there may be continued confusion about the differences between the use of multiple measures and the use of multiple non-academic indicators in accountability determinations.

Discussion: Section 200.2(b)(7) addresses only the requirement in section 1111(b)(3)(C)(vi) of the ESEA that State assessments involve multiple, up-to-date measures of student academic achievement. As discussed earlier, such measures must meet all the statutory and regulatory requirements applicable to State assessments. Separate and apart from this requirement is the flexibility for a State to include multiple, additional academic indicators in making AYP determinations, consistent with section 1111(b)(2)(C)(vii) and (b)(2)(D) of the ESEA and current § 200.19(b) (new § 200.19(c)). These indicators, however, may not be used to reduce the number of, or change, the schools that would otherwise be subject to school improvement, corrective action, or restructuring (see § 200.19(e)).

Changes: None.

Comment: One commenter expressed concern that requiring multiple types of questions on a State assessment could delay the reporting of results. One commenter stated that including different types of questions to assess higher-order thinking skills would add complexity to an assessment and may increase the time it takes to score the assessment and make AYP determinations. Another commenter stated that the language in the proposed regulations did not describe how States should assess higher-order thinking skills.

Discussion: We wish to emphasize that the new language in § 200.2(b)(7) is intended merely to clarify the several ways a State may involve multiple measures in the State's assessment system. If a State chooses to make a substantive revision to its assessment system by changing the way it implements the multiple measures requirement in § 200.2(b)(7), it must submit its proposed change to the Department for peer review. Otherwise, no actions are required by States as a result of the amendment to this section.

Changes: None.

Comment: One commenter stated that the regulations on multiple measures set a bar that any State could currently claim to meet. Another commenter asked why the requirement to use multiple measures to assess student achievement and higher-order thinking skills was not negotiated as a part of the original State accountability plans, given the statutory mandate that such measures be used. Another commenter asked why the Department is only now emphasizing that multiple assessments may be used in States' accountability systems. One commenter stated that the Department objected to multiple

measures in the early implementation of the NCLB amendments to the ESEA and asked why the Department has changed its position.

Discussion: The Secretary explained in the preamble to the NPRM that the changes to § 200.2(b)(7) simply clarify section 1111(b)(3)(C)(vi) of the ESEA, which requires State accountability systems to include multiple up-to-date measures of student academic achievement. We believe it is necessary to make these clarifications based on our understanding that some parents, teachers, and administrators mistakenly believe that the ESEA requires the use of a single assessment. The changes do not impose new requirements or require States to change their current assessment systems; nor do they represent a change in the Department's position. The Department has consistently made clear to States, since the early implementation of NCLB, that multiple assessments may be used to measure student achievement in a subject area in order to assess mastery of the breadth of a particular content domain, provided that all assessments used to determine AYP meet the applicable statutory and regulatory requirements. There are States, for example, that currently use reading and writing assessments to calculate AYP in reading/language arts or use algebra and probability assessments to calculate AYP in mathematics. These policies may continue under the revised regulation.

Changes: None.

Comment: One commenter requested clarification regarding whether a State that uses multiple assessments to measure achievement must ensure that those assessments are uniform throughout the State.

Discussion: Section 1111(b)(1)(B) of the ESEA and § 200.1 make clear that a State must adopt challenging academic content and student achievement standards, which must be the same standards the State applies to all students. A State's assessments must be aligned with those standards. Therefore, a State's assessments, although they need not necessarily be uniform, must measure the same content and the same level of achievement.

Changes: None.

Comment: One commenter objected to the provision in proposed § 200.2(b)(7)(i), which stated that multiple measures may include a single-question format to measure student achievement. The commenter recommended removing the words ''single or'' in § 200.2(b)(7)(i).

Discussion: We believe that States should have the flexibility to assess student academic achievement, as defined by the State, using a single-question format. Assessments that use one type of question format are able to, and in fact are required to, assess varying levels of cognitive complexity and higher-order thinking skills. Therefore, we decline to make the change suggested by the commenter.

Changes: None.

Comment: One commenter stated that the proposed regulation would define multiple measures in a way that undermines the ESEA by subsuming the multiple-measures requirement within the requirement to assess higher-order thinking skills and understanding of challenging content. The commenter stated that the purpose of multiple measures is to ensure the validity and reliability of judgments about proficiency, as required by the ESEA, by providing multiple ways for students to demonstrate proficiency in the same skills and knowledge. The commenter maintained that the regulation, as drafted, implies that the purpose of multiple measures is to assess higher-order thinking skills and understanding of challenging content. The commenter recommended that the Department (1) remove the proposed language and retain the language in the current regulations; (2) clarify that, in order to achieve the overall purpose of ensuring validity and reliability of the proficiency determinations made under the ESEA, multiple measures must include different ways of measuring the same proficiencies of students in the knowledge and skills identified in the State's standards; and (3) provide guidance on how multiple measures can be combined in order to make valid and reliable determinations of a student's proficiencies.

Discussion: The regulations provide clarifications that are necessary to ensure that States understand that their assessments may include single or multiple question formats and that they may use multiple assessments to measure achievement in a specific content domain. They also refer to assessments that measure objectives within a particular content domain and assessments with items that both measure higher-order thinking skills (e.g., reasoning, synthesis, and analysis) and knowledge and recall items that assess the depth and breadth of mastery of a particular content domain. The changes requested by the commenter are not necessary given the purpose of the amendments to this particular section of the regulations.

Changes: None.

Comment: Many commenters recommended that the final regulations in § 200.2(b)(7) include language requiring that assessments use the principles of ''universal design'' in order to increase the accessibility of assessments for a wide variety of students.

Discussion: Although we agree that using the principles of universal design in developing assessments would increase the accessibility of assessments, we do not believe it is necessary to include such a requirement in these regulations. Section 200.2(b)(2) already requires State assessments to be ''designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency.'' In addition, the regulations in 34 CFR 300.160(g) implementing the IDEA require States to use universal design principles, to the extent possible, in developing all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA.

Changes: None.

Section 200.7 Disaggregation of Data

Comment: Many commenters objected to the Department's proposal to amend § 200.7, which would require a State to determine the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used and to ensure, to the maximum extent practicable, that all student subgroups are included, particularly at the school level, for purposes of making accountability decisions. Several commenters did not agree with the statement in the preamble to the NPRM that nearly 2 million students are not counted in NCLB subgroup accountability determinations at the school level because States set unnecessarily large minimum group sizes. The commenters asserted that this statement is not based on peer-reviewed research by reputable scholars. One of the commenters argued that the statement ignores the fact that every child is included in at least one group (the ''all students'' group) either at the school or LEA level. Other commenters objected to statements in the preamble that the commenters interpreted to be a suggestion by the Department that States set their minimum group size in order to exclude certain subgroups and minority students from accountability determinations. These commenters maintained that States set minimum group sizes in order to protect the privacy of students and not to exclude certain subgroups and minority students from accountability determinations.

Another commenter stated that the proposed changes would result in schools being identified for improvement based on the scores of too few students.

Discussion: The Secretary's intent in amending § 200.7 was to ensure that schools and LEAs are held accountable for the achievement of all their students. The Department recognizes that, when reporting information to the public, States must balance the need to maintain student privacy and the need for statistically reliable information with the clear intent of the statute to hold schools and LEAs accountable for the achievement of their subgroups. Further, if schools and LEAs are held accountable only for the achievement of their students as a whole, the importance that the ESEA places on disaggregated data and subgroup accountability would be diminished.

Section 1111(b)(2)(C)(v) of the ESEA requires a State to define AYP so that its annual measurable objectives apply to all students as well as to specific subgroups of students—that is, economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and LEP students. Section 1111(b)(2)(I) of the ESEA makes clear that, for a school or LEA to make AYP, all students as well as each subgroup of students must meet or exceed the State's annual measurable objectives. This emphasis on subgroup accountability is one of the major changes that Congress made to the ESEA's accountability provisions when it enacted NCLB. In fact, as stated in section 1001(3) of the ESEA, one of the primary purposes of NCLB is to close the achievement gap between high- and low-performing students, especially the achievement gaps between minority and non-minority students and between disadvantaged children and their more advantaged peers. This purpose could not be accomplished without subgroup accountability.

Disaggregated accountability is tempered only by the need to ensure statistical reliability and to protect student privacy. Thus, section 1111(b)(2)(C)(v) of the ESEA and § 200.7 do not require accountability determinations by student subgroup if the size of the subgroup is too small to yield statistically reliable information or is such that personally identifiable information about individual students would be revealed. Logically, the larger a State's minimum group size, the less likely that students in a subgroup will constitute an accountability group, particularly at the school level, and that the school will be held accountable for the performance of that subgroup. Thus, it is appropriate that the regulations require States to find the optimal minimum group size that maximizes the inclusion of student subgroups in accountability decisions.

It is important to note that these regulations amend § 200.7(a), which is intended to ensure that the minimum group size that is used by a State to calculate proficiency rates in AYP determinations yields statistically reliable information. Section 200.7(b) of the current regulations includes an additional requirement with which a State must comply when reporting information to the public. Specifically under this section, a State may not report achievement results if the results would reveal personally identifiable information about an individual student in accordance with the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. 1232g; 34 CFR part 99. Because the threshold (i.e., the number of students) that a State uses to ensure that it does not reveal personally identifiable information is generally lower than the threshold it uses for ensuring its proficiency calculations yield statistically reliable information, a State can, and often does, establish separate minimum group sizes for calculating proficiency rates and for reporting assessment results.

Changes: None.

Comment: Some commenters stated that the proposed regulations did not go far enough to ensure that States use statistically reliable methods to determine minimum group size. Several commenters recommended that the Department establish a uniform minimum group size for all States. A few commenters recommended a minimum group size of between 10 and 20 with confidence intervals that do not exceed 95 percent. Another commenter recommended a minimum group size of no greater than 30 and no confidence intervals greater than 90 percent. Several commenters supported a minimum group size of 67.

Other commenters argued that a State should be permitted to use confidence intervals along with their minimum group size in making AYP determinations. One commenter stated that a small minimum group size requires larger confidence intervals to make accurate school and LEA AYP determinations. Some commenters, however, stated that confidence intervals exceeding 95 percent are unwarranted. Still other commenters argued that confidence intervals greater than 90 percent should not be allowed.

Discussion: The diversity of recommendations by commenters reflects the lack of consensus in the education community on a uniform minimum group size that all States would be required to use. Given this lack of consensus, as well as the lack of research supporting the use of a specific number, we believe the requirements in § 200.7 establish a reasonable approach to ensuring that States establish minimum group sizes that appropriately balance statistical reliability and privacy with the statutory emphasis on disaggregation and subgroup accountability.

A State's minimum group size must be large enough to produce statistically reliable information and protect students' privacy, yet small enough to maximize the inclusion of student subgroups in accountability decisions. Further, the Department believes that a State's minimum group size must be considered along with other components of a State's AYP definition. Therefore, § 200.7(a)(2)(ii) requires a State to explain how a State's minimum group size interacts with the other components of its AYP definition to affect the statistical reliability of the data, and to ensure the maximum inclusion of students and student subgroups in AYP determinations.

The National TAC will provide advice to the Department on how a State should consider the interactions of the various components in its AYP definition (such as the interaction of minimum group size and confidence intervals). In addition, external peer reviewers will review the evidence submitted by a State in order to help ensure that the State is establishing a system that leads to statistically sound AYP determinations and also maximizes the inclusion of all students and student subgroups while ensuring student privacy.

Changes: None.

Comment: A few commenters requested that the Department consider requiring States and LEAs to include additional groups in the student subgroups referenced in proposed § 200.7(a)(2). One commenter suggested that the Department require States and LEAs to disaggregate data for AYP determinations not only for students with disabilities but by disability category.

Discussion: Although the Secretary understands the intent of these comments, we do not think it is appropriate to expand the subgroups covered by this regulation beyond those specified in the ESEA and § 200.13(b)(7)(ii). We believe that the inclusion of these subgroups is sufficient to ensure meaningful and comprehensive accountability for all students. Further, the more specific the

categories (e.g., individual disability categories), the smaller the groups would be and, therefore, the less likely they would meet a State's minimum group size and be reflected in accountability determinations.

Changes: None.

Comment: Another commenter, wanting to gain more information about the extent to which accountability systems exclude highly mobile students from accountability determinations, suggested that proposed § 200.7(a)(2) require States to provide information about the number of students excluded from accountability determinations due to student mobility.

Discussion: We agree with the commenter and believe § 200.7(a)(2)(ii)(C) already requires a State to provide information in its Accountability Workbook about students excluded from accountability determinations due to student mobility. Section 200.7(a)(2)(ii)(C) requires a State to provide information regarding the number and percentage of students and student subgroups excluded from school-level accountability determinations. This requirement encompasses subgroups that are excluded from school-level accountability determinations as a result of the State's minimum group size and other statistical principles, as well as students excluded from school-level accountability determinations as a result of not attending the same school for a ''full academic year.''

Changes: None.

Comment: One commenter stated that lowering a State's minimum group size would have a profound impact on small schools because the assessment results from one or two students could affect AYP determinations.

Discussion: It is true that if a State, through the process outlined in the final regulations, adopts a smaller minimum group size, the number of schools with student subgroups included in AYP calculations is likely to increase. A State's minimum group size, however, would still need to be of sufficient size to yield statistically reliable information and protect the privacy of individual students. Thus, it is unlikely that one or two students would have a deleterious effect on AYP determinations, except when a subgroup is at or near a State's minimum group size. In that case, the performance of one or two students could affect AYP determinations no matter what the minimum group size is. We believe that the requirement that States adopt an optimal minimum group size strikes a balance between the need to produce statistically reliable information and the goal of maximizing inclusion of student subgroups in accountability. When this balance is achieved, students in all schools, including small schools, benefit because their schools are held accountable for their achievement.

Changes: None.

Comment: One commenter recommended that States be allowed to use a specific number or percentage of a population in their definition of minimum group size.

Discussion: Any State that uses or wishes to use a minimum group size that is based on a specific number or percentage of the school population would need to demonstrate how this method yields statistically reliable information for each purpose for which disaggregated data are used and ensure that, to the maximum extent practicable, all groups are included for the purposes of making accountability determinations, consistent with § 200.7(a)(2)(i).

Changes: None.

Comment: One commenter recommended that the regulations clarify whether the minimum group size applies to graduation rate calculations.

Discussion: Section 200.7(a)(2)(i)(A) requires a State to establish a minimum group size that yields statistically reliable information for each purpose for which disaggregated data are used. Therefore, minimum group size, and the requirements that accompany it, applies to determining whether a group has met the State's annual measurable objectives; whether it has at least a 95 percent participation rate; whether it made AYP based on ''safe harbor;'' and whether it met the State's objectives for the other academic indicators, including graduation rate. Minimum group size also applies to reporting achievement data to the public. The Department believes that the current language is clear and declines to amend the regulations.

Changes: None.

Comment: Many commenters expressed concerns regarding the provision in proposed § 200.7(a)(2)(ii) that would require a State to revise its Accountability Workbook to include information about its minimum group size and the students and student subgroups excluded from school-level accountability determinations. Several commenters representing States asserted that revising their Accountability Workbook would be an unnecessary fiscal and staffing burden. Others stated that the time and resources needed to revise the Accountability Workbook were significantly underestimated in the *Summary of Costs and Benefits* in the NPRM. One commenter stated that requiring a State to revise its Accountability Workbook gives the perception that the State is concealing its data.

A number of other commenters supported proposed § 200.7(a)(2)(ii). Several commenters recommended making information about the exclusion of students from accountability determinations more transparent by requiring a State to report: (a) The results of empirical or simulation studies and the process the State used to select its minimum group size; and (b) the number and percentage of subgroups that made AYP using the ''safe harbor'' provision or confidence intervals. The commenters recommended including information about the exclusion of students from accountability determinations on State and LEA report cards because the public is more likely to read a report card than an Accountability Workbook.

Discussion: Transparency is a key element of NCLB. The Department believes it is appropriate for a State to explain in its Accountability Workbook the effect that the various components of the State's AYP definition have on the inclusion of students and student subgroups in accountability determinations. Making this information available through a State's Accountability Workbook will enable the public to gain a better understanding of how schools are being held accountable for the performance of their students and student subgroups.

We disagree that the requirements in § 200.7(a)(2)(ii) are unnecessary or give the impression that a State is concealing data. We believe that the benefits of increasing transparency and accountability greatly outweigh the costs to a State of revising its Accountability Workbook. We address the specific concerns about the costs of revising Accountability Workbooks in the *Summary of Costs and Benefits* section later in this preamble.

We do not believe it is necessary to require a State to submit the additional information recommended by the commenters. Although some States may include the information recommended by the commenters in their Accountability Workbook, we believe that States should have flexibility in how they address the requirements in § 200.7(a)(2)(ii). We also do not agree that the information included in a State's Accountability Workbook should be included on State and LEA report cards. The information in § 200.7(a)(2)(ii) that a State is required to submit to the Department is more appropriately provided in the State's Accountability Workbook where the

various elements of the State's AYP definition are outlined and to ensure peer review of those elements.

Changes: None.

Comment: Several commenters objected to requiring a State to submit a revised Accountability Workbook six months following the effective date of the final regulations. The commenters stated that a six-month timeline is too short and is unrealistic given that each State would need to conduct an extensive policy review to establish its minimum group size. Other commenters requested that the Department wait until Congress reauthorizes the ESEA before requiring a State to revise its Accountability Workbook because reauthorization will likely require additional changes to States' accountability systems.

Discussion: In order to have a cohesive accountability system, a State must understand how the various components of its AYP determinations fit together to provide accurate accountability decisions. The Secretary believes that now, more than six years after the implementation of NCLB, is an appropriate time for a State to reexamine its policies to ensure that there is a balance between, on the one hand, the need for statistical reliability of AYP determinations and students' privacy and, on the other hand, the need to ensure maximum inclusion of students and student subgroups in accountability determinations. Since receiving initial approval for its accountability system, every State has amended its Accountability Workbook with respect to the definition of AYP. Although the Department has worked to ensure that any amendments to a State's AYP definition are considered within the context of other components in the definition, we believe that now is an appropriate time to reexamine how the components fit together to ensure that sound accountability decisions are made.

However, the Department recognizes that it will take some time for the National TAC to provide input on the types of evidence the Secretary should consider in reviewing a State's Accountability Workbook and for the Department to provide guidance to States. Therefore, we have revised § 200.7(a)(2)(iii) to require a State to submit the required information in time for changes to be in effect for school year 2010–2011 AYP determinations using school year 2009–2010 assessment results.

Changes: We have revised § 200.7(a)(2)(iii) to require each State to submit a revised Consolidated State Application Accountability Workbook in accordance with paragraph (a)(2)(ii) to the Department in time for any changes to be in effect for school year 2010–2011 AYP determinations based on school year 2009–2010 assessment results.

Comment: A few commenters recommended that § 200.7(a)(2)(ii)(C) be revised to refer to ''school-level subgroup accountability'' rather than ''school-level accountability.'' The commenters stated that students in an excluded group would still be included in the overall school AYP calculation and that it is important to be clear that the concern is with students who are excluded from school-level accountability determinations.

Discussion: We believe § 200.7(a)(2)(ii)(C) appropriately requires each State to provide information regarding the number and percentage of students and student subgroups that are excluded from school-level accountability determinations, which will include, but not be limited to, students from various subgroups who are excluded from accountability determinations. In addition to a State's minimum group size, other factors in a State's AYP definition affect the inclusion of students at the school level. For example, a State's definition of ''full academic year'' also affects the number of students who are excluded from school-level accountability determinations. We believe it is important to understand the full impact of the components that converge to make up a State's definition of AYP at both the school and subgroup levels. Therefore, we decline to make the suggested change.

Changes: None.

Comment: A few commenters supported the requirements in § 200.7(a)(2)(ii) regarding the submission of Accountability Workbooks, but stated that the additional data collection will be costly. The commenters requested that Congress provide additional funding and resources to allow States to upgrade their data systems.

Discussion: Section 200.7(a)(2)(ii) requires a State, in its Accountability Workbook, to: (a) Explain how the State's minimum group size yields statistically reliable information and ensures that all student subgroups, to the maximum extent practicable, are included in AYP determinations; (b) explain how components of the State's definition of AYP, in addition to the minimum group size, interact to affect the statistical reliability of the data and to ensure the maximum inclusion of all students and student subgroups; and (c) provide information regarding the number and percentage of students and student subgroups excluded from school accountability determinations. Considering that a State uses this information each year to make AYP determinations, the Department believes that the State should have this information readily available and should not have to collect additional data. In addition, evaluating a State's definition of AYP is a statutory requirement and part of what is required in an Accountability Workbook. We address other more specific concerns about the costs of revising Accountability Workbooks in the *Summary of Costs and Benefits* section.

With regard to the commenters' request for additional funding and resources for a State to upgrade its data systems, the Department's Institute of Education Sciences (IES) Statewide Longitudinal Data Systems program has provided almost $122 million to 27 States to design, develop, and implement statewide longitudinal data systems that can accurately manage, analyze, disaggregate, and use individual student data. The President's fiscal year 2009 budget request for this program is $100 million, a significant increase intended to support new awards to States that have not yet received funding, as well as to support the expansion of systems in previously funded States. The 2009 request would support approximately 32 awards for developing longitudinal data systems or expanding existing data systems.

Changes: None.

Comment: One commenter suggested that the Department identify States that need to change their minimum group size and require only those States to revise their Accountability Workbooks. Another commenter recommended that the Department establish a specific minimum group size and require States that want a different minimum group size to revise their Accountability Workbooks.

Discussion: The Department believes that each State should re-examine its minimum group size, along with the other components of its AYP definition, in order to ensure that the components interact to provide statistically reliable information while maximizing the inclusion of students and student subgroups in accountability determinations. Section 200.7(a)(2)(ii) is focused not only on a State's minimum group size, but also on ensuring that the entirety of a State's AYP definition is coherent and results in statistically reliable accountability determinations. For the reasons stated previously in this section, at this time, we do not believe

it is appropriate to establish one minimum group size for all States.

Changes: None.

Comment: One commenter expressed concern that decisions regarding minimum group size would be partisan and biased if States were required to justify their minimum group size to the National TAC.

Discussion: The National TAC will not evaluate States' minimum group size. Rather, the National TAC will provide advice to the Department on how States should consider the interactions of the various components in their AYP definition and will provide recommendations to the Secretary that the Secretary and peer reviewers may consider when reviewing each State's revised Accountability Workbook. We note that the National TAC is a nonpartisan group that is subject to Federal Advisory Committee Act (FACA) requirements, thus guarding against any perception that its recommendations are based on anything but sound education policy.

Changes: None.

Comment: None.

Discussion: In the course of our internal review of the proposed regulations, we determined that the regulations should refer to ''minimum group size'' rather than ''minimum subgroup size'' because AYP determinations are made for the ''all students'' group as well as student subgroups.

Changes: We have revised § 200.7(a)(2)(ii) to change the term ''minimum subgroup size'' to ''minimum group size.''

Section 200.11 Participation in NAEP

Section 200.11(c) Report Cards

Comment: Many commenters supported the proposal in § 200.11(c) that States and LEAs be required to include results from the NAEP on their report cards, stating that this information provides an important tool to help the public evaluate and compare results across States and to help parents learn more about how the rigor of their State's standards and assessments might compare with other States and with national benchmarks.

However, several commenters recommended that the regulations encourage, but not require, States to include NAEP results on State and LEA report cards. One commenter maintained that States should have the discretion to determine whether information on the NAEP would be valuable to the public and, if so, how to disseminate it. Several commenters stated that it is unnecessary to require States to include NAEP results on State and LEA report cards because many States already post NAEP results on their Web sites. Other commenters recommended requiring NAEP results to be posted on State and LEA Web sites instead of requiring that they be included on SEA and LEA report cards. One commenter stated that State Web sites are the most appropriate vehicle for making publicly available comparisons of results from State assessments and the NAEP and for communicating the relationship between the NAEP and State assessments. Finally, several commenters stated that this proposed requirement could be viewed as an effort to push States to adopt a national curriculum that is aligned with the standards and curriculum implicit in the NAEP.

Discussion: The NAEP is the only nationally representative and continuing assessment of what America's students know and can do in various grades and subject areas and, therefore, is an important source of information about student achievement. The Secretary believes that NAEP data should be easily accessible and available to parents and the public in order to provide them with a tool for comparing how students in a State are performing on the NAEP with how students in the State are performing on State assessments.

The Department does not believe that giving States the option to include NAEP data on State and LEA report cards or requiring only that they post NAEP results on State or LEA Web sites would be sufficient. We believe that including NAEP results on State and LEA report cards provides the greatest transparency and gives parents easy access to an important tool for assessing the educational performance of students in their State. We also do not agree with commenters who stated that requiring the inclusion of NAEP data on State and LEA report cards may be viewed as an effort to push States to adopt a national curriculum aligned with the standards and curriculum implicit in the NAEP. The purpose of requiring State and LEA report cards to include NAEP results is to ensure that NAEP results are easily accessible and available to parents and the public.

Changes: None.

Comment: A number of commenters supported requiring NAEP results on State report cards, but not on LEA report cards. One commenter stated that State NAEP results on LEA report cards would be irrelevant to parents because the data would not help a parent decide which school their child should attend. Other commenters stated that including the information on LEA report cards would lead parents and the public to conclude, mistakenly, that students in that LEA participated in the NAEP.

Discussion: While we agree that including NAEP results on LEA report cards will not likely help a parent decide which school their child should attend, we believe that the data will give parents an important comparison between the percent of students proficient according to State standards and assessments and the percent of students proficient on the NAEP. Therefore, we disagree with commenters who recommended that we require NAEP results to be included only on State report cards.

Changes: None.

Comment: Several commenters recommended amending the regulations to make clear that NAEP results must be reported on State and LEA report cards disaggregated by subgroup, including subgroups for students from major ethnic and racial groups, LEP students, and students with disabilities. The commenters also recommended that we require States and LEAs to include on their report cards information about the participation of students with disabilities on the NAEP. Other commenters recommended that we require State and LEA report cards to include the State's average scale score for the NAEP mathematics and reading assessments in comparison with the national average scale score for the NAEP mathematics and reading assessments.

Discussion: The Secretary agrees that the regulations should be more specific about the State NAEP data that are to be reported on State and LEA report cards. In order to provide parents and the public with sufficient information to compare how students in a State are performing on the NAEP with their performance on State assessments, we believe the data should, at a minimum, be reported in terms of the percentage of students, at each achievement level reported on the NAEP (below basic, basic, proficient, advanced) in the aggregate on State and LEA report cards. Recognizing commenters' concerns, as described later in this section regarding the burden of including NAEP data on State and LEA report cards, however, we are revising the regulations to require that the achievement data be disaggregated for each subgroup for which AYP determinations are made only on the State's report card.

We also agree with commenters that the participation rates for students with disabilities and the participation rates for LEP students should be included on

both State and LEA report cards. States and LEAs may include additional NAEP data, such as scale scores, but we decline to require them to do so.

Changes: We have revised § 200.11(c) to make clear that each State and LEA must include on its report card the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments. We also have added two paragraphs to this section to make clear that State and LEA report cards must include: (1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated by economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and LEP students; and (2) the participation rates for students with disabilities and the participation rates for LEP students.

Comment: Numerous commenters opposed the proposed regulations, stating that NAEP results would be misinterpreted by parents and the public and create an inappropriate comparison because the results reflect different types of tests that are developed for different purposes and that have different constructs, different standards-setting procedures, and different ''cut scores.'' Many commenters stated that parents already receive an abundance of data on the academic performance of their child, and on their child's school and LEA, and that adding NAEP results to report cards would be cumbersome, confusing, and of little value to parents. Other commenters stated that the NAEP and State assessments test different groups of students and are not administered at the same time in the school year, and that NAEP results are not disaggregated by the same subgroups required under the ESEA.

A number of commenters stated that it is important to clarify on report cards, using simple and clear terms, that only limited comparisons can be made between the NAEP results and the results on State assessments and to clearly explain that NAEP results are based on Statewide samples of students and not necessarily on the same students whose results are reported on the State assessments. Several commenters stated that the Department has not provided guidance on how to interpret NAEP results and to explain the differences between the NAEP and State assessments. One commenter asked whether the Department will provide technical assistance to help States accurately interpret and explain the differences between the NAEP and State assessments.

Discussion: The Secretary recognizes that simple comparisons of student performance on the NAEP and State assessments cannot be made without some understanding of the key differences between the two assessments. Just as States and LEAs provide information about their State assessments to help parents and the public interpret assessment data, we encourage States and LEAs to provide information on interpreting NAEP results. We believe that providing parents and the public with information about the differences between the NAEP and State assessments, in a manner that is easily accessible and understandable, will allay commenters' concerns that NAEP results would be misinterpreted, misleading, confusing, or of little value to parents and the public. The Department intends to provide guidance to States on how best to convey this information to parents and the public in simple and clear terms.

Changes: None.

Comment: A number of commenters stated that the Department exceeded its statutory authority by requiring State and LEA report cards to include NAEP results. The commenters stated that the ESEA prescribes in detail the information that must be included on State and LEA report cards, as well as other information that may be included. Because the ESEA does not require the inclusion of NAEP results on report cards, and does not indicate that States and LEAs may include this information on their report cards, the commenters stated that the Department lacks the authority to add to these requirements.

Discussion: We agree with the commenters that section 1111(h)(1) and (2) of the ESEA sets out specific information that States and LEAs must include on their report cards and also permits States and LEAs to include additional optional information. We note that section 1111(h)(1)(D) specifically expresses the rationale for including optional information on report cards: to ''best provide parents, students, and other members of the public with information regarding the progress of each of the State's public elementary schools and public secondary schools.'' Congress obviously believed that participation in the NAEP is important because, in sections 1111(c)(2) and 1112(b)(1)(F) of the ESEA, it required each State and LEA, if selected, to participate in NAEP's reading and mathematics assessments in fourth and eighth grades as a condition of receiving Title I, Part A funds. For the reasons stated previously, we believe that including State NAEP results on State and LEA report cards is consistent with Congress' reason for permitting additional information on report cards—that is, to best provide parents, students, and the public information regarding the academic progress of students in the State. Accordingly, the Secretary has exercised her specific regulatory authority in section 1901(a) of the ESEA and her general regulatory authority in section 410 of the General Education Provisions Act, 20 U.S.C. 1221e–3, to require States and LEAs to include State NAEP data on their report cards to provide another significant indicator of student achievement in the State.

Changes: None.

Comment: One commenter stated that the proposed amendment to § 200.11 conflicts with language in Executive Order 12866 on reducing regulatory burden.

Discussion: Executive Order 12866, which governs Federal agencies' regulatory planning and review, requires agencies to adhere to a number of principles when considering and promulgating regulations. Among those Principles of Regulation is the principle that each agency tailor its regulations to impose the least burdens on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the agency's objectives, taking into account, among other things and to the extent practicable, the costs of cumulative regulations.

Thus, although Executive Order 12866 encourages agencies to take efforts to reduce regulatory burden, it also recognizes that some burden may be necessary for an agency to achieve its objectives. The Executive Order, therefore, also requires an agency to analyze the costs and the benefits of a regulation and ''to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' As we discuss elsewhere in this section, we believe that the benefits of requiring States and LEAs to include NAEP data on their respective report cards significantly outweigh the burden of complying with this requirement. The NAEP is the only nationally representative and continuing assessment of student achievement. We believe that keeping parents and the public informed about student achievement is worth the additional time and resources needed to make this information readily available. Accordingly, we disagree with the commenter that the NAEP requirement conflicts with Executive Order 12866.

Changes: None.

Comment: One commenter stated that the amount of time and effort that would be required to ensure accurate and appropriate use of NAEP results far outweighs any potential benefits. A number of commenters stated that NAEP results are already available to States and the public and that requiring the data to be included on report cards would place an undue burden on States and LEAs and require additional resources. The commenters stated that changes to report cards require significant staff time and resources because States must seek input from stakeholders, obtain State Board of Education approval, and pay the costs for reproduction. Several commenters stated that the Department should provide States with sufficient time to make these changes.

Discussion: We disagree with the comment that the amount of time and effort required to ensure accurate and appropriate use of NAEP results outweighs any potential benefits of including this information on report cards. We believe that the benefits of providing parents and the public with information that will help them evaluate student achievement and the State's educational system outweigh the additional time and resources needed to make this information readily available. Further, we do not agree that the amount of time and effort required to include NAEP data (and appropriate interpretations of those data) will be substantial. State NAEP results are available on the Web site of the Department's National Center for Education Statistics (NCES), as well as through other sources, and obtaining these data should not pose a significant burden. That said, as we have noted previously, we are revising the regulations to provide that only State report cards must include disaggregated achievement data.

Finally, we note that States and LEAs may use their Title I, Part A administrative funds to pay for the staff time and resources needed to make these changes to their report cards, which we expect to be implemented when States and LEAs report the results from assessments administered in the 2008–2009 school year. We address the specific concerns about the costs of making these changes to State and LEA report cards in the *Summary of Costs and Benefits section*.

Changes: We have revised § 200.11(c) to make clear in paragraph (c)(1) that only State report cards must include NAEP achievement data disaggregated by subgroup.

Comment: One commenter recommended that, in addition to the results from State NAEP reading and mathematics assessments, States and LEAs should be required to report NAEP results on assessments for all academic subjects, including history, civics, government, economics, and geography.

Discussion: We agree that including NAEP results on State and LEA report cards for all academic subjects would be informative. Given that AYP determinations are based on student performance in reading/language arts and mathematics, however, we believe that, at a minimum, NAEP results for these two subjects must be included on State and LEA report cards. There is nothing in these regulations that would prevent a State or LEA from reporting the results from other NAEP assessments on their report cards if they so choose.

Changes: None.

Comment: One commenter agreed with the proposal to require NAEP results on State and LEA report cards, provided that the most recent data are used and that the Department ranks State assessments for rigor so that stakeholders can determine whether their State's assessments reflect the same level of rigor as the NAEP. One commenter expressed concern that NAEP results would not be available in time to report them with the State assessment data. Another commenter recommended that the regulations establish a specific date by which NAEP results will be provided so that there would be no delay in reporting State assessment data. The commenter recommended that the Department not enforce the NAEP requirement if there is a delay in releasing NAEP data.

Discussion: Section 200.11(c) requires States and LEAs to include only the most recently available academic achievement results from the State's NAEP reading and mathematics assessments on their report cards. In other words, States and LEAs will include on their report cards the most recent NAEP data that are available (whatever year's data happen to be most recent). A delay in the release of NAEP data therefore would not affect the timing of report cards. With regard to the commenters' recommendation that the Department rank order State assessments for rigor, NCES has conducted several analyses comparing the results from the NAEP with results from State assessments in reading and mathematics (*see http://nces.ed.gov/nationsreportcard/researchcenter/statemapping.asp*).

Changes: None.

Comment: One commenter opposed requiring States to report NAEP results on State and LEA report cards because of deficiencies in the NAEP mathematics assessment. The commenter recommended that, because the National Mathematics Advisory Panel report identified a deficiency with the NAEP mathematics assessment, the Department correct this problem before requiring States and LEAs to include NAEP results on their report cards.

Discussion: NCES is responsible by law for carrying out the NAEP. *See* 20 U.S.C. 9010. The National Assessment Governing Board, appointed by the Secretary but independent of the Department, sets policy for the NAEP and is responsible for developing the framework and test specifications that serve as the blueprint for the assessments. NCES and the National Assessment Governing Board take seriously the criticisms of the National Mathematics Advisory Panel and are considering the Panel's recommendations.

In the meantime, we note that one of the resources upon which the National Mathematics Advisory Panel relied in making its recommendations for NAEP and State tests was the 2007 *Validity Study of the NAEP Mathematics Assessment: Grades 4 and 8.* Although that report identified some areas for improvement, it concluded that, ''The NAEP mathematics assessment is sufficiently robust to support the main conclusions that have been drawn about United States and state progress since 1990.'' [1] The Task Group on Assessment of the Mathematics Advisory Panel found that NAEP employs acceptable processes for setting standards and cut scores.[2] Based on the findings of these reviews, the Secretary continues to believe that NAEP is still the best indicator of student achievement in mathematics and that the inclusion of NAEP data on State and local report cards should not be delayed until NCES makes revisions in response to the National Mathematics Advisory Panel's recommendations.

Changes: None.

Section 200.19 Other Academic Indicators

Reorganization of § 200.19

Comment: None.

Discussion: In light of the significant number of changes the Department is including in the final regulations on the ''other academic indicator'' for high

[1] Daro, P., Stancavage, F., Ortega, M., DeStefano, L., & Linn, R. (2007). *Validity Study of the NAEP Mathematics Assessment: Grades 4 and 8.* (pp. ii and 119).

[2] U.S. Department of Education, *Standards for Success: The National Mathematics Advisory Panel, Reports of the Task Groups and Subcommittees.* (2008). Washington, DC: Author.

schools, we have reorganized § 200.19 to group all the requirements for high schools in new paragraph (b) and all the requirements for elementary and middle schools in new paragraph (a). We believe that this reorganization makes this section of the regulations more accessible and will aid readers' understanding of the new high school graduation requirements.

Changes: Section 200.19 has been reorganized as follows:

- Section 200.19(a) sets forth all of the requirements for elementary and middle schools with respect to other academic indicators.
- Section 200.19(b) sets forth all of the requirements for high schools with respect to the other academic indicator—graduation rate.
- Section 200.19(c) incorporates the requirements from current § 200.19(b) regarding additional academic indicators.
- Section 200.19(d) incorporates the requirements from current § 200.19(c) regarding statistical quality of data.
- Section 200.19(e) is substantively unchanged from the current regulation and has been changed only to update cross-references to other paragraphs within this section.

New § 200.19(b) (Proposed § 200.19(a)(1)) Definition of Adjusted Cohort Graduation Rate

General

Comment: Many commenters supported the Department's proposal to require States to use an adjusted cohort graduation rate, as defined in proposed § 200.19(a)(1), to calculate graduation rate for purposes of determining whether a high school has made AYP. The commenters noted that the proposed definition closely follows the definition of graduation rate adopted by the National Governors Association (NGA) in 2005. Commenters also stated that using a uniform method of calculating graduation rate would allow policymakers to make more meaningful cross-State comparisons and would give parents and other interested individuals a more accurate picture of high school completion in their communities. In addition, the commenters stated that information gained from using this graduation rate would allow school leaders to make more targeted adjustments in high school curriculum and programs in order to improve the transition of students from school to work and from school to college.

Other commenters, however, opposed our proposal regarding the definition of graduation rate. Several of these commenters suggested that the Department conduct studies of the implications of using an adjusted cohort graduation rate before requiring the use of such a rate for LEA-or school-level accountability determinations. Other commenters stated that the proposed regulations were too prescriptive and punitive and recommended that the Department instead take a broader approach and provide technical assistance to States in the design, development, and implementation of initiatives that would result in improved graduation rates.

Several commenters argued that, while establishing a uniform method for calculating graduation rate is a commendable endeavor, the regulations do not provide for the support system and services necessary to address the causes of low graduation rates. One commenter suggested that any additional focus on graduation rate be coupled with support for research on and development of career and technical education strategies.

Discussion: The Secretary appreciates the commenters' support for the proposed regulations. We do not agree with those commenters who believe that studies are needed before States are required to use an adjusted cohort rate. Nor do we agree that the regulations are prescriptive or punitive. The regulations requiring States to use a uniform and accurate cohort-based method of calculating high school graduation rates reflect broad consensus in the field. In August 2004, NCES released a report synthesizing the recommendations of a panel of experts on graduation rate calculations that recommended the use of an adjusted cohort graduation rate.[3] Additionally, in 2005, the lead recommendation of the NGA Task Force on High School Graduation Rate Data was for all States to immediately adopt and begin taking steps to implement a standard four-year adjusted cohort graduation rate (the ''NGA rate''), consistent with that proposed by the NCES panel.[4] All 50 governors agreed to adopt the NGA rate.

An adjusted cohort graduation rate will improve our understanding of the characteristics of the population of students who do not earn regular high school diplomas or who take longer than four years to graduate. An approach that provides technical assistance to States in designing programs to increase high school graduation is not sufficient. Moreover, all 50 States have already agreed to adopt the NGA rate, a rate similar to the four-year adjusted cohort graduation rate, and most States have made significant progress in implementing the rate. NGA's recent report (2008) states that 16 States already use the NGA rate to calculate their high school graduation rate; five more States plan to report the NGA rate in late 2008, eight more in 2009, nine more in 2010, six more in 2011, and one more in 2012; five States are uncertain about their plans to use the NGA rate.[5] In summary, the great majority of States are planning to implement the NGA rate within the next few years. Later in this preamble, we provide data suggesting that all but one State will have the capability to implement an adjusted cohort graduation rate within four years.

We agree that better and more data alone will not increase graduation rates, but those data will provide States, LEAs, and schools with critical information that is necessary for understanding the reasons for low graduation rates and for designing better programs and services to help students graduate.

Changes: None.

Comment: Several commenters questioned whether the Secretary has the authority to define how each State must calculate its graduation rate.

Discussion: We believe these regulations, which require a uniform definition of graduation rate that each State must use for NCLB purposes, are clearly within the Secretary's regulatory authority. Section 1111(b)(2)(C)(vi) of the ESEA requires a State to include, in determining AYP, a measure of graduation rate, defined as ''the percentage of students who graduate from secondary school with a regular diploma in the standard number of years.'' The legislative history accompanying NCLB makes clear that this definition must track students who graduate ''on time''—that is, ''within four years of starting the ninth grade for high schools that begin with the ninth grade''—and must avoid counting a dropout as a transfer. H.R. Rep. No. 334, 107th Cong, 1st Sess. 713 (2001). To date, each State has used its own definition. Some of those definitions, however, do not track a cohort of students from entry in high school through graduation. Moreover, many do

[3] National Institute of Statistical Sciences and Education Statistics Services Institute. (2004). *National Institute of Statistical Sciences/Education Statistics Services Institute Task Force on Graduation, Completion, and Dropout Indicators* (NCES 2005–105). U.S. Department of Education. Washington, DC: National Center for Education Statistics.

[4] National Governors Association. (2006). *Graduation Counts: A Report of the National Governors Association Task Force on High School Graduation Rate Data.* Washington, DC: Author.

[5] National Governors Association. (2008). *Implementing Graduation Counts: State Progress to Date, 2008.* Washington, DC: Author.

not sufficiently account for students who drop out, thereby overstating a school's graduation rate. Section 1901(a) of the ESEA authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].'' Accordingly, the Secretary has chosen to require that States use a uniform and accurate method of calculating graduation rate in order to hold schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma.

Changes: None.

Comment: Several commenters stated that adopting an adjusted cohort definition of graduation rate has significant costs because States would be required to establish data systems that can track students individually. Other commenters contended that States do not have the data-system capacity to track students who transfer between LEAs and that current budget constraints are affecting States' development of longitudinal data systems. Other commenters suggested that the Federal government provide technical assistance and funding to help States build capacity and the infrastructure needed to track transferring students. One commenter recommended that the Department provide incentives and funding to help States develop longitudinal data systems that can track individual students over time, whether they drop out of high school and re-enter at a later date, enroll in a General Education Development (GED) program, enter an alternative school, or are placed in a juvenile detention center.

Discussion: The definition of graduation rate in the final regulations is very similar to the one that States' governors endorsed and requires the same data system capacity. In addition, the NGA reports that 36 States now have the information systems they need to collect longitudinal data and are tracking cohorts of students as they progress through the school system and, within four years, 49 States should have high school cohort data that will allow them to use the NGA rate.[6] Again, these data reflect activities that States initiated in the absence of these regulations. Moreover, the Department supports States' development of longitudinal student data systems through the Department's Statewide Longitudinal Data Systems program. As noted earlier, for fiscal years 2005 (when the program began) through 2008, Congress appropriated more than $122 million for this program and, through fiscal year 2007, 27 States have received these grants. In addition, the President, in his fiscal year 2009 budget request, has asked Congress to more than double funding for this program to $100 million. Thus, we believe that the regulations would not impose significant costs on States that they were not already likely to assume in the absence of these regulations or that they would have to support with non-Federal funds.

Changes: None.

Comment: One commenter argued that the proposed definition of graduation rate would unfairly penalize a school for students who drop out of school in order to get a job because, under the proposed definition, a dropout could not be removed from the cohort. This commenter stated that some students do not function well in a regular school setting and may need to enter the workforce early; in these cases, the commenter said that dropping out of school may be in the best interest of all concerned.

Discussion: The Secretary strongly disagrees that it would be best for the educational system and students if certain students drop out of high school to join the workforce instead of graduating from high school. Numerous reports and statistics from the U.S. Department of Labor (DOL) indicate the importance of a high school diploma. For example, in 2006, the unemployment rate for high school dropouts aged 25 and older was more than 1.5 times the rate of individuals who had a high school diploma (6.8 percent compared to 4.3 percent, respectively). Data for the same year also show that median annual earnings for high school graduates were $29,000, or nearly 32 percent higher than the $22,000 earned by those who did not receive a high school diploma.[7] These data make very clear the high economic costs of not completing high school.

Changes: None.

Comment: Several commenters questioned the Department's proposal to require States to use an adjusted graduation cohort rate that is based on ''first-time in 9th grade'' cohorts because, according to the commenters, the rate would not account for the 9th grade ''bulge'' reported in nearly all high schools (i.e., a larger enrollment of students in 9th grade due to student retention). Several commenters suggested that the adjusted cohort graduation rate allow States to use actual 9th grade enrollment rather than an estimated enrollment. One commenter recommended that the Department consider requiring States to use an alternative definition of graduation rate that would use an age rather than a grade as the starting point. Another commenter noted that there are students who drop out of school prior to entering high school and recommended that, because the adjusted cohort graduation rate would not include these students, the Department should adopt an approach that measures the high school graduation rate of students who graduate from middle or junior high school.

Discussion: Including ''first-time 9th graders'' in the definition of graduation rate in the final regulation is explicitly intended to account for the 9th grade ''bulge,'' which otherwise would distort the adjusted cohort rate by counting retained students in multiple cohorts. For example, unless the cohort is based on a count of first-time 9th graders, a student who is retained in 9th grade, but successfully completes the next four years of high school and receives a regular diploma, would be counted as a four-year graduate, even though the student spent five years in high school. To avoid such inaccuracies in measuring a school's graduation rate, a State must have data allowing it to determine ''first-time'' status for each student in 9th grade and thus count, not estimate, the number of such students in order to accurately identify the 9th grade cohort for a given year. Note that high schools in which the 10th grade is the earliest grade would use first-time 10th graders as the initial cohort. Further, we decline to adopt the recommendation that the Department base the adjusted cohort graduation rate on the age of students. Nor do we agree that the Department should be measuring the graduation rate of students starting with middle school graduates as the baseline. The ESEA specifically requires a measurement of on-time graduation from high school as a means of holding high schools accountable; a measure that is either based on age or uses middle school graduation as the starting point most likely would not meet that requirement.

Changes: None.

Adjusted Cohort Graduation Rate—Standard Number of Years and Extended-year Graduation Rate

Comment: Some commenters supported proposed § 200.19(a)(1)(i)(C)(*1*), which would have defined the term ''standard number of years'' to mean four years unless a high school begins after ninth grade, in which case the standard number of years is the number of grades

[6] *Id.*

[7] U.S. Department of Education. (2008). *Condition of Education 2008.* Washington, DC: Author.

in the school. Many commenters, however, opposed this definition. A number of these commenters expressed concern that applying this definition would penalize schools serving students who typically take longer to graduate, such as students with disabilities; LEP students; returning dropouts; students with necessary medical leave; children of immigrants; children of migrant workers; children with parents serving in the military; incarcerated students; students involved in the foster care, juvenile justice, or homeless shelter systems; students in alternative education programs; and students who enter high school performing at a State's lowest level of achievement. The commenters stated that the effect of this provision would be to undermine the education and accomplishments of these struggling students. Other commenters stated that schools and LEAs should not be penalized in AYP calculations for any student who takes more than four years to graduate, no matter how long that student takes. Some commenters argued that the proposed definition did not recognize the investments that SEAs and LEAs have made in programs that provide additional time and services to students who need more support to meet challenging content standards and pass rigorous exit exams. Some commenters argued that early college high schools and alternative education settings, such as those designed for students who are ''under-credited'' or have dropped out of high school, that award a regular high school diploma should be provided a waiver from meeting the four-year requirement for accountability purposes. Some commenters expressed concern that subgroups singled out for not reaching a ''standard number of years'' target would be stigmatized and that this regulation could promote discrimination. One commenter asked if there was a research basis for our proposed definition of ''standard number of years.''

One commenter recommended that the graduation rate calculation take into account that some students graduate high school in less than the ''standard number of years'' and ensure that these students are not counted as dropouts.

Discussion: Section 1111(b)(2)(C)(vi) of the ESEA requires that graduation rate be defined as the percentage of students who graduate from secondary school with a regular diploma in the ''standard number of years.'' We have interpreted and continue to interpret the ''standard number of years'' to be four years because the vast majority of high schools in this country provide four years of education and expect students to graduate at the end of those four years with a regular high school diploma. Rather than using the phrase ''standard number of years,'' however, we now use ''students who graduate in four years'' and define that phrase in § 200.19(b)(1)(iii) to make clear that it includes not only students who earn a regular high school diploma at the conclusion of their fourth year but also those who graduate early or during a summer session immediately following their fourth year. Moreover, as described in greater detail later in this preamble, we have added a provision in § 200.19(b)(1)(v) that addresses many of the commenters' concerns about students who need more than four years to graduate by permitting a State also to include in its AYP definition, subject to approval by the Secretary, an ''extended-year adjusted cohort graduation rate.'' This extended-year graduation rate would include students who graduate in four years or more with a regular high school diploma. States may decide to include one or more years beyond the standard four years (e.g., an extended-year graduation rate that combines a five-year rate and a six-year rate). A State may also choose to have more than one extended-year graduation rate (e.g., a five-year rate and a six-year rate) without combining those rates into one extended-year graduation rate. Examples of ways in which extended-year graduation rates may be used in AYP determinations can be found later in this preamble in the discussion of new § 200.19(b)(6)(i)(F). If a State chooses to calculate an extended-year graduation rate, such rate should not be limited to groups of students based on their characteristics (e.g., students with disabilities, LEP students).

Changes: New § 200.19(b)(1)(i)(A) (proposed § 200.19(a)(1)(i)(A)(*1*)) defines ''four-year adjusted cohort graduation rate'' as the number of students who graduate in four years with a regular high school diploma divided by the number of students who form the adjusted cohort for that graduating class. New § 200.19(b)(1)(ii)(A) defines ''students who transfer into the cohort'' to mean the students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12. New § 200.19(b)(1)(iii) defines ''students who graduate in four years'' as students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year. (For ease of reference, we sometimes refer to this rate elsewhere in the preamble as the ''four-year rate.'') The following formula shows the calculation of the four-year adjusted cohort graduation rate reported in the summer of 2006 (based on the class entering 9th grade in the fall of 2002).

$$\frac{\text{Number of cohort members who earned regular high school diplomas through summer 2006}}{\text{Number of first-time 9th graders in fall 2002 (starting cohort) plus transfers in minus students who transfer out, emigrate, or die during school years 2002-2003, 2003-2004, 2004-2005, and 2005-2006}}$$

We also have revised the regulations in § 200.19(b)(1)(v) to provide that, in addition to calculating a four-year rate, a State may propose to the Secretary for approval an extended-year adjusted cohort graduation rate. This rate is defined as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year rate, accounting for any students who transfer into the cohort by the end of the year of graduation being considered and for students who transfer out, emigrate to another country, or are deceased by the end of that year. A State may calculate one or more extended-year adjusted cohort graduation rates. (For ease of reference, we sometimes refer to the extended-year adjusted cohort graduation rate or rates elsewhere in the preamble as the ''extended-year rate.'') The following formula shows the calculation of a five-year extended-year rate reported in the summer of 2007 (based on the class entering 9th grade in the fall of 2002).

$$\frac{\text{Numerator in the 4-year adjusted cohort graduation rate plus cohort members who earned a regular high school diploma through summer 2007}}{\text{Denominator in the 4-year adjusted cohort graduation rate plus transfers in during the 2006-2007 school year minus students who transfer out, emigrate, or die during the 2006-2007 school year}}$$

Appendix A provides an example of how the four-year and extended-year adjusted cohort graduation rates would be calculated.

Comment: Several commenters argued that the definition of ''standard number of years'' should not apply to students with disabilities because the IDEA allows students with disabilities to receive special education services through 21 years of age. The commenters stated that this requirement in the IDEA should supersede the ESEA requirements and that the definition of adjusted cohort graduation rate should provide an exception for students with disabilities who require additional time to (1) complete the requirements for a regular high school diploma, (2) meet their individualized education program (IEP) goals, or (3) fulfill the requirements for other State-approved diplomas.

Discussion: As we noted in response to the previous comments, we are revising the regulations, in new § 200.19(b)(1)(v), to permit a State, in addition to calculating a four-year rate, to calculate an extended-year rate that includes, as graduates, students who graduate in four years or more with a regular high school diploma. Therefore, students with disabilities who need additional time to complete the requirements for a regular high school diploma and who graduate with a regular high school diploma may be included as graduates in an extended-year rate (if a State chooses to use an extended-year rate). Students with disabilities who fulfill requirements for any other State-approved alternative award, certificate of attendance, or GED credential or who complete their IEP goals but do not receive a regular high school diploma may not be counted as graduating in either the four-year or extended-year rate, consistent with the definition of regular high school diploma in new § 200.19(b)(1)(iv).

Changes: As previously noted, we have revised the regulations to provide in new § 200.19(b)(1)(v) that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate.

Comment: One commenter asked how the definition of ''standard number of years'' in proposed § 200.19(a)(1)(i)(C)(*1*) would apply to a school that does not have four grades.

Discussion: New § 200.19(b)(1)(i)(B) provides that, if a high school does not have four grades (e.g., does not have a 9th grade), then the State uses the number of grades in the school to calculate its adjusted cohort graduation rate. For example, if a school has three grades, then the adjusted cohort will be made up of those three grades. Any student who graduates in more than three years would be included in an extended-year rate, if a State chooses to use an extended-year rate.

Changes: None.

Comment: Some commenters supported proposed § 200.19(a)(1)(i)(C)(*2*), which would have permitted a State to propose, for approval by the Secretary, an alternate definition of ''standard number of years'' that would apply to limited categories of students who, under certain conditions, may take longer to graduate. These commenters stated that schools and LEAs should receive credit for students who take longer than four years to graduate. However, the majority of commenters opposed this proposal for a variety of reasons. Several commenters expressed concern that the criteria the Department would use to evaluate a State's alternate definition of ''standard number of years'' would be subjective and stated that further discussion was necessary to ensure that the Department establishes a clear, transparent process and timeline for approving States' alternate definitions. The commenters contended that, if States are permitted to propose their own categories of students and alternate definitions of ''standard number of years,'' graduation rates will remain difficult, if not impossible, to compare across States. Some commenters, on the other hand, argued that States should have the flexibility to propose an alternate definition of ''standard number of years'' without seeking approval from the Department. Other commenters objected to this provision because they wanted schools and States to be accountable for graduating all students within four years and stated that no exceptions should be allowed for students who may take longer to graduate.

Discussion: The Secretary has amended the final regulations to remove the provision for a State to propose an alternate definition of ''standard number of years'' when calculating the four-year adjusted cohort graduation rate. Accordingly, each school, LEA, and State must calculate a four-year adjusted cohort graduation rate, in accordance with § 200.19(b)(1)(i) through (iv). This provision will ensure use of an accurate, uniform method of calculating graduation rate that will be comparable across States. To address the commenters' concerns that some students need more time to graduate with a regular high school diploma, new § 200.19(b)(1)(v) permits a State to also establish an extended-year adjusted cohort graduation rate because we recognize it is important for schools and LEAs to receive credit for successfully graduating students, even if some students take longer to graduate for a variety of reasons.

Changes: As previously noted, new § 200.19(b)(1)(i)(A) provides for a four-year adjusted cohort graduation rate. New § 200.19(b)(1)(v) provides that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate, subject to approval by the Secretary.

Cohort Reassignment

Comment: Many commenters opposed proposed § 200.19(a)(1)(i)(C)(*2*), which would have allowed States to propose and use, if approved by the Secretary, an alternate definition of the ''standard number of years'' required for high school graduation because it would have allowed States to reassign students from their original cohort to a subsequent cohort if those students were not expected to graduate in the ''standard number of years.'' Commenters identified three major problems with using cohort reassignment. First, according to the commenters, cohort reassignment would allow States to predetermine how many years certain categories of students would take to graduate high school with a regular high school diploma, thereby reducing State accountability for those students and causing schools to ignore the educational needs of individual students. This potential outcome was

particularly troubling to commenters because, according to these commenters, the populations that are most likely to be reassigned are students who already suffer from low expectations (e.g., students with disabilities and LEP students). Second, many commenters stated that cohort reassignment is complicated and lacks transparency. These commenters argued that it is difficult to know which students and how many were reassigned to later cohorts and to identify the cohorts to which they were reassigned. They claimed that, therefore, cohort reassignment would make the adjusted cohort rate less useful as a tool for determining whether a school is graduating its students on time. Third, some commenters argued that permitting cohort reassignment would be inconsistent with the Department's overall goal of having States use a consistent, accurate, and uniform method for calculating graduation rate. Many of these commenters recommended use of an extended-year graduation rate.

Discussion: As noted previously, after considering the public comments, the Secretary has revised the regulations to remove the provision that would have allowed a State to propose and use an alternate definition of ''standard number of years.'' We recognize, however, that some students may take longer to graduate than others. Accordingly, rather than permitting cohort reassignment, we have revised the regulations to require States to calculate and report a four-year adjusted cohort graduation rate. If a State chooses to do so, and receives approval from the Secretary, it may also calculate and report an extended-year graduation rate. We believe that, with these changes, schools and LEAs will be held accountable for their performance in graduating students in four years while also receiving credit for graduating additional students in a cohort over a longer time frame. We agree with the commenters that cohort reassignment could reduce State and local accountability for students who are reassigned to a different cohort, would add complexity and reduce transparency in graduation rate calculations, and would undermine comparability in graduation rates across States.

Changes: As previously stated, new § 200.19(b)(1)(i)(A) requires States to calculate a four-year adjusted cohort graduation rate. New § 200.19(b)(1)(v) provides that, in addition to calculating a four-year rate, a State may calculate an extended-year adjusted cohort graduation rate.

Adjusted Cohort Graduation Rate—Removing Students From the Cohort

Comment: None.

Discussion: In reviewing the comments on documenting student transfers, we realized that the proposed definition of the adjusted cohort graduation rate did not provide for removing a student from the cohort who emigrates to another country and is no longer in the United States. We believe such a student should not continue to be included in the cohort and have revised the regulations accordingly.

Changes: We have revised new § 200.19(b)(1)(ii)(B) to include students who emigrate to another country among the students whom a school or LEA may, with written confirmation (as discussed in the following paragraphs), remove from the cohort.

Comment: A number of commenters expressed concern about requiring States to document that a student has transferred before removing the student from an adjusted cohort. Several commenters requested that we modify the requirement in proposed § 200.19(a)(1)(i)(A)(*2*) that would require a school or LEA to have official documentation that the student has enrolled in a program of study in another school, LEA, or other educational program that culminates in the award of a regular high school diploma in order to confirm that a student has transferred. These commenters appeared to assume that, in proposing to require ''official documentation,'' we meant to require a school to receive a request for a student's transcript. These commenters argued that, in many cases, it would be very difficult for schools to obtain this specific documentation and suggested the Department consider other types of documentation. They also stated that documenting transfers can be challenging because some families move and withdraw from school without any notification to school officials, especially in the case of migrant students, children of undocumented immigrants, or students who move outside the United States. The commenters specifically noted that there is no national database with common student identifiers to track students who transfer across State lines and that parents are not required under most State laws to notify their child's school when they move out of an LEA or to provide the child's former school with the name of the student's new high school.

One commenter questioned why proof of enrollment in another school would be required when a family moves. The commenter stated that, in these circumstances, a school should be required only to obtain evidence that a family has moved in order to count the student as a transfer. Several commenters suggested that a school or LEA should only be required to have ''reasonable evidence'' (rather than ''official documentation'') that the student has enrolled in a program of study in another school, LEA, or other educational program that culminates in the award of a regular high school diploma. These commenters suggested that ''reasonable evidence'' that a student has transferred could include: a records request from the receiving high school; an approved application for home schooling, or enrollment in a virtual school or distance education program; signed documentation from the student's parent or legal guardian that the family is moving out of the LEA, State, or country and that the student will be enrolled in school in the new location; and telephone or other personal contact with a responsible adult who verifies that the student's family has moved out of the LEA and that the adult believes the student is attending school elsewhere. These commenters also stated that ''reasonable evidence'' that a student has died may include a written statement to that effect. One commenter recommended that, if a student transfers to another school in the same State, confirmation that the student appears on the receiving school's enrollment list in the State's student record system should be required.

Discussion: We agree with the commenters that further clarification is needed regarding the documentation that is needed to confirm that a student has transferred out, emigrated to another country, or died. New § 200.19(b)(1)(ii)(B) therefore requires a school or LEA, before removing a student from the cohort, to confirm in writing that the student transferred out, emigrated to another country, or is deceased. Unless a school or LEA can confirm that a student has transferred out, emigrated to another country, or is deceased, the school or LEA must consider that student to still be in the cohort for purposes of the graduation rate calculation. Too often, any student who leaves the cohort for any reason is classified as a transfer, even if the student does not enroll in another program of study that culminates in the award of a regular high school diploma.

With respect to a student who transfers out, in particular, new § 200.19(b)(1)(ii)(B)(*1*) requires the school or LEA to have official written documentation that the student has

enrolled in another school or in an educational program that culminates in the award of a regular high school diploma. Official written documentation that a student transferred out may include several different types of documentation, such as a request for records from the receiving high school; an approved application for home schooling or distance education; evidence of a transfer that is recorded in a State's data system; or a letter from an official in the receiving school acknowledging the student's enrollment. Documentation must be in writing rather than a telephone conversation or other verbal communication with a parent, relative, or neighbor so that the transfer can be verified through audits or monitoring.

Although the Secretary appreciates that it may be difficult for a school or LEA to confirm through official written documentation that a student has transferred to another school or educational program that awards a regular high school diploma, we believe that it is critically important for school officials to do so in order to have an accurate measure of the school's and LEA's graduation rates.

With respect to students who are deceased or who have emigrated to another country, the school or LEA also must confirm this fact in writing but need not obtain official documentation. For example, written confirmation of a student who has emigrated might include a school administrator's memo to the student's file, based on a phone conversation with a parent, stating that the student is leaving the country. The Department plans to provide non-regulatory guidance on ways that States can obtain official written documentation of a student's transfer to another school or educational program and can obtain appropriate written confirmation of a student's emigration or death before removing the student from the cohort.

Finally, regarding the comment that it is difficult to confirm the transfer of migrant students, the Department is currently implementing the Migrant Student Information Exchange system. This system contains information on migrant students that can be accessed by all States and LEAs to help ensure that the academic records of these highly mobile students are preserved despite frequent moves, and should be of great assistance to States in need of documentation of the re-enrollment of students in another school or in an educational program that results in the award of a regular high school diploma.

Changes: Section 200.19(b)(1)(ii)(B) has been amended to clarify that, to remove a student from the cohort, a school or LEA must confirm in writing that the student transferred out, emigrated to another country, or is deceased. Section 200.19(b)(1)(ii)(B)(*1*) has been amended to require that, when confirming that a student has transferred out, a school or LEA must have official written documentation that the student has enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.

Comment: Several commenters recommended that schools and LEAs not be penalized if, after multiple attempts, they are unsuccessful in contacting the parents or student to confirm that a student has transferred. Several other commenters, however, recommended that we specifically prohibit States from removing a student from a cohort as an ''error'' simply because the school could not confirm the student's final status.

Discussion: Although we recognize that in some cases it may be difficult for an LEA to obtain official written documentation of a student's transfer, we decline to allow a State to remove a student from the cohort simply because the student's status cannot be confirmed. Currently, in many cases, a student who is documented as a transfer to another school has dropped out of school, and removal of such a student from the cohort produces an inaccurate graduation rate. It is critical that LEAs accurately calculate high school graduation rates in order to give parents and the public important information about the success of a school, LEA, and State in graduating students and to ensure that AYP determinations are based on valid graduation rate calculations.

With respect to commenters who requested that we specifically prohibit the removal of students whose status cannot be confirmed as ''errors,'' we believe the regulation is clear that students may not be removed from the cohort in this situation and believe that no further change in the regulations is necessary.

Changes: None.

Comment: One commenter stated that many youth leave school and then enter workforce programs and adult basic education programs, and even go directly into community colleges, and do not necessarily return to high school. This commenter recommended that LEA data systems document and take these transitions into account.

Discussion: Although LEAs may choose to track and report on students who leave school and enter workforce programs, adult basic education programs, and community colleges, they may not count these students as transfers in the four-year adjusted cohort graduation rate. These students must be counted as dropouts unless they earn a regular high school diploma or enroll in another school or in an educational program that culminates in the award of a regular high school diploma (not including an alternative degree, such as a GED credential).

Changes: None.

Comment: Several commenters recommended that the regulations more specifically address the issue of creating uniform exit code policies across States. One commenter stated that, without transparency and common guidelines for exit codes, inconsistent coding practices undermine the accuracy of graduation rates and contribute to a lack of comparability among States. One commenter recommended that the Department require, through these regulations, that States submit to the Secretary for approval a plan for how State exit codes will be considered in calculating graduation rate in order to help ensure that the use of exit codes does not undermine the accuracy, comparability, and transparency of graduation rates.

Discussion: Although we agree with the commenter that it is important for States to create and maintain exit code rules, we do not think it is appropriate that the Department require standardized exit codes across States. However, the Department, through NCES, has provided guidance for the inclusion of exit codes in State data systems. In 2006, a Task Force of NCES' National Forum on Education Statistics (Task Force) developed a system of voluntary student exit codes designed for use with student information systems. The Task Force's goal was to construct a taxonomy that could account, at any point in time, for all students enrolled (or previously enrolled) in a particular school or LEA. Through careful review of coding systems used by States and LEAs, six broad categories emerged that were mutually exclusive and covered every possible situation. The six major exit code categories are: still enrolled in the same LEA; transferred; dropped out; completed school; not enrolled, eligible to return (e.g., a student who is participating in a foreign exchange program); and exited—neither completed nor dropped out (e.g., a student who is deceased). This work was published in a guidebook that can be found at: *http://nces.ed.gov/pubs2006/2006804.pdf*. The Department will continue to provide guidance to States in this area and encourages States

as they develop their data systems to consider the recommendations of the Task Force.

Changes: None.

Comment: One commenter recommended that the Department clarify in the regulations that the requirements for calculating an adjusted cohort graduation rate apply to States as well as schools and LEAs, and that States may not remove students from a cohort without acceptable confirmation and documentation from an LEA.

Discussion: We do not anticipate that a State would remove students from a cohort without confirmation from an LEA. Because a State must calculate the same graduation rate that is required for its schools and LEAs, we do not believe it is necessary to make any additional clarifications in the regulations specific to calculating States' graduation rates.

Changes: None.

Comment: One commenter suggested requiring an SEA- or LEA-administered audit in any school or LEA in which 20 percent or more of the entering 9th grade class is removed from the cohort on the basis of having transferred prior to graduation, or in any school or LEA in which documentation is lacking for more than 10 percent of students who are removed from the cohort as transfer students. This commenter also suggested that the Department direct the Office of Inspector General (OIG), as a priority activity, to review graduation rate data, conduct audits to determine the accuracy of State-reported graduation rates, and evaluate the adequacy of State policies regarding data quality and accuracy.

Discussion: Although we agree that States may determine that either an SEA- or an LEA-administered audit is necessary in schools or LEAs in which a certain percentage of students are removed from the cohort, we do not believe it is appropriate for the Federal government to require these audits. We also decline to direct the OIG to review the accuracy of State-reported graduation rates and State policies regarding data quality and accuracy because the Secretary does not set OIG priorities. We do, however, monitor State compliance with these regulations, and implementation of the four-year adjusted cohort graduation rate will certainly be a component of the Department's monitoring of Title I programs.

Changes: None.

Comment: One commenter recommended that the Department specifically state in the regulations that ''marginalized'' students, such as incarcerated students, must remain in the cohort and be included in the denominator of the adjusted cohort rate. Several commenters expressed concern that using an adjusted cohort rate would allow States to remove students who are in prison from the cohort. The commenters stated that this should not be permitted and suggested requiring States that want to remove incarcerated students from the cohort to propose, for approval by the Secretary, evidence that a State has in place (1) a plan to educate children in prison that will allow those students to receive a regular high school diploma; and (2) measures to ensure a full accounting of every child removed from any school's cohort. One commenter recommended that the regulations make clear that students who are incarcerated may be removed from the adjusted cohort. Another commenter recommended that States be permitted to remove students in alternative programs from the adjusted cohort.

Discussion: New § 200.19(b)(1)(ii)(B) makes clear that, in order to remove a student from the adjusted cohort, a school or LEA must confirm in writing that the student (1) transferred to another school or in an educational program that culminates in the award of a regular high school diploma; (2) emigrated to another country, or (3) is deceased. Unless a student, such as an incarcerated student or a student in an alternative program, meets one of these three conditions, the student may not be removed from the adjusted cohort and must remain in the denominator in calculations of the four-year rate for the school, LEA, and State in which the student last attended high school.

Changes: None.

Comment: We received a number of comments about how the proposed regulations would affect the tracking of students who are homeless or otherwise highly mobile. One commenter suggested that, because LEAs may not have much control over how long it takes highly mobile students to graduate, the regulations should allow States to assign these students to a cohort based on a student's grade-level placement at the time of the transfer. Another commenter opposed use of the adjusted cohort rate because it assumes a relatively stable student cohort beginning with the 9th grade and, according to the commenter, some programs with students who are highly mobile have no cohort to track. Another commenter stated that the proposed regulations would provide a disincentive for an LEA to which a highly mobile student has transferred to promote the continued education of this student who might not graduate on time. Another commenter asked that the Department clarify how calculation of the adjusted cohort graduation rate would be affected by school boundary changes within an LEA.

Discussion: The adjusted cohort rate does not assume stable cohorts, but does assume that a State has in place an accurate student record system that can track the progress of all individual students over time. States must account for students who are highly mobile in the same way that they track students who do not move frequently. If a student transfers out of a school, and the transfer can be documented, the student is placed in the corresponding cohort at the new school or program. This should provide an incentive, not a disincentive, for a receiving school to graduate that student on time. Schools that undergo a boundary change should be able to obtain the proper documentation from the LEA necessary to account for transfers out of a given cohort, and to place transfers into their proper cohorts.

Changes: None.

Comment: Several commenters noted that rapid and sustained enrollment increases or decreases will either mask or exaggerate graduation rates.

Discussion: The adjusted cohort graduation rate is based on data that follow the trajectory of individual students over time. States should not encounter problems with either masked or exaggerated graduation rates.

Changes: None.

Regular High School Diploma

Comment: Some commenters expressed concern about our proposal to define a regular high school diploma as the standard high school diploma that is awarded to students in the State, that is fully aligned with the State's academic content standards or is a higher diploma, and that is not a GED credential, certificate of attendance, or any alternative award. The commenters stated that allowing States to set their own high school graduation requirements would reduce the comparability of graduation rates due to differing standards for graduation. Another commenter remarked that the proposed regulations did not provide a definition of what graduation itself means. This commenter stated that State governors and educators generally agree that graduation should attest to the readiness of a student for postsecondary education or for productive work and that our regulations should reflect this definition. Some commenters argued that the graduation rate should include students who pass local requirements but not State assessment requirements for graduation.

Discussion: State requirements for earning a regular high school diploma vary across States, and it is the role of States, not the Federal government, to define what high school graduation means, based on a State's content standards, which indicate what students should know and be able to do by the time they leave high school. In fact, under section 1905 of the ESEA, as well as other similar provisions, the Secretary is specifically prohibited from mandating, directing, or controlling a State's, LEA's, or school's ''specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.'' To regulate on what constitutes ''graduation'' or what curricula a student must complete to receive a ''regular high school diploma'' would violate this prohibition. We, therefore, are not authorized to make the commenters' recommended changes to the regulations.

Changes: None.

Comment: Many commenters stated that the proposed definition of regular high school diploma was too narrow and that it should include any type of graduation diploma issued to a student. Some commenters suggested that the definition should include GED credentials. These commenters argued that a GED credential is accepted as an alternative to a regular high school diploma and satisfies eligibility requirements for entrance into postsecondary training opportunities, such as colleges and technical schools, as well as entrance into the job market.

Some commenters argued that modified or special education diplomas should be considered regular high school diplomas because not including these types of diplomas penalizes high schools for meeting the needs of students with disabilities. Several commenters recommended that the regulations explain that States have the option to craft a definition of ''regular diploma'' that encompasses high-quality accredited alternative education programs or special-purpose schools with curricula that are aligned with State academic standards and offer students a regular high school diploma based on graduation requirements that may differ from those applied to other schools in the State. One commenter recommended that States be more transparent about the requirements for earning a regular high school diploma.

Discussion: It is important that only students who receive a regular high school diploma (which could include a higher diploma) that is fully aligned with a State's academic content standards be included in the four-year rate in order to ensure that graduation rates accurately reflect the percentage of students who graduate with a diploma that represents what the State determines all students should know and be able to do by the end of 12th grade; alternative credentials, such as a GED credential and modified special education diplomas, do not meet these requirements. Furthermore, research demonstrates that GED recipients earn less than, and are generally not as successful in the labor market and in postsecondary education as, students who earn a regular high school diploma.[8] We agree with the commenter that States should be transparent about their diploma requirements and encourage States to make that information widely available.

Changes: None.

Comment: Another commenter noted that the definition of graduation rate proposed by the Department differs from the graduation rate adopted by the NGA. The commenter stated that, under the NGA rate, students who earn modified diplomas, such as special education diplomas, count as graduates if the modified diploma is the standard that the State and the school system have set for a student with an IEP.

Discussion: The commenter is correct that the NGA rate allows students who graduate with modified high school diplomas to count as graduates. Section 1111(b)(2)(C)(iv) of the ESEA, however, defines graduation rate as the ''percentage of students who graduate from secondary school with a regular diploma in the standard number of years.'' The legislative history accompanying this provision makes clear that Congress intended a ''regular diploma'' to exclude ''an alternative degree that may not be fully aligned with State academic standards, such as a certificate or GED.'' H.R. Rep. No. 334, 107th Cong, 1st Sess. 713 (2001). The four-year rate required in these regulations, therefore, does not permit students who receive modified or other diplomas that are not regular high school diplomas to be counted in the rate. For this reason, we no longer refer to the ''NGA rate'' when discussing the four-year adjusted cohort graduation rate, as defined in new § 200.19(b)(1).

Changes: None.

Comment: Some commenters recommended that we authorize States to establish procedures allowing schools and LEAs to count as graduates some students with the most significant cognitive disabilities who perform at a proficient level on a State's alternate assessment based on alternate academic achievement standards, but in no case more than one percent of all students assessed.

Discussion: In order for students to be counted as graduates, they must graduate with a regular high school diploma. Typically, students with the most significant cognitive disabilities do not receive regular high school diplomas but, instead, are working to meet their IEP goals or fulfill the requirements for a State-approved alternative diploma. Performing at a proficient level on a State's alternate assessment based on alternate academic achievement standards is not equivalent to receiving a regular high school diploma. Any student graduating with a credential other than a regular high school diploma may not be counted as a graduate for purposes of determining AYP; however, a State may choose to report the rate of students who successfully meet their IEP goals in order to highlight this important work. The final regulations also permit a State to set its graduation rate goal at less than 100 percent in recognition that students who are assessed based on alternate academic achievement standards, for example, may not receive a regular high school diploma. We discuss these provisions later in this preamble.

Changes: None.

Timeline for Use of the Four-Year Adjusted Cohort Graduation Rate

Comment: Several commenters opposed the requirement in proposed § 200.19(a)(1)(i) that would require States to use the four-year adjusted cohort rate definition no later than the 2012–2013 school year. Other commenters recommended that the Department require States to use the four-year adjusted cohort graduation rate earlier than the proposed 2012–2013 school year deadline; some commenters suggested that the deadline be the 2010–2011 school year, while others recommended a 2011–2012 school year deadline. One commenter suggested that States, LEAs, and schools be required to report the adjusted cohort graduation rate no later than the 2010–2011 school year and to use the rate for AYP determinations no later than the 2011–2012 school year. Some of the commenters who suggested requiring implementation earlier than the proposed deadline stated that the Department should provide States that do not have the technical capacity to implement the four-year adjusted cohort graduation rate by the new deadline additional time to do so. Most of the commenters who suggested requiring an earlier deadline stated that in no case should the Department permit a State to

[8] *Id.*

implement the adjusted cohort graduation rate any later than the 2012–2013 school year.

Discussion: We agree with the commenters who recommended requiring States to implement the four-year adjusted cohort graduation rate earlier than the 2012–2013 school year, given that, based on data from the recent NGA report,[9] we believe the great majority of States will be able to do so. We believe that an earlier deadline will help maximize the number of States using this rate as soon as possible. Accordingly, the final regulations require States to (a) report the four-year rate beginning with report cards providing results of assessments administered in the 2010–2011 school year and (b) calculate the four-year rate for determining AYP based on school year 2011–2012 assessment results.

Under the heading, *Implementation Timelines,* later in this notice, we have summarized the implementation timeline for the graduation rate requirements.

Changes: We have revised the regulations as follows:

• New § 200.19(b)(4) provides that States must calculate, for reporting purposes, the four-year adjusted cohort graduation rate, in the aggregate and disaggregated by subgroup, beginning with report cards providing assessment results for the 2010–2011 school year.

• New § 200.19(b)(5) requires a State to calculate the four-year rate, in the aggregate and disaggregated by subgroups, for purposes of determining AYP, beginning with AYP determinations based on school year 2011–2012 assessment results.

Comment: Some commenters requested that the Department allow flexibility for States that do not have the capacity to implement the four-year adjusted cohort graduation rate by the deadline proposed in the regulations. These commenters noted that States may need additional time, beyond the deadline proposed, to develop their longitudinal data systems and to train staff on implementing the new requirements. Several commenters recommended that States that currently do not have the capacity to implement the adjusted rate, or States that would not be able to meet the proposed 2012–2013 deadline, be required to demonstrate why they do not have the capacity, what changes they must make in order to attain that capacity, and the timeline for making those changes. Commenters suggested a range of ways a State could demonstrate this. Some commenters suggested that this justification be required in the State's Accountability Workbook; one commenter suggested that the Department enter into compliance agreements or timeline waivers with any States that do not implement the rate using the adjusted cohort definition by the deadline.

Commenters made various suggestions as to the information a State should be required to provide, such as an affirmation that it lacks the data system to report the data; an explanation of what changes will need to be made to its data systems; the transitional rate the State will use in the meantime; a timeline for creating the capacity and using the data; and an agreement to file interim reports on its progress.

Discussion: We understand, based on the NGA report, that some States will not be able to begin using the four-year rate for reporting and AYP determinations by the deadlines and agree with the commenters who suggested States be able to request more time to do so. We also agree with commenters that if these States need more time, these final regulations should require States to explain why they do not have that capacity, what changes they will make in order to develop that capacity, and their timeline for making those changes. We, therefore, have added new § 200.19(b)(7), which permits a State that is unable to meet the 2010–2011 deadline for reporting the four-year adjusted cohort graduation rate to request an extension of that deadline from the Secretary. To receive an extension, a State must submit, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that it cannot meet the deadline and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with § 200.19(b)(1)(i) through (iv). As a condition of approving an extension, the Secretary may require the State to use a more rigorous transitional graduation rate than it has been using until such time as the State is able to implement the four-year adjusted cohort graduation rate. The Department will use the State's plan and timeline to provide technical assistance and support to the State to implement the four-year rate as soon as possible. In addition, fiscal year 2009 grantees under the Statewide Longitudinal Data Systems grant program that lack the capacity to implement the four-year rate may use their grant to develop the data capabilities needed to implement that rate.

Any State that cannot meet the 2010–2011 deadline for reporting the four-year adjusted cohort graduation rate and does not submit a request for an extension by March 2, 2009, which is subsequently approved by the Secretary, will be out of compliance with the regulations. Should a State not meet the 2010–2011 deadline, the Secretary has the authority to take appropriate action, including, but not limited to placing a condition on a State's Title I, Part A grant, requiring the State to enter into a Compliance Agreement with the Department, or withholding Title I, Part A funds.

Changes: We have added the following regulations:

• New § 200.19(b)(7)(i) provides that, if a State cannot meet the deadline for reporting the four-year rate in § 200.19(b)(4)(ii)(A), the State may request an extension of that deadline from the Secretary.

• New § 200.19(b)(7)(ii) requires that, to receive an extension, a State must submit, by March 2, 2009, evidence satisfactory to the Secretary demonstrating that the State cannot meet the deadline in § 200.19(b)(4)(ii)(A), and a detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with § 200.19(b)(1)(i) through (iv).

Comment: Some commenters asked whether proposed § 200.19(a)(1)(ii)(A) would have required States that can calculate the adjusted cohort graduation rate to begin using it immediately for reporting and AYP purposes (i.e., for the 2008–2009 school year), ahead of the timeline that we proposed in the NPRM. Some commenters argued that, given that most States have or are close to having the data systems necessary to calculate the adjusted cohort graduation rate, the regulations should specify that States that can immediately calculate the adjusted cohort graduation rate must do so. On the other hand, some commenters opposed any requirement that States be required to use the adjusted cohort graduation rate immediately.

Discussion: The final regulations do not require immediate use of the four-year adjusted cohort graduation rate by States that have the systems and data required to calculate this rate. According to NGA, only 16 States currently have the ability to calculate the four-year rate.[10] The Secretary has decided not to require these 16 States to use the four-year adjusted cohort graduation rate for accountability

[9] *Id.*

[10] *Id.*

purposes before the deadlines in § 200.19(b)(4) and (5). However, we encourage such States to use the four-year rate as soon as possible.

Changes: None.

New § 200.19(b)(2) (Proposed § 200.19(a)(1)(i))—Transitional Graduation Rate

Comment: One commenter supported our proposal in the NPRM to require States that are not yet able to calculate the adjusted cohort graduation rate to use the AFGR on a transitional basis. Another commenter supported the use of the AFGR for reporting purposes because, according to the commenter, it would be useful to compare the AFGR to what States are currently reporting for graduation rate. However, for several reasons, the vast majority of commenters opposed requiring the AFGR as the transitional measure of graduation rate for accountability purposes. First, commenters argued that the AFGR is an inadequate substitute for a true longitudinal rate and stated that they did not agree with the statement in the NPRM that research has shown the AFGR to be a reliable, accurate estimate of the high school graduation rate. According to the commenters, the AFGR would likely over-estimate graduation rates in high schools in which students drop out before the beginning of 10th grade, a common occurrence in schools serving large numbers of minority and low-income students. The commenters also stated that the AFGR is inaccurate in communities with significant in-or out-migration because the AFGR calculation has no mechanism for reassigning students whose families enter or leave an LEA. Second, commenters expressed concern that requiring States to use the AFGR as a transitional measure would create additional administrative, technical, and financial burdens and hinder States' efforts to transition to the adjusted cohort graduation rate, as well as hinder efforts to educate and inform high schools and the public of the pending adoption of the adjusted cohort graduation rate. Third, commenters argued that making a significant change now in defining graduation rate, and then again when the adjusted cohort graduation rate definition is implemented, would only create confusion, undermine public confidence regarding graduation rate data and school accountability systems in general, and complicate longitudinal analyses due to the use of as many as three different rates as well as multiple sets of goals and targets. Overall, commenters stated that the problems potentially created by using the AFGR as the transitional measure of graduation rate greatly outweigh the possible benefits of its increased accuracy compared to the rates currently used by some States.

Other commenters recommended alternatives to using the AFGR. Some commenters recommended that States be allowed to continue using their current graduation rate definitions until they can implement the adjusted cohort graduation rate. One commenter suggested that the AFGR be required as a transitional measure only for States that, by 2009, have not collected at least two years of data necessary to compute the adjusted cohort graduation rate. One commenter recommended the use of what the commenter said was a more reliable estimate of graduation rate, the Cumulative Promotion Index (CPI) method. Another commenter recommended that States be allowed to propose, for Secretarial approval, an interim rate that measures or estimates the number of graduates compared to the number of students in a high school's entering grade; does not use dropout data; counts as graduates only those students who receive a regular high school diploma; can be disaggregated; and can be used on an annual basis to determine a rate of growth.

Discussion: Although we believe the AFGR is a more valid and reliable graduation rate measure than some States currently use, we are persuaded by the commenters' reasons for not requiring the use of the AFGR as the transitional measure. To respond to these concerns, we have revised the regulations to focus States, LEAs, and schools on moving toward a uniform and more accurate method of calculating high school graduation rate—the four-year adjusted cohort graduation rate—in order to provide parents and the public with important information about the number of students graduating in four years with a regular high school diploma, and to ensure that AYP determinations are based on valid graduation rate calculations. We now believe that requiring the use of any interim alternative graduation rate, whether the AFGR or the alternatives suggested by the commenters, would not necessarily produce increases in accuracy and reliability, compared to current rates used by States, sufficient to compensate for the risks of slowing progress toward fully implementing the four-year rate.

Changes: We have removed the requirement in proposed § 200.19(a)(1)(ii) to use the AFGR as the transitional measure for those States that cannot yet calculate the four-year rate. Instead, under new § 200.19(b)(2), a State must use either the four-year adjusted cohort graduation rate or, on a transitional basis, a graduation rate that meets the requirements in current § 200.19(a)(1)—*i.e.*, measures the percentage of students from the beginning of high school who graduate with a regular high school diploma in the standard number of years, or another definition, developed by the State and approved by the Secretary, that more accurately measures the rate of student graduation from high school with a regular high school diploma.

Comment: One commenter questioned the apparent inconsistency in the proposed regulations that would have required use of the AFGR in school-level ''safe harbor'' AYP determinations but not for other school-level AYP determinations.

Discussion: The proposed regulations would not have required disaggregated AFGR results at the school level, except in the case of ''safe harbor'' calculations, because we did not have sufficient confidence in the validity of disaggregated AFGR results with small populations of students. However, because section 1111(b)(2)(I)(i) of the ESEA requires disaggregation of the other academic indicator—in this case, the graduation rate—in calculating ''safe harbor'' at the school level, we had no choice but to propose requiring disaggregation of the AFGR for ''safe harbor'' calculations. We note that this apparent inconsistency is not present in the final regulations, which do not require use of the AFGR.

Changes: As noted previously, we have removed the requirement in proposed § 200.19(a)(1)(ii) to use the AFGR as the transitional measure for those States that cannot yet calculate the four-year rate.

Comment: One commenter recommended that the Department publish State-level AFGRs for every State through 2012–2013.

Discussion: The Department currently publishes State-level AFGRs at the following Web site: *http://nces.ed.gov/programs/digest/d07/tables/dt07_102.asp?referrer=list*.

Changes: None.

Comment: One commenter asked specific questions about how to calculate the AFGR.

Discussion: As stated previously, we are removing the requirement to use the AFGR as the transitional graduation rate measure. However, information about the AFGR is available at the following Web site: *http://nces.ed.gov/pubs2007/dropout05/DefiningAveragedFreshman.asp*.

Changes: None.

New § 200.19(b)(3) (Proposed § 200.19(d)(1))—Goal and Targets

Comment: Several commenters supported proposed § 200.19(d) (new § 200.19(b)(3)), which would require States to set a graduation rate goal that represents the rate that the State expects all high schools to meet and to define how schools and LEAs must demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the State's graduation rate goal. However, some of these commenters expressed concern that the proposed regulations did not go far enough in specifying what the Department would consider to be rigorous goals and targets, arguing that States are not likely to make needed improvements in their graduation goals and targets if they are allowed to set their own goals and targets and are required only to undergo another round of Secretarial review. One commenter noted that the proposed regulations would not have required States' goals and targets to be peer reviewed and did not provide specific guidance on how States should set their goals and targets. Another commenter requested clarification about the role the Department would play in approving States' goals and targets.

Some commenters noted that the term ''continuous and substantial improvement'' in proposed § 200.19(d)(1)(ii) (new § 200.19(b)(3)(i)(B)) was not defined and suggested that the regulations indicate more clearly what standards States' goals and targets would be expected to meet. Many commenters suggested changes intended to ensure adoption of rigorous goals and targets, including requiring all States to use the same goals and targets (in part, to promote comparability), requiring ''high, ambitious end goals'' and growth targets, and requiring States to set a minimum increase in the rate each year that is ''aggressive, attainable, and uniform.''

Other recommendations included adding specific goals (e.g., 90 percent) and targets (e.g., three percent increase annually), requiring higher targets for five-year graduation rates than for four-year rates, setting targets that would eliminate subgroup differences in graduation rates within four years, or establishing goals that reflect the economic needs of a State's employers.

On the other hand, one commenter supported flexibility in this area and urged the Department not to impose rigid standards for approving a State's goal and targets. The commenter requested that the Department use a transparent peer review process and permit States to use a variety of approaches in setting their goals and targets, including, for example, goals that increase over time and definitions of progress that use an averaging model.

Discussion: The Secretary believes that high schools and LEAs with low rates of graduation should not make AYP by simply maintaining the same low rate or minimally increasing it from year to year. At a time when a high school diploma is the absolute minimum credential needed for success in the labor force, the Secretary believes States must set aggressive goals and hold LEAs and high schools accountable for graduating more of their students. However, given the variation in State assessment and accountability systems and differences in State graduation requirements, the Secretary believes that States should have the flexibility to establish their own graduation rate goal and targets and, therefore, declines to specify in these regulations what the goal and targets must be for each State or to define ''continuous and substantial improvement.''

We agree that the proposed regulations should have been clearer in requiring States to set a single graduation goal and to set specific targets towards meeting or exceeding that goal. Therefore, we have amended proposed § 200.19(d)(1) (new § 200.19(b)(3)(i)) to require States to set a single graduation rate goal that represents the rate the State expects all high schools in the State to meet and to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the graduation rate goal.

Regarding questions about the Department's role in approving States' goal and targets, the final regulations require each State to submit its graduation rate goal and targets to the Department as part of its revised Accountability Workbook, which will be peer reviewed.

Changes: We have made the following changes in new § 200.19(b)(3)(i) (proposed § 200.19(d)(1)):

- Section 200.19(b)(3)(i)(A) requires a State to set a single graduation rate goal that represents the rate it expects all high schools in the State to meet.
- Section 200.19(b)(3)(i)(B) requires a State to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the State's goal.

We also have added new § 200.19(b)(6)(i), which requires each State to revise its Accountability Workbook to include the following:

- The State's graduation rate definition that the State will use to determine AYP based on school year 2009–2010 assessment results (new § 200.19(b)(6)(i)(A)).
- The State's progress toward meeting the deadline in § 200.19(b)(4)(ii)(A) for calculating and reporting the graduation rate defined in § 200.19(b)(1)(i) through (iv) (new § 200.19(b)(6)(i)(B)).
- The State's graduation rate goal and targets (new § 200.19(b)(6)(i)(C)).
- An explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal (new § 200.19(b)(6)(i)(D)).
- The graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State, ranked in terms of graduation rate (new § 200.19(b)(6)(i)(E)).
- If a State uses an extended-year adjusted cohort graduation rate, a description of how it will use that rate with its four-year rate to determine whether its schools and LEAs have made AYP (new § 200.19(b)(6)(i)(F)).

In addition, we have added new § 200.19(b)(6)(ii) to require each State to submit, consistent with the timeline in § 200.7(a)(2)(iii), its revised Accountability Workbook to the Department for technical assistance and peer review.

Comment: Several commenters stated that rules or policies on establishing graduation rate goals and targets need to be reasonable and realistic for alternative schools, including early college high schools and schools designed to serve former or potential dropout students, so as to ensure that these schools are not penalized for helping struggling students successfully complete high school.

One commenter suggested that States be permitted to set different goals for different schools based on each school's present level of performance, rather than one statewide goal. This commenter suggested that setting the same goal, with the same time frame, for a high school that currently has a graduation rate of 60 percent and a high school with a current graduation rate of 80 percent means that the bar is set too high for the first school and too low for the second school.

Discussion: We agree that States should carefully consider graduation rate targets for alternative and early college high schools. However, we do

not agree that the State graduation rate goal for alternative schools should be lower than those for other schools because, as with the annual measurable objectives set for reading and math proficiency under NCLB, States must have the same high expectations regarding graduation rate for *all* schools. The Secretary believes strongly that States must set a graduation rate goal that represents the rate a State expects *all* high schools to meet, but acknowledges that it may be appropriate for schools to have different graduation rate targets. For example, a State might propose targets for schools with the lowest graduation rates that are more aggressive than targets for schools that are very close to meeting the State goal since schools with the lowest graduation rates will need to make more progress to reach the State's goal. A State might propose a target that represents a percent reduction from the prior year in the number of students not reaching the graduation rate goal. When approving a State's goal and targets, the Department intends to consider the relationship between the State's goal and its targets.

Changes: As noted previously, new § 200.19(b)(3)(i)(A) requires a State to set a single graduation rate goal that represents the rate it expects all high schools to meet. Also, new § 200.19(b)(3)(i)(B) requires a State to set annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward the State's goal, but does not require that those targets be the same for every high school.

Comment: Several commenters requested that the regulations require States to be transparent in setting their graduation rate goals and targets and suggested requiring States to hold public meetings or to report to the public on their graduation rate goals and targets. Some commenters recommended that States explain how they set their goals and targets and how they plan to meet them. One commenter suggested that LEAs be required to hold public meetings that are accessible for individuals with limited English proficiency and individuals with disabilities, and are well advertised in advance, including through schools and, where available, minority and alternative language media outlets to discuss the establishment of the State's graduation goal and targets. One commenter recommended that each State be required to report to the public on how its goal and targets would lead to 100 percent of students graduating and the number of years that would be required to meet this 100-percent graduation goal. Finally, one commenter recommended requiring each State, in setting its goal and targets, to consider the views of experts on the needs of students at the highest risk of dropping out, including racial, ethnic, and language minority students, children from low-income families and neighborhoods of concentrated poverty, students with disabilities, pregnant students or students who are parents, and students whose families move frequently during their school years.

Discussion: In general, the Secretary agrees that each State should use an open and ''transparent'' process to set its graduation rate goal and targets. We encourage States and LEAs to involve parents and the public, as appropriate, in this process. However, we decline to regulate on any specific requirements for such a process. We believe these decisions are best left to States.

At the same time, we believe it is appropriate to require each State to include additional information on its graduation rate goal and targets in its Accountability Workbook. Therefore, as noted earlier, we have amended the final regulations to require each State to include in its Accountability Workbook, in addition to the State's graduation rate goal and targets, an explanation of how the State's graduation rate goal represents the rate the State expects all high schools to meet and of how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal. In order for the Department and the public to consider the approximate number of years it will take for a State to reach its graduation rate goal, we are also requiring States to include in their Accountability Workbook, the graduation rate of the school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate). We believe these three points depict the range of graduation rates among a State's high schools and provide context for considering the goal and targets the State has chosen.

For example, a State might report in its Accountability Workbook that it proposes to set its graduation rate goal at 90 percent and its target as a five percent increase per year, and that the school at the 10th percentile has a graduation rate of 50 percent, which would indicate that the State will hold its lowest-performing schools accountable for reaching the State's graduation rate goal in at least eight years.

Changes: As previously noted, new § 200.19(b)(6)(i)(E) has been added to require each State to include in its Accountability Workbook the graduation rate for the most recent school year of the high school at the 10th percentile, 50th percentile, and 90th percentile in the State (ranked in terms of graduation rate).

Comment: Two commenters suggested that the Department allow each State to wait until the State implements the four-year adjusted cohort rate before requiring a more rigorous definition of its graduation rate goal and continuous and substantial improvement towards meeting that goal.

Discussion: The purpose of setting a meaningful graduation rate goal and targets, whether a State has adopted the four-year rate in new § 200.19(b)(1) or is using a transitional rate until it can calculate the four-year rate, is to focus attention on graduation rates and motivate efforts to improve these rates as soon as possible. The Secretary does not believe that we can afford to wait one, two, or three years to begin addressing the human and economic costs of education systems under which, on average, roughly one-quarter of the Nation's high school students leave school without a diploma. When a State changes to the four-year rate, it may reset its goal and targets to align with that graduation rate and resubmit any changes to the Secretary for approval.

Changes: None.

Comment: Several commenters argued that only Congress, not the Secretary, has the authority to require States to set a graduation rate goal and targets, and that any new graduation rate requirements should be considered only in the context of comprehensive changes to the overall Title I accountability system.

Discussion: Section 1901(a) of the ESEA authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].'' The Secretary has chosen to require a more accurate, uniform definition of graduation rate in order to raise expectations and to hold high schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma. Given the ever-increasing importance of a high school diploma, allowing high schools and LEAs with low rates of graduation to make AYP by simply maintaining the same low rate or minimally increasing the number of graduates from the previous year would not provide for appropriate and meaningful accountability. Moreover, although new § 200.19(b)(3) requires a State to set a graduation rate goal and targets, the regulations leave to the States the

determination of what the goal and targets should be. The Secretary is promulgating these regulations now because Congress has not yet completed the reauthorization of the ESEA, and because she believes strongly that we should continue to address the needs of students and their parents while Congress considers various reauthorization proposals.

Changes: None.

Comment: Several commenters argued that the proposed 2008–2009 timeline for establishing the new goal and targets would not provide adequate lead time because many States must undergo a thorough review and approval process for any changes to their policies, including, for example, reviews by stakeholder groups, State boards of education, and State legislatures.

Discussion: The Department agrees that additional time is needed for States to implement new graduation rate goals and targets, particularly given that States have different procedures they must follow in adopting and implementing new State policies. Therefore, we have changed the timeline to require that a State's graduation goal and targets under new § 200.19(b)(3)(ii) first be used for AYP determinations based on school year 2009–2010 assessment results.

Changes: New § 200.19(b)(3)(ii) requires a State to use its graduation rate goal and targets for the first time with AYP determinations based on school year 2009–2010 assessment results.

Comment: Some commenters opposed including graduation rate goals and targets in AYP determinations, as proposed § 200.19(d) would have required, because, according to the commenters, including goals and targets would significantly increase the number of high schools and LEAs that are identified for improvement. The commenters also stated that requiring all States to resubmit their Accountability Workbooks would result in unnecessary expenditures of time and money for both the States and the Department.

Discussion: We agree that the inclusion of a graduation rate goal and targets in AYP calculations is likely to increase the number of high schools and LEAs identified for improvement, although it is difficult to estimate the extent of any increase because the proportion of schools and LEAs identified for improvement already is rising due to higher annual proficiency objectives as we move toward the goal of ensuring that all students are proficient in reading and mathematics by 2013–2014. We believe that any additional identifications for improvement that occur because high schools or LEAs miss a State's graduation rate goal or targets would be entirely appropriate as part of the overall effort to improve graduation rates, which is the purpose of these regulations. In addition, we believe that the benefits of more meaningful accountability for graduation rates far exceed the costs of implementing these new requirements.

Changes: None.

New § 200.19(b)(6)(i)(F)—Determining AYP With an Extended-Year Rate

Comment: Many of the commenters who supported allowing the use of an extended-year graduation rate also recommended various ways to include the extended-year rate with the four-year adjusted cohort graduation rate in determining AYP. Many commenters recommended basing AYP determinations primarily on the four-year rate but giving schools and LEAs credit for students who graduate in five years or more. These commenters stated that the four-year rate should constitute a high and specific percentage (e.g., 90 percent) of the AYP calculation. Another commenter recommended requiring a weighted graduation index that combines a four-year adjusted cohort graduation rate (weighted no less than 70 percent of the index), a five-year adjusted cohort graduation rate, and a longer-term adjusted cohort graduation rate. One commenter suggested that the Department allow States to propose rules under which schools receive full credit for graduating students in four years and partial credit for students graduating in more than four years (e.g., students who fall behind in credit accumulation or otherwise struggle to complete graduation requirements). One commenter recommended weighting the graduation rate calculation by giving 75 percent of the weight to the four-year rate and the remaining 25 percent to the extended-year rate. Some commenters recommended requiring States to set higher graduation rate targets for students graduating in four years, compared to those graduating in more than four years. Several commenters recommended that AYP determinations based on the four-year and extended-year graduation rates be calculated in the same manner across all States to ensure comparability; otherwise, any differences in four-year and five-year graduation rates should be indicated in reports on high school graduation rates.

Discussion: As previously discussed, the Secretary agrees that States should be permitted to use an extended-year adjusted cohort graduation rate, in addition to the required four-year adjusted cohort graduation rate, for purposes of determining AYP. The Secretary offers this flexibility for States but prefers that they adopt AYP definitions that hold LEAs and schools accountable for graduating the vast majority of their students in four years. For example, a State might use an index that weights the four-year rate significantly more than the extended-year rate (e.g., 80 percent for the four-year rate and 20 percent for the extended-year rate) or a State might use a higher target for the four-year rate than for the extended-year rate (e.g., an increase of 5 percent for the four-year rate versus an increase of 3 percent for the extended-year rate) and require that an LEA or school meet both targets in order to make AYP. The Department plans to issue non-regulatory guidance providing more specific examples of how a State might use its four-year rate and extended-year rate in AYP calculations. Regardless of the methodology a State uses to calculate AYP, a State must report its four-year rate separately from any extended-year rate, consistent with § 200.19(b)(4)(ii)(B).

We believe it is important that a State have the flexibility to consider how to use its four-year rate and an extended-year rate in AYP calculations, subject to peer review and approval by the Secretary. Therefore, as previously noted, we have added new § 200.19(b)(6)(i)(F) to require a State that uses an extended-year graduation rate to submit to the Department, for technical assistance and peer review, a description, in its Accountability Workbook, of how it will use an extended-year rate along with its four-year rate to determine whether its schools and LEAs make AYP.

Changes: We have added new § 200.19(b)(6)(i)(F) to provide that, if a State uses an extended-year cohort graduation rate, the State must submit as part of its Accountability Workbook, for peer review and approval by the Secretary, a description of how it will use its extended-year rate with its four-year rate to determine whether its schools and LEAs have made AYP.

Section 200.19(b)(5) (Proposed § 200.19(e))—Disaggregation for Determining AYP

Comment: Some commenters expressed support for the requirement to disaggregate graduation rates in proposed § 200.19(e) because, according to the commenters, disaggregation of data is vital to realizing the goals of improving graduation rates for subgroups with below-average graduation rates. Some commenters

supported reporting disaggregated graduation rates but opposed the use of these rates in AYP determinations because, according to the commenters, it would add another level of complexity and confusion to AYP calculations and potentially erode support for the core principles of NCLB.

Many commenters opposed the requirement to use disaggregated data in AYP determinations because they believed more schools and LEAs would not make AYP based on disaggregated data. Other commenters opposed the regulation because, they claimed, it would disproportionately affect the most diverse schools. One commenter argued that this requirement increases the Federal role in education, rather than diminishing it, and focuses on process instead of achievement. One commenter urged caution because of the likely variability in graduation rates among small subgroups, while another claimed that verifying disaggregated results could make it difficult for a State to release AYP results before the start of the school year.

Discussion: When the current regulations were issued in 2002 (67 FR 71710, 71742 (Dec. 2, 2002)), the Department believed that permitting States to use aggregate graduation rate data for the purpose of determining AYP, while requiring disaggregation for reporting, would be sufficient to ensure school and LEA accountability for the achievement of all groups of students and would avoid overburdening State accountability systems. Six years later, we now know that simply reporting disaggregated graduation rate data is not sufficient to ensure that graduation rates improve for all students. Although we recognize that the use of disaggregated graduation rates in AYP determinations may increase the number of schools and LEAs identified for improvement, we decline to eliminate this requirement because we believe too many high schools currently are not being held accountable for improving graduation rates that are well below the national average. Moreover, it is evident that there are significant disparities in outcomes among subgroups. For example, data provided by NCES show significant gaps in subgroup AFGRs. Data from the 2005–2006 school year found that the average AFGR for white students was 80.6 percent, whereas the average AFGR for Hispanic, black, and American Indian/Alaska Native students was 61.4 percent, 59.1 percent, and 61.8 percent, respectively.[11] Similar to the importance of disaggregating assessment results to ensure that high performance by the ''all students'' group does not mask low performance by subgroups of students, we believe schools and LEAs need to be held accountable for the differences in graduation rates among subgroups.

Changes: None.

Comment: A number of commenters recommended that the Department wait to require disaggregation of graduation rates until the ESEA is reauthorized. Some commenters, for example, opposed the use of disaggregated graduation rates in determining AYP until the rates can be considered in the context of the overall structure of States' accountability systems. Some commenters stated that now is not the right time to add new data cells for determining AYP when efforts to improve the ESEA's accountability system, such as the Department's differentiated accountability pilot, have not had a chance to take effect on a large scale.

Discussion: As discussed previously, the Secretary proposed new graduation rate regulations precisely because Congress has not yet completed the reauthorization of the ESEA, and because she believes strongly that we cannot delay addressing this critical area. The Secretary has chosen to regulate use of a uniform definition of graduation rate and disaggregation of that rate for accountability purposes in order to raise expectations and to hold high schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma. We note that the final regulations in new § 200.19(b)(5) would not require disaggregation of graduation rates for AYP purposes until a State makes AYP determinations based on school year 2011–2012 assessment results.

Changes: None.

Comment: Several commenters recommended requiring disaggregation of graduation rate data for AYP purposes earlier than the timelines in proposed § 200.19(e). Other commenters, who generally supported the regulations, suggested a later timeline to coincide with the use of the adjusted cohort graduation rate or, to ensure comparable data, after the adjusted cohort rate has been implemented fully for at least two years.

Discussion: Proposed § 200.19(e)(2) would have required States, beginning in the 2008–2009 school year, to disaggregate graduation rate data (either the AFGR or the adjusted cohort graduation rate) at the LEA and State levels for determining AYP, and at the school, LEA, and State levels for reporting. All States would have been required to use the adjusted cohort graduation rate and disaggregate graduation rate for AYP and reporting purposes no later than the 2012–2013 school year.

The Secretary has modified the timeline for disaggregating graduation rate data in the final regulations to require States to report disaggregated data for the four-year adjusted cohort graduation rate one year before disaggregated data are required for AYP determinations. The Secretary believes that this timeline will enable a State to resolve any data quality and accuracy issues associated with calculating the four-year rate and disaggregating the results prior to using those disaggregated results to determine AYP based on school year 2011–2012 assessment results.

States that cannot meet the 2010–2011 deadline for calculating the four-year rate and receive an extension from the Secretary, as provided in new § 200.19(b)(7)(iii), must make AYP determinations using a transitional graduation rate, as provided in new § 200.19(b)(2), in the aggregate and disaggregated by subgroups at the same time as States that implement the four-year rate—that is, for AYP determinations based on school year 2011–2012 assessment results.

Changes: We have made the following changes in the final regulations to reflect the modifications to the timeline for disaggregating graduation rates:

Reporting

- New § 200.19(b)(4)(ii)(A) requires reporting the four-year adjusted cohort graduation rate in the aggregate and disaggregated by subgroups at the high school, LEA, and State levels on report cards providing results of assessments administered in the 2010–2011 school year.
- New § 200.19(b)(4)(ii)(B) requires that, if a State adopts an extended-year adjusted graduation cohort rate, the State must report that rate separately from the four-year rate, in the aggregate and disaggregated by subgroups, beginning with the first year for which the State calculates such a rate.
- New § 200.19(b)(4)(ii)(C) requires, prior to school year 2010–2011, reporting of graduation rate, in the aggregate and disaggregated by subgroups, at the high school, LEA, and State levels using either the four-year adjusted cohort graduation rate or the transitional rate.

[11] National Center for Education Statistics. (2008). *Public School Graduates and Dropouts from the Common Core of Data: School Year 2005–2006.* Washington, DC: Author.

Determining AYP

• New § 200.19(b)(5)(i) requires that a State use the four-year adjusted cohort graduation rate, in the aggregate and disaggregated by subgroups, at the high school, LEA, and State levels for determining AYP beginning with AYP determinations based on school year 2011–2012 assessment results.

• New § 200.19(b)(5)(ii) requires that, prior to school year 2011–2012, a State calculate graduation rate, in the aggregate, using either the four-year adjusted cohort graduation rate or the transitional rate, for determining AYP at the high school, LEA, and State levels, although disaggregation is required for ''safe harbor.''

• New § 200.19(b)(7)(iii) provides that a State that cannot meet the school year 2010–2011 deadline for calculating and reporting the four-year rate and receives an extension from the Secretary, must make AYP determinations based on school year 2011–2012 assessment results, in the aggregate and disaggregated by subgroups, using the State's transitional graduation rate under § 200.19(b)(2).

Comment: One commenter expressed concern that requiring graduation rates to be disaggregated for the purpose of calculating AYP may be a disincentive for States to set an aggressive graduation rate goal and targets.

Discussion: Although we understand this commenter's concern, as noted previously the Secretary will review each State's graduation rate goal and targets to ensure that the State sets (1) a single goal that represents the on-time graduation rate the State expects all high schools to meet, and (2) targets that demonstrate continuous and substantial improvement toward meeting or exceeding that goal, in order to make AYP.

Changes: None.

Comment: Several commenters argued that requiring States to use disaggregated graduation rate data in AYP determinations exceeds the Secretary's legal authority and has no basis in statute. One of these commenters further argued that requiring States to use disaggregated graduation rate data in AYP determinations appears to contradict section 1111(b)(2)(C)(vi) and (vii) of the ESEA, which, according to the commenter, gives States the authority to determine their own other academic indicators.

Discussion: We believe the commenter has misunderstood the statutory requirements regarding the need to use other academic indicators in determining AYP. Section 1111(b)(2)(C)(vi) of the ESEA requires a State to select one other academic indicator (in addition to assessment results and assessment participation rates) to be used in determining AYP, but also specifies that, for high schools, that indicator must be the graduation rate. Thus, graduation rate is a required element of determining AYP for high schools, not an element that, at a State's discretion, may or may not be adopted. A State has discretion to select the other academic indicator for elementary and middle schools. In addition under section 1111(b)(2)(C)(vii) of the ESEA, a State has discretion to select other academic indicators, in addition to those required by section 1111(b)(2)(C)(vi), that must be measured separately for each group described in section 1111(b)(2)(C)(v) of the ESEA, provided those additional indicators do not reduce the number of or change the schools that would otherwise be subject to school improvement.

Section 1111(b)(2)(C)(vi) of the ESEA does not explicitly address, and thus does not prohibit, the use of results disaggregated by subgroup for the other academic indicators required for AYP determinations, including graduation rate. We believe that stronger subgroup accountability with respect to graduation rate is needed in order to accomplish the statutory purpose of Title I—that is, ''to ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education'' by closing the achievement gap between high- and low-performing students, especially between minority and non-minority students and between disadvantaged students and their more advantaged peers, and to hold schools and LEAs accountable for improving the achievement of all students (*see* section 1001 of the ESEA). We believe the best way to close the gap in graduation rates among subgroups is to hold schools accountable for the graduation rate of those groups. Accordingly, the Secretary has decided to require disaggregation of graduation rate data for calculating AYP as well as for reporting and believes this regulation is well within her regulatory authority under section 1901(a) of the ESEA to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].''

Changes: None.

Comment: Several commenters stated that minimum group size should be considered before including a subgroup's graduation rate in AYP determinations. One commenter suggested that the danger in using the graduation rate for relatively small subgroups is that small shifts in counts of students could generate large changes in graduation rates. Some commenters suggested that the same minimum group size used for including subgroups in AYP determinations be used for graduation rate subgroup accountability. Several commenters also asked whether any of the statistical measures allowed in current AYP calculations, including multi-year averaging of data and confidence intervals, would be allowed for the graduation rate indicator. One of these commenters recommended that these statistical measures be permitted in order to minimize the effect of normal yearly fluctuations among cohorts of students on AYP determinations.

Discussion: Section 200.7(a) requires that a State determine the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used. This requirement applies to graduation rates used for AYP calculations; States are permitted to set minimum group sizes and to use other statistical measures, such as multi-year averaging, to ensure statistical reliability. Some statistical measures, however, such as confidence intervals, which generally are used with samples of a population rather than an entire population, would likely not be appropriate if applied to graduation rates, which are actual counts of individual students in a cohort. The Department will review any proposed application of statistical measures to graduation rates as part of its review of States' Accountability Workbooks under new § 200.19(b)(6).

Changes: None.

Comment: One commenter stated that the proposed regulations erred in requiring a State and its LEAs to report disaggregated graduation rates only for the subgroups in § 200.13(b)(7)(ii), which does not include gender and migrant status as required by section 1111(h) of the ESEA. (Section 200.13(b)(7)(ii) describes the subgroups for AYP accountability as economically disadvantaged students; students from major racial and ethnic groups; students with disabilities as defined in section 9101(5) of the ESEA; and students with limited English proficiency as defined in section 9101(25) of the ESEA.) The commenter claimed that, by removing gender and migrant status from the statutory list of subgroups that must be used for reporting purposes, the Department exceeded its rulemaking authority.

Discussion: The Secretary disagrees with the commenter that the proposed regulations erred in requiring disaggregation only for the subgroups

described in § 200.13(b)(7)(ii) (subgroups for determining AYP), rather than the subgroups listed in section 1111(h)(1)(C)(i) of the ESEA (report cards). The list in section 1111(h)(1)(C)(i), which includes gender and migrant status in addition to the subgroups in § 200.13(b)(7)(ii), pertains to reporting disaggregated achievement results on a State's academic assessments. Section 1111(h)(1)(C)(vi) of the ESEA, which requires reporting graduation rates for secondary school students, contains no similar list of disaggregation categories. Accordingly, we have taken our cue from section 1111(b)(2)(C)(v)(II) of the ESEA and § 200.13(b)(7)(ii), which list the subgroups for which a State must disaggregate data for AYP purposes. It is these categories that a State uses to calculate ''safe harbor'' and that these regulations now require for disaggregating AYP results. Therefore, we believe it is appropriate to require reporting of disaggregated graduation rates only by the categories that are used for other AYP purposes, because graduation rate data will already be disaggregated by those categories.

Changes: None.

Comment: A number of commenters recommended changes to the subgroups for which graduation rates must be disaggregated. Several commenters, for example, questioned the need to disaggregate by race or ethnicity because, they argued, substantial evidence exists to show that socioeconomic status is a more meaningful indicator than race when it comes to student performance. On the other hand, some commenters suggested requiring further disaggregation of student racial subgroups by socioeconomic status to reveal a more accurate picture of student performance in each subgroup. One commenter recommended that disaggregation be required for former LEP students and recently arrived LEP students in addition to LEP students in general. One commenter suggested requiring disaggregation by additional ethnic subgroups, particularly Asian subgroups. Several commenters suggested that the regulations require reporting graduation rates in a format that can be cross-tabulated so that users of the data can identify and evaluate the interplay of race, ethnicity, disability, poverty, and other factors. One commenter recommended requiring a State and its LEAs to report data on students who do not graduate, disaggregated by the reasons for not graduating.

Discussion: Although the Department understands the intent of these commenters, we do not think it would be appropriate or beneficial to change the requirements for disaggregating graduation rates beyond the subgroups described in § 200.13(b)(7)(ii) that are used for determining AYP. We believe that requiring disaggregation of data for these subgroups is sufficient to ensure meaningful and comprehensive accountability for all high schools and LEAs with respect to graduation rate. Further, we are concerned that the more specific the subgroup categories, the less likely they would actually be reflected in accountability decisions because too few students would likely fall into a given category. Further, we note that each State determines which major racial and ethnic categories in the State will be used in accountability determinations. Although we agree that cross-tabulation of subgroups could be informative, we believe that requiring cross-tabulation would be excessively burdensome and costly for States and also could raise privacy concerns if the resulting groups are small. Although a State may not eliminate subgroups from those described in § 200.13(b)(7)(ii), a State is not prohibited from adding reporting categories that may provide additional insights on why students do not graduate from high school.

Changes: None.

Comment: One commenter recommended that the regulations require standardized business rules across States with regard to how they calculate graduation rates for certain subgroups (e.g., the LEP subgroup or the students with disabilities subgroup) in which students may enter or exit during their four years of high school (e.g., reporting graduation rates by subgroup based on a student's status as a first time 9th grader).

Discussion: Under current § 200.19(d)(2)(ii), States have been required to include disaggregated graduation rates on their State report cards since December 2002. States should, therefore, already have business rules for determining how to count students who enter or exit a subgroup during high school. We agree with the commenter that it is important for States to create and maintain these kinds of rules and will provide guidance to States on ways to count students who enter or exit a subgroup during high school. However, we believe it would be inappropriate for the Department to require specific business rules across States.

Changes: None.

Comment: Some commenters stated that a student who falls within more than one subgroup should not be counted in the graduation rate more than once. The commenters recommended that the Department develop special formulas to address students belonging to more than one subgroup so as not to affect unfairly the graduation rate and resulting AYP status of schools and LEAs. One commenter recommended permitting States to explain to the public that students may be counted in more than one subgroup.

Discussion: The Department declines to address the issue of student membership in multiple subgroups in the final regulations. Section 1111(b)(2)(C)(v) requires AYP to be defined so that it applies separately to the achievement of all public elementary and secondary school students as well as to the achievement of students in each of four specific subgroups: economically disadvantaged, major racial and ethnic groups, students with disabilities, and LEP students. This provision serves a very important purpose: to focus attention on those schools and LEAs in which the ''all students'' group may be achieving but in which particular subgroups may not be achieving. The statute does not authorize, either expressly or implicitly, a State to choose to omit certain subgroups, to ''prioritize'' subgroups and thus give greater weight to students in some subgroups over others, or to randomly select one of several subgroups to which a student would be assigned. There simply is no support in the statute for a State to include a student in some but not all of the subgroups in which the student is a member. To do so would misrepresent the achievement of subgroups.

We believe it is important to know how each subgroup performs with respect to graduation rate. Even if it were possible to develop a special formula for assigning students to only one subgroup for the purpose of disaggregating graduation rates, such an approach would skew the data for particular subgroups, because not all students who fall within each subgroup would be counted. However, States may, if they choose, explain on their report cards that students may be counted in more than one subgroup.

Changes: None.

Comment: One commenter asked why high schools must be held accountable for subgroup performance for graduation rate when elementary and middle schools are not held accountable for subgroup performance for their other academic indicators.

Discussion: The Secretary is requiring disaggregation only of graduation rates for determining AYP because she believes it is critically important to improve the graduation rates of

subgroups. By holding schools and LEAs accountable for ensuring that each subgroup either meets or exceeds the State's graduation rate goal or meets its annual target, we hope to focus greater attention on improving graduation rates for all students. Moreover, there is no single indicator for elementary or middle schools that has an impact comparable to graduation rate on the lives and economic opportunities of millions of students. We do not believe that requiring disaggregation of the other academic indicators for elementary or middle schools would have the same critical effect of improving student outcomes that it will for high schools.

Change: None.

New § 200.19(b)(4) (Proposed § 200.19(e))—Reporting

Comment: Some commenters recommended that States be required to report three-, five-, six- and seven-year graduation rates in addition to a four-year rate. One commenter recommended requiring States to report an aggregated graduation rate, as well as disaggregated data, on the number and percentage of students who drop out of high school, attend high school but do not graduate, ''age out'' (i.e., reach the State's maximum age for public education and leave high school without a regular diploma), transfer to another school, or die. Another commenter requested that the regulatory requirements for reporting graduation rates be clear so that State reports are accurate and comparable. Several commenters suggested that the Department require schools to track and report the graduation rates of students who are pregnant and students who are parents. One commenter recommended requiring States to report dropout rates (aggregated and disaggregated), completion rates for students enrolled in alternative programs, GED credential completion rates, and rates of students who complete high school course requirements but do not pass State high school graduation examinations.

Discussion: States and LEAs must report a four-year rate, as well as any extended-year rate they use in AYP calculations, in the aggregate and disaggregated by the subgroups described in § 200.13(b)(7)(ii). As discussed earlier, the final regulations require each State and its LEAs to report a four-year rate, consistent with new § 200.19(b)(1). In addition, under new § 200.19(b)(1)(v), a State may, but is not required to, adopt an extended-year rate. If a State does not calculate a four-year rate before the deadline specified in new § 200.19(b)(4), the State must use a transitional graduation rate, consistent with new § 200.19(b)(2). The requirements in new § 200.19(b)(2) are virtually identical to the graduation rate definition in current § 200.19(a).

If a State adopts an extended-year rate, the extended-year rate must be reported separately from the four-year rate in order to ensure that LEAs and schools are held accountable both for their performance in graduating students in the four-year timeframe and for their success in teaching students who need more time to obtain a regular high school diploma. A State must also report its transitional rate if it does not calculate a four-year adjusted cohort graduation rate before the deadlines specified in new § 200.19(b)(4).

We agree that information about the total number of students in the graduating cohort, the number who graduated in four years, and the number who graduated in more than four years would provide a more complete description of how high schools are addressing the needs of their students. We also believe that the data would provide the Department, States, LEAs, and schools with information that is essential in understanding the reasons for low graduation rates and for designing better programs and services to help students graduate from high school who are at risk of dropping out and those who have dropped out. The Department plans to propose that States report these data to the ED*Facts* system, the centralized portal through which States submit their education data to the Department. States are currently required to submit aggregated and disaggregated graduation rates to ED*Facts* (OMB collection 1810–0614). Requiring these additional data to be reported through ED*Facts* will not add a significant burden to States because these data are needed to calculate the four-year adjusted cohort graduation rate required in new § 200.19(b)(1)(i) through (iv) and any extended-year adjusted cohort graduation rate in new § 200.19(b)(1)(v). Almost all States have begun the process of developing the data systems and data definitions needed to calculate a four-year rate. The Department will notify the public of its plans to collect these data through a notice in the **Federal Register** and provide the public with an opportunity to comment on these new data collection requirements.

We agree that the other high school data that commenters recommended States collect and report (e.g., dropout rates; the number of students who age out, become pregnant, or are parents; transfer students; and deceased students) might provide useful information. However, we do not believe that this information (with the exception of dropout rates) is essential and, therefore, decline to add burden to States by requiring them to collect and report these data. We note that data on the number of students who drop out are currently collected as part of the Common Core of Data, and we will continue to collect these data. A disaggregated State-level dropout rate is currently collected as part of the Consolidated State Performance Report. The Department does not anticipate any additional reporting requirements for dropout data at this time.

Changes: As noted earlier, we have revised the final regulations to provide in new § 200.19(b)(4) that a State and its LEAs, beginning with report cards providing assessment results for the 2010–2011 school year, must report, under section 1111(h) of the ESEA (annual report cards), the four-year adjusted cohort graduation rate at the school, LEA, and State levels in the aggregate and disaggregated by the subgroups in § 200.13(b)(7)(ii). In addition, new § 200.19(b)(4)(ii)(B) requires a State that adopts an extended-year rate to report, beginning in the first year for which the State calculates such a rate, the extended-year rate separately from the four-year rate.

Comment: Several commenters stated that the definition of ''graduation'' under the IDEA and the ESEA are not the same and recommended that graduation rate calculations and reporting under the two laws be better aligned. Some commenters suggested that the Department align the data systems and reporting requirements under the IDEA and the ESEA, specifically related to post-school transition outcomes.

Discussion: Neither the IDEA nor the ESEA regulations define ''graduation,'' but the use of the term is consistent across the programs. New § 200.19(b)(1)(iv) of the ESEA regulations and § 300.102(a)(3)(iv) of the IDEA regulations make clear that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a GED credential.

In new § 200.19(b)(1), the Department has established a uniform method for calculating graduation rate under the ESEA, rather than the multiple methods that were permitted under current § 200.19(a)(1). Section 612(a)(15) of the IDEA requires States to establish performance goals for children with disabilities that are the same as the annual measurable objectives in the State's definition of AYP under the

ESEA and that address graduation rate, among other factors. We are aware that some States do not report the same graduation rates in their IDEA State Performance Plans (SPPs) and in their Annual Performance Reports (APRs) that they use for calculating AYP under the ESEA. In the future, States will be required to use the four-year adjusted cohort graduation rate and any extended-year rate in their IDEA SPPs and APRs, consistent with the timelines in these regulations, and align the IDEA SPP graduation rate goals with the goal and targets that a State uses for accountability under Title I.

However, some differences in reported graduation rates are unavoidable. In particular, section 618 of the IDEA requires the Department to collect and report by State each year the number and percentage of children with disabilities, from age 14 through 21, who stopped receiving special education and related services and the reasons why those students stopped receiving special education and related services. Based on these data, the Department considers the ratio of 14 through 21 year old students with disabilities who stopped receiving special education and related services (i.e., the denominator) with the number of students with disabilities who graduated from high school with a regular high school diploma (i.e., the numerator). The Department uses these data to report, for Government Performance Results Act purposes, a rate of children with disabilities who graduate with a regular high school diploma for each State that is computed differently than the graduation rate under new § 200.19(b)(1).

Finally, with regard to the recommendation that the Department align the data reporting requirements related to post-school transition outcomes, we note that, although States are required to report annually to the Department post-secondary outcome data related to students with disabilities as part of their APRs under the IDEA, there is no similar requirement under the ESEA; thus there is nothing to align.

Changes: None.

Section 200.20(h) Making Adequate Yearly Progress

Comment: Numerous commenters expressed support for our proposal in § 200.20(h) to permit all States to request authority to incorporate individual student academic growth (using what is often referred to as a ''growth model'') in a State's definition of AYP. One commenter stated that the criteria established in § 200.20(h)(2) are sufficiently rigorous to ensure that the lowest-achieving students must make the greatest gains in order for schools to make AYP using measures of individual student growth, while also providing useful information about student achievement and growth. Another commenter, however, recommended that we adopt clearer and more specific approval criteria. Several commenters objected to proposed § 200.20(h)(2)(i)(B), which would require a State's annual growth targets to be based on meeting the State's proficient level of academic achievement on the State's assessments and not on individual student background characteristics. These commenters stated that a school should receive credit for any growth, regardless of whether the growth is sufficient to achieve proficiency by 2013–2014. Alternatively, two commenters expressed concern that students who are already far behind their peers will never reach proficiency and close the achievement gap if they make only the same amount of progress as their peers. These commenters acknowledged that students who are below grade level must make more than a year's growth in a school year to reach proficiency by 2013–2014. These commenters also expressed concern that States lack the technical knowledge necessary to set appropriate growth targets for LEP students.

Discussion: We believe that § 200.20(h) establishes the criteria necessary to ensure that schools continue to be held accountable for the achievement of all students, while providing flexibility for States to propose a variety of growth models that provide schools and teachers with useful information on how their students are progressing towards grade-level proficiency.

Consistent with section 1111(b)(2)(F) of the ESEA, a State's accountability system must ensure that all students are proficient by 2013–2014. The Secretary's intent in these regulations is to allow States to include accurate measures of individual student academic progress in AYP calculations, not to lower expectations for student achievement.

The criteria established in § 200.20(h)(2) help ensure that States develop growth models that hold schools accountable for the achievement of all students to State standards. It is not sufficient to provide ''credit for any growth'' as this would not encourage efforts to close the achievement gap, which by definition requires accelerated growth.

In response to the commenters who suggested that States do not have the technical expertise to set appropriate targets for LEP students, § 200.2(h)(2)(i)(A) and (B) specifically requires a State to establish annual targets for individual students that will lead to all students being proficient by the 2013–2014 school year and that the annual targets be based on meeting the State's proficient level of academic achievement on the State's assessments, not on an individual student's background. Therefore, setting growth targets does not require expertise in the achievement of particular groups of students (e.g., LEP students). Rather, States must have the technical understanding of how to establish appropriate student academic growth targets that result in all students reaching grade-level proficiency. Schools must make the greatest gains with the lowest-achieving students because the expectation for reaching or exceeding grade-level proficiency remains the same for all students and groups of students. Thus, in order for a school or LEA to make AYP using its growth model, the achievement gap must continue to close. Moreover, although growth models must measure the growth of students who are at or above proficiency in order to provide information to schools and parents, their performance may not be used to mask the lack of growth for students who are below proficient.

Changes: None.

Comment: A number of commenters disagreed with the criterion proposed in § 200.20(h)(2)(iv), which would require a State's growth model to be based on State assessments that produce comparable results from grade to grade and from year to year in mathematics and reading/language arts, have been in use by the State for more than one year, and have received full approval from the Secretary. Some commenters argued that States should be allowed to use adaptive and formative assessments in their growth models. One commenter recommended revising the criterion to permit a specified amount of annual growth through the use of pre- and post-test gains as a more accurate measure of accountability for instructional gains.

Discussion: Section 1111(b)(3) of the ESEA requires States to develop and implement student academic assessments and to use the results of those assessments in reading/language arts and mathematics to determine AYP. Because strong accountability depends on the quality of those assessments, section 1111(b)(3)(C) sets forth a number of requirements that a State's assessments must meet. The Secretary believes strongly that these requirements must also be the basis for

measuring individual student growth. The regulations do not prohibit a State from using any particular form of assessment, such as adaptive assessments or pre- and post-test gains to measure student achievement for determining AYP, provided those assessments meet the requirements in section 1111(b)(3)(C) of the ESEA and §§ 200.2 and 200.3.

Changes: None.

Comment: A few commenters objected to the requirement in § 200.20(h)(2)(iv)(C) that allows a State to use a growth model only if the State has a fully approved standards and assessment system. One commenter suggested that States with partial approval of their assessment systems be allowed to implement a growth measure using the approved assessments. The commenter argued that disapproval of a State's alternate assessment that, even if approved, would not be able to measure student growth accurately should not preclude a State from using a growth model. Another commenter expressed concern that the requirement for full approval of a State's assessment system potentially excludes many States that use additional assessments at the high school level that are not used for AYP determinations under NCLB and, therefore, are not approved by the Secretary through the peer review process. This commenter recommended amending the criteria in § 200.20(h)(2)(iv)(C) to permit the use of State assessments to measure individual student academic growth at the high school level if at least one assessment used in the growth model calculation receives full approval by the Secretary and if the other assessments used in the growth model, while not required to receive the Secretary's approval, produce results comparable to the results from assessments approved by the Secretary.

Discussion: The foundation of a State's accountability model is its standards and assessments in reading/language arts and mathematics. The desire to incorporate individual student growth into AYP determinations is not a rationale for undermining that foundation. The Secretary believes strongly that for a State to be eligible to implement a growth model it must have fully approved assessments in reading/language arts and mathematics, which include alternate assessments for students with disabilities. States must be able to demonstrate that they have the capacity to develop and administer such assessments and ensure that all students are validly and reliably assessed before turning their attention to developing a model to measure individual student academic growth.

Changes: None.

Comment: We received several comments about how to account for students with disabilities in a State's growth model. One commenter stated that a State's growth model should measure the achievement of students with disabilities based on progress in meeting their IEP goals in order to be consistent with the IDEA. Others stated that the criteria for growth models should specifically require States to include the scores of students with disabilities who take alternate assessments based on alternate, modified, or grade-level academic achievement standards.

Discussion: The Department has previously addressed in other rulemakings whether States may measure the achievement of students with disabilities against the goals in their IEPs, rather than against grade-level academic achievement standards for purposes of determining AYP. The Department's position has consistently been that this practice does not comply with the ESEA (*see* 68 FR 68698 (Dec. 9, 2003)) and we have no reason to adopt a different position now. Section 1111(b)(1)(B) of the ESEA requires a State to apply the same grade-level academic content and academic achievement standards to all students in the State, including students with disabilities. Section 1111(b)(3)(C)(ix) of the ESEA requires a State's assessment system, which is based on these grade-level achievement standards, to assess students with disabilities, with or without appropriate accommodations. Except for the small population of students with disabilities for whom the Department's regulations in § 200.6(a)(2) permit a State to measure achievement with alternate assessments based on alternate or modified academic achievement standards, students with disabilities must be assessed based on the State's grade-level academic achievement standards, not a student's IEP goals. There is no reason that measuring individual student academic growth should be based on anything different.

We agree with the comment that students with disabilities who are assessed with an alternate assessment should, to the extent possible, be included in a State's growth model. The Department believes it is possible to include results from alternate assessments based on alternate academic achievement standards in a growth model. Currently, two of the 11 States approved in the growth model pilot include results from their alternate assessments based on alternate academic achievement standards in the State's growth model. The Department strongly encourages States to pursue models that include the results of alternate assessments based on alternate academic achievement standards.

However, we understand that not all alternate assessments can support a growth measure. In many cases, the technical complexity needed for a State's growth model may not be supported by alternate assessments based on alternate or modified academic achievement standards. Alternate assessments based on modified academic achievement standards, in particular, are still in their infancy, not having been permitted until the Department's April 2007 Title I regulations,[12] and currently no State has met all ESEA requirements for these assessments. As such, it may be difficult for a State that is developing an alternate assessment based on modified academic achievement standards to achieve the stability in those assessments necessary to meaningfully and validly include the results in its growth model. The Department will continue to work with States on understanding how these assessments can best be included in growth models and encourages States to pursue models that support the inclusion of alternate assessments based on modified academic achievement standards. States submitting growth model proposals to the Department for peer review should include all students in their growth model, to the extent possible, and must provide a justification for the exclusion of any students. We note, however, that all students, including students with disabilities who take alternate assessments must be included in AYP determinations under § 200.20(a)(1) (''status'') and § 200.20(b) (''safe harbor'').

Changes: None.

Comment: Several commenters supported the use of growth models generally, but stated that it is too early to allow all States to use a growth model because there is still much to be learned from the original growth model pilot. The commenters recommended that a report on the lessons learned from the original growth model pilot be completed before the Department allows all States to adopt growth models.

Discussion: The Secretary believes that these commenters may have misunderstood the intent of the proposed regulations. The regulations do not provide blanket authority for all States to incorporate individual student

[12] 12 FR 17748, April 9, 2007.

academic progress in their definitions of AYP. Rather, the regulations establish the criteria that a State must meet before the State may implement such a model. We believe that the criteria in proposed § 200.20(h) provide sufficient rigor to ensure that schools are held accountable for the grade-level achievement of all students, while giving schools the opportunity to demonstrate progress toward this goal. Therefore, although the regulations afford all States the opportunity to implement a growth model, in order to implement such a model a State must demonstrate that its growth model meets all seven criteria described in § 200.20(h)(2)(i) through (vii). Moreover, as with the proposals submitted in the growth model pilot, a State's proposal to use a growth model must be approved by the Department through its peer review process.

Changes: None.

Comment: One commenter supported the expanded use of growth models, but encouraged the Department to ensure that States have data systems that are technically capable of supporting a growth model.

Discussion: The Department agrees with this commenter that it is important for a State using a growth model to have a data system that can accurately measure student academic growth on the State's assessments from grade to grade. Section 200.2(h)(2)(iv) and (v) require that a State wishing to incorporate student academic growth in its definition of AYP have a fully approved assessment system that has been operational for more than one year and a data system that can track student progress through the State data system. This is particularly important for students who move between schools or LEAs over time. Through the Department's peer review process, we will ensure that a State's data system is sufficiently robust to support the State's growth model.

Changes: None.

Comment: One commenter recommended that the regulations reflect the urgency of high school accountability by promoting States' efforts to incorporate individual student academic progress into high school accountability determinations.

Discussion: The Department agrees that there is a need for greater accountability at the high school level. The ESEA, however, requires only one year of testing at the high school level. As a result, it is difficult for a State to accurately measure growth from a student's 8th grade assessment to his or her high school assessment. For this reason, the Secretary does not believe it would be appropriate to require States to incorporate individual student academic progress into high school accountability determinations; however, we welcome and encourage States to find innovative ways to include individual student academic progress in measures of academic achievement at the high school level.

Changes: None.

Comment: One commenter requested that the Department add a requirement for LEAs to provide a plan for measuring student academic growth for students who transfer or transition out of traditional high school settings into alternative educational settings, such as workforce training or post-secondary ''bridge'' programs. The commenter stated that growth models are particularly helpful for alternative educational settings that cater to struggling students.

Discussion: A State that implements individual student academic growth measures at the high school level should include students who transfer to alternative high schools. Tracking such students should be possible because § 200.20(h)(2)(v) requires a State to demonstrate that it has a data system capable of tracking students as they move between schools or LEAs over time. However, as explained in the response to the previous comment, because most States administer a high school assessment in only one grade, it is often difficult to measure student growth at the high school level, regardless of whether students are transferring schools. As a result, the Secretary declines to adopt the commenter's suggestion.

Changes: None.

Comment: One commenter supported the proposal to permit States to incorporate individual student academic growth in their definitions of AYP, but asked that the Department also increase scientifically based research on the development of growth models. The commenter also recommended requiring States to obtain stakeholder input in the development of their growth models.

Discussion: The Department recognizes the importance of scientifically based research and is supporting an external evaluation of the growth model pilot, which will inform the field and increase the level of knowledge about successful growth models that other States might replicate.

With regard to the recommendation to require States to obtain stakeholder input, we agree that stakeholder input in the development of a State's growth model is important, particularly given that most growth models include very complex mathematical formulas and computations that require technical expertise. However, we believe that each State is in the best position to determine how and when to involve stakeholders in the process of developing its growth model.

Changes: None.

Comment: Several commenters supported the proposed regulations, stating that they will add consistency to how growth models are approved and implemented. However, these commenters questioned how the regulations would affect the Department's ability to approve flexibility agreements under section 9401 of the ESEA. Specifically, these commenters stated that the purpose of section 9401 is to permit and support innovation by States through waivers of statutory or regulatory requirements, and that the constraints included in proposed § 200.20(h) would potentially undermine that purpose. These commenters requested clarification regarding whether the Secretary would retain authority to approve applications for flexibility under section 9401, including growth model applications.

Discussion: The Secretary's intent in promulgating the criteria in § 200.20(h) that a State's growth model must meet is to establish clear criteria that the Department can apply consistently in approving flexibility agreements proposing the use of growth models under section 9401 of the ESEA. To the extent that a State's growth model proposal is particularly innovative or unique in ways that conflict with the regulatory criteria in § 200.20(h), the Secretary may exercise her authority in section 9401 to waive those criteria, as she can with most other statutory and regulatory requirements. Given that § 200.20(h) reflects the criteria that the Secretary deems essential for quality growth models, however, we do not anticipate that the Secretary will need to waive those criteria in many, if any, circumstances. These regulations in no way constrain the Secretary's authority to approve flexibility agreements under section 9401 with regard to other matters.

Changes: None.

Comment: Several commenters stated that the criteria in proposed § 200.20(h)(2) are too restrictive and that the models that the Department would allow under the regulations are really trajectory models that do not give full credit for gains in student achievement. One of the commenters added that, because of the restrictions imposed by the criteria in § 200.20(h)(2), the growth models approved by the Department would produce the same results as status models.

Discussion: The Department disagrees that the requirements established by § 200.2(h)(2) are too restrictive. Through the growth model pilot, the Department approved a variety of models. These models include trajectories of student performance, as well as value tables that assign points based on movement across achievement levels. In response to the comment that growth models produce the same results as status models because the Department's criteria for growth models are restrictive, we note that the relevant question for growth models is whether they truly measure gains in student achievement in a school or LEA, not the degree to which AYP determinations may vary using a growth model versus a status model or as a way for more schools to make AYP. We believe that growth models can strengthen accountability by providing more useful information on the performance of individual students to schools, teachers, and parents.

Changes: None.

Comment: One commenter objected to the statement in the preamble in the NPRM that encouraged States to include a teacher identifier in their data systems. The commenter argued that this statement was included to promote teacher pay-for-performance initiatives. The commenter noted that experts do not believe it is possible to validly isolate and evaluate the effect of teachers on student achievement. Another commenter, however, supported the statement.

Discussion: We believe that the information gained by including a teacher identifier could provide States, schools, and teachers with valuable information to guide a number of policy objectives; for example, linking student performance with specific teachers could guide professional development or other instructional improvement strategies. We note, however, that the criteria in § 200.20(h)(2) do not require a State's growth model to include a teacher identifier.

Changes: None.

Comment: One commenter requested that funds be appropriated to support States in implementing a longitudinal student information system.

Discussion: Through the IES' Statewide Longitudinal Data Systems program, the Department has provided almost $122 million to 27 States to design, develop, and implement statewide longitudinal data systems that can accurately manage, analyze, disaggregate, and use individual student data. In addition, the President's fiscal year 2009 budget request for this program is $100 million, a significant increase intended to support new awards to States that have not yet received funding under the program, while also supporting the expansion of systems in previously funded States. The 2009 budget request could support approximately 32 new awards for developing longitudinal data systems or expanding existing data systems to include postsecondary and workforce information, as well as funding for State coordinators and data coordination. It is the Congress, however, and not the Department, that makes the final decision on Federal education appropriations.

Changes: None.

Comment: Several commenters agreed that States should be permitted to use individual student academic growth measures when determining AYP, but asked that the Department permit any State that would like to use such a model to do so.

Discussion: Section 200.20(h) does not limit the number of States that may incorporate individual student academic growth into their AYP definitions, but establishes specific criteria growth models must meet to ensure that they produce technically sound results that uphold the core tenets of the NCLB. The criteria outlined in § 200.20(h) are designed to promote ingenuity while ensuring that States have the capacity to implement growth measures through stable standards and assessments that are part of data systems that can track student progress and measure student achievement over time so as to ensure accountability for grade-level proficiency in reading and mathematics.

Changes: None.

Comment: A few commenters suggested amending § 200.20(h) to allow States to implement other types of growth measures, particularly for States that do not have the capacity to measure individual student progress.

Discussion: The intent of § 200.20(h) is to guide the development and implementation of measures of individual student academic progress. A State with an innovative growth model that does not measure individual student academic progress may request permission to use that model for purposes of determining AYP through a flexibility agreement under section 9401 of the ESEA that the Secretary may grant, at her discretion. States that do not have the capacity to measure individual student progress are already using a group measure of progress through what is referred to as ''safe harbor.'' This approach allows a school to make AYP when the percent of students who were not proficient from one year to the next decreases by at least 10 percent. This is, in fact, a measure of school progress already allowed and used by every State.

Changes: None.

Comment: A few commenters requested that the Department expand upon § 200.20(h)(3), which requires a State's growth model proposal to be peer reviewed. These commenters suggested that experts in the teaching and learning of LEP students and students with disabilities be a part of the peer review process.

Discussion: The Department intends, throughout the peer review of State growth model proposals, to continue to include peers with expertise in assessing students with diverse needs, as has been the case under the growth model pilot.

Changes: None.

Section 200.22 National Technical Advisory Council (National TAC)

Section 200.22(a) Purpose of the National TAC

Comment: One commenter stated that establishing the National TAC should not result in another layer of review of State accountability plans, like the Title I peer review process, that could prevent States from implementing innovative accountability solutions. One commenter recommended that the expert findings from the National TAC inform the peer review process and provide guidelines to States on what constitutes acceptable practice in technical areas. Another commenter stated that there appeared to be overlap in the roles of the National TAC and the peer review process and asked how the peer review panels and the National TAC would coordinate their responsibilities. The commenter stated that the membership of the National TAC appears to focus primarily on individuals with technical knowledge in statistics and psychometrics, which appears inconsistent with the requirements for the peer review process in section 1111(e) of the ESEA. Another commenter stated that the purpose of the National TAC should be to review and approve or deny State accountability plans.

Discussion: The functions of the peer review process and the National TAC are different, but complementary. Section 1111(e)(1)(A) of the ESEA requires the Secretary to establish a peer review process for the review of State plans and to appoint peer reviewers who are representative of parents, teachers, SEAs, and LEAs, and familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other

educational needs of students. The National TAC will not replace this peer review process and will not review, or recommend for approval or disapproval, individual State accountability plans. Rather, the National TAC will consider complex technical issues that affect all States, and on which the Department would benefit from discussions with experts in the fields of educational standards, assessments, accountability, statistics, and psychometrics (e.g., the appropriate use of confidence intervals and performance indexes). The Department intends to use the advice from the National TAC to inform the peer review process and provide guidance to States. In sum, the National TAC will have a broad advisory role but will not participate in the review and approval of individual State accountability plans.

Changes: None.

Comment: One commenter stated that creating a National TAC to advise the Secretary empowers the current Secretary or future secretaries with additional authority well beyond that which is circumscribed by the law creating the U.S. Department of Education.

Discussion: We do not agree that creating the National TAC is beyond the authority of the Department of Education Organization Act (DEOA) (Pub. L. 96–88), 20 U.S.C. 3401 *et seq.* There is a long history of the Federal government seeking advice from the public on Federal policies and programs. Recognizing the value of advice from the public, Congress enacted the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), 5 U.S.C. App. 2, in 1972. Section 3(2) of FACA specifically provides that committees may be established by statute, reorganization plan, or the President, or by a Federal agency. The Department will ensure that the National TAC adheres to the requirements of FACA and operates in a transparent and open manner, including by providing opportunities for the public to comment.

Changes: None.

Comment: Numerous commenters supported the formation of the National TAC so long as it includes widely respected scholars and practitioners and is non-partisan. However, one commenter questioned the value of and compelling need for the National TAC at this time, and a few commenters stated that appointments to the National TAC should be made by a new Administration. Another commenter stated that establishing the National TAC is in direct conflict with the effective and efficient administration of Title I.

Discussion: We agree that the National TAC should include widely respected scholars and practitioners and be nonpartisan. That is why § 200.22(b)(3) requires a very public and open process for soliciting nominations from the public for National TAC members and § 200.22(b)(1) requires the National TAC to include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including experts with technical knowledge related to statistics and psychometrics.

On August 13, 2008, Secretary Spellings announced the appointment of 16 members to the National TAC. All members are experts in assessment and accountability and represent a range of backgrounds from academicians and researchers to national, State, and local policymakers. The following Web site has a list of the council members and their affiliations: *http://www.ed.gov/news/pressreleases/2008/08/08132008.html*. Proposed § 200.22(b)(2) would have provided for 10 to 15 National TAC members. We have changed the number of members to 10 to 20 to conform with the Secretary's desire to appoint 16 members to the National TAC.

We do not agree that creation of the National TAC is in direct conflict with the effective and efficient administration of Title I, or that appointments to the National TAC should be made by a new Administration. There are a number of complex technical issues related to State standards, assessments, and accountability systems that we have identified as important issues to be considered by the National TAC. For example, the appropriate use of confidence intervals and performance indexes in determining AYP are issues that would benefit from immediate consideration by the National TAC. In addition, we plan to use the National TAC to advise the Department on how a State should determine an appropriate minimum group size taking into consideration other elements of the State's AYP definition, consistent with the amendments to § 200.7 that we are adopting. We believe that addressing these issues as soon as possible will benefit the Department, States, and, ultimately, students in ensuring that State standards and assessments are of the highest technical quality and that State accountability systems hold schools and LEAs accountable for the achievement of all students.

Changes: The number of National TAC members has been changed from ''10 to 15'' to ''10 to 20'' in § 200.22(b)(2).

Comment: One commenter stated that the Department should not rely solely on the National TAC for advice, but should utilize existing resources in the Department (e.g., IES) and other agencies (e.g., National Science Foundation), as well as commissioned studies (e.g., by the Government Accountability Office (GAO)) in making decisions on technical issues related to standards, assessments, and accountability.

Discussion: We agree with the commenter. The Department values the information provided by existing resources in the Department, as well as information provided by other agencies and commissioned studies. The Department will continue to avail itself of these resources, along with the advice of the National TAC, in addressing technical issues related to the design and implementation of standards, assessments, and accountability systems.

Changes: None.

Comment: One commenter supported the creation of the National TAC, but stressed that it should be sensitive to State authority and the need to permit latitude for States to develop their own innovative approaches to standards, assessments, and accountability systems. Several commenters expressed concern that the National TAC not adhere to a ''one-size-fits-all'' approach.

Discussion: The Department has no intention of using the National TAC to arrive at a single national answer to every issue it is asked to address, nor do we believe that the regulatory language implies or suggests that this is the Department's intent. We recognize a State's authority to develop its own standards, assessments, and accountability system.

Changes: None.

Comment: One commenter recommended that States receive technical assistance from the National TAC at least six months prior to the date a State's revised accountability plan is due.

Discussion: The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems that are part of State plans. We do not anticipate that the National TAC will provide direct technical assistance to States. However, we do anticipate using the advice that we receive from the National TAC to provide technical assistance to States on improving their accountability systems.

Changes: None.

Comment: One commenter suggested that the National TAC consider how the Carl D. Perkins Career and Technical Education Act of 2006, Public Law 109–270, 20 U.S.C. 2301 (Perkins Act), relates to NCLB and examine ways to better align the Perkins Act with NCLB and to incorporate the learning that takes place in work-based settings into accountability determinations.

Discussion: The National TAC will focus on key technical issues related to State standards, assessments, and accountability systems that are part of State plans under Title I. Examining the alignment of the Perkins Act with NCLB would not be in keeping with the Department's intentions for the National TAC. However, the National TAC may consider requirements under the Perkins Act that are related to State standards, assessments, and accountability under Title I.

Changes: None.

Comment: One commenter recommended that the National TAC (a) focus on ensuring that the reauthorized ESEA meets the needs of the education community; (b) work with the education research community to develop new research that is informed by and useful to education practitioners; (c) provide advice to the Department about how the Department can develop guidance with recommendations that can be most effectively implemented in schools; and (d) offer guidance about how the Department can best communicate with teachers and the larger education community.

Discussion: The recommendations provided by the commenter are not in keeping with the Department's intention for the National TAC, which is that it advises the Secretary on key technical issues related to State standards, assessments, and accountability systems that are part of State plans under Title I.

Changes: None.

Section 200.22(b) Members of the National TAC

Comment: Various commenters recommended that parents; current K–12 teachers and practitioners; principals; professional groups concerned with measuring student achievement; educators with an understanding of career and technical education; and individuals representing all core academic subjects, including social studies, music, and other arts, be required members of the National TAC. Other commenters stated that the National TAC should include a cross-section of experts, including practitioners in the areas of curriculum, standards, measurement, statistics, psychometrics, policy, and State and LEA accountability systems. Several commenters stated that the National TAC should not be limited to experts, but include practitioners, members of community-based organizations, and professionals who reflect the interests of LEAs and communities.

Discussion: The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems. The National TAC will consider complex issues that affect all States, as well as issues that would benefit from discussions with experts in the field. Section 200.22(b)(1) specifically requires the members of the National TAC to have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including technical knowledge related to statistics and psychometrics. Individuals who meet these criteria and who are also parents, current K–12 teachers and practitioners, principals, educators with an understanding of career and technical education, representatives of professional groups concerned with measuring student achievement, members of community-based organizations, individuals with expertise in core academic subjects, and others would bring important perspectives to the National TAC. However, we do not agree that such individuals without technical expertise in standards, assessments, and accountability should be required members of the National TAC.

Changes: None.

Comment: Many commenters emphasized the importance of ensuring that National TAC members are trusted by the States and include experts with knowledge about the operational aspects of administering assessments and with experience in handling the practical challenges that States and LEAs face in implementing assessment and accountability systems. Other commenters emphasized the importance of including local education practitioners as members of the National TAC in order to ensure that the realities of NCLB implementation in schools and LEAs are considered. A few commenters recommended that at least 50 percent of the members be individuals who are directly responsible for implementing the requirements of NCLB.

Discussion: We agree that it is important to include experts with first-hand knowledge of and experience in assessments and accountability at the State and local levels as members of the National TAC. That is why § 200.22(b)(1) requires the National TAC to include members with knowledge and expertise in the design and implementation of educational standards, assessments, and accountability systems. The 16 members that the Secretary appointed to the National TAC on August 13, 2008 reflect her desire for the National TAC to include experts with State and local experience in assessments and accountability. We believe that experts with experience in these areas, regardless of whether they are currently directly responsible for implementing NCLB, have valuable information and experiences to contribute to the National TAC. Moreover, the primary purpose of the National TAC is to advise the Secretary on technical issues (such as statistical validity and reliability) related to the standards, assessments, and accountability systems required by NCLB. For this reason, the membership of the National TAC is necessarily weighted toward individuals with technical expertise.

Changes: None.

Comment: A number of commenters objected to the Secretary appointing the members of the National TAC. One commenter stated that National TAC members should be selected independently and suggested that the President of the National Academy of Sciences screen and select members. Another commenter recommended that the members be appointed by their peers. Several commenters recommended that States and LEAs play a role in appointing members to the National TAC. Other commenters stated that stakeholder organizations should be permitted to elect a member with appropriate expertise to serve on the National TAC. Another commenter urged the Department to ensure that the process for selecting National TAC members is fully transparent, explicit, and inclusive and that the selection process for the National TAC meets the requirements of FACA so as to ensure a fair and balanced council. The commenter stated that it is critical to include diverse viewpoints and identify potential conflicts of interest when decision-makers are being chosen so that processes remain fair and open. One commenter stated that the specific criteria used in the selection process were not included in the regulations and that, unless a more transparent and inclusive process to select the members is provided, the National TAC would have no credibility.

Discussion: Section 200.22(b)(3) requires the use of a very public and open process to solicit nominations

from the public for National TAC members. The selection of National TAC members complied with the requirements of FACA that the council be fairly balanced in terms of points of view, including the members' backgrounds and qualifications. We believe that this requirement, along with the requirements in § 200.22(b)(1) that members of the National TAC have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, sufficiently outlines the criteria for selecting National TAC members.

The members of the National TAC are Special Government Employees (SGEs) and, as such, are subject to all Federal conflict-of-interest laws and regulations. Consistent with FACA and the members' status as SGEs, the Department provided prospective members of the National TAC with information regarding the Department's standards of conduct, including those imposed by Federal conflict-of-interest statutes. As required in § 200.22(b)(4), the Secretary screened nominees for membership on the National TAC for potential conflicts of interest in order to prevent, to the extent possible, such conflicts, or the appearance thereof, in the National TAC's performance of its responsibilities under this section.

We do not agree that the selection of the National TAC members should be made by anyone other than the Secretary. The purpose of the National TAC is to advise the Secretary on key technical issues related to State standards, assessments, and accountability systems. It would defeat the purpose of the National TAC for the Secretary and the Department to select members of the National TAC who did not represent a range of perspectives, from a variety of fields, and with diverse viewpoints. That is why the regulations specifically require that the National TAC include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems, including experts with technical knowledge related to statistics and psychometrics.

Changes: None.

Comment: Several commenters recommended that the National TAC include members who represent the diverse needs and situations of States. The commenters stated that the National TAC should include members from different geographic regions of the United States, and members from States that differ in terms of their size and populations. Several commenters stated that the National TAC should include members with knowledge of and expertise with diverse student populations. A number of commenters supported the creation of the National TAC so long as it includes at least one member with expertise on assessment and accountability for students with disabilities, including students with the most significant cognitive disabilities. Several commenters recommended requiring at least one member of the National TAC to have knowledge in the design and implementation of educational standards, assessments, and accountability systems for LEP students.

Discussion: We agree that the National TAC should include members who have experience with diverse populations, such as students with disabilities and LEP students and have modified § 200.22(b)(1) to require inclusion of members with that expertise. We note that the members of the National TAC appointed by the Secretary on August 13, 2008 include such experts. Regarding the comment that members come from different regions of the United States and from small and large States, we do not believe that selecting members based on where they live would be beneficial in enabling the National TAC to fulfill its purpose and, therefore, decline to make the change suggested by the commenter. Nevertheless, we also note that the members of the National TAC appointed in August represent a cross section of the Nation.

Changes: We have revised § 200.22(b)(1) to require the National TAC to include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems for all students, including students with disabilities and LEP students.

Comment: One commenter asked for information about the tenure of National TAC members, including whether there will be a rotation schedule for selecting members and whether membership on the National TAC will be connected to a specific Secretary's tenure. Another commenter recommended requiring that appointments to the National TAC be made at the discretion of the Secretary and not include fixed terms of service.

Discussion: All members serve at the pleasure of the Secretary. The next Secretary may appoint new members at his or her discretion. That said, the charter provides that each member appointed by the Secretary shall serve a term of three years, except that the terms of the initial members shall be staggered as follows: One year for five members; two years for five members; and three years for six members. Initial terms of members are determined by a random selection process at the time of appointment. No member may serve more than two terms.

Changes: None.

Section 200.22(d) Rules of Procedure for the National TAC

Comment: Several commenters asked how the Department and the Secretary will ensure that there is a balanced perspective on issues considered by the National TAC. A number of commenters emphasized the importance of ''transparency'' in the operation of the National TAC. Several commenters urged that the meetings of the National TAC be public so that States and the public can participate and understand the recommendations made to the Department. One commenter recommended requiring transparency so that members of the public would not have to exercise their rights under the Freedom of Information Act. One commenter supported the National TAC in theory, but opposed the proposed regulation, stating that the process for creating the National TAC lacked safeguards against bias. Another commenter expressed concern that a small group of people would have the power to drive assessment policies and stated that the proposed regulations gave too much power to an advisory council that the public would not be able to hold accountable. The commenter stated that the Secretary and Congress should not rely on a single source of advice, but should obtain advice from a variety of professionals, practitioners, and organizations representing many fields of expertise in order to ensure that a broad cross-section of the public will be heard and to mitigate against a panel skewed by ideology or special interests.

Discussion: The National TAC operates in a manner that is open and transparent to the public and provides opportunities for a fair and balanced discussion of the issues. The National TAC strictly adheres to FACA, which requires that meetings be announced at least fifteen days in advance and that meetings are presumed to be open to the public except in certain limited circumstances. In short, the provisions of FACA require that the Department: (a) Arrange meetings of the National TAC at reasonably accessible and convenient locations and times; (b) publish advance notice of meetings in the **Federal Register**; (c) open National TAC meetings to the public; (d) make available for public inspection, subject to the exceptions of the Freedom of Information Act, papers and records, including detailed minutes of each

meeting; and (e) maintain records of expenditures.

In addition, as required by FACA, the Department has appointed a full-time Federal employee (Designated Federal Official, or DFO) who will (a) call, attend, and adjourn meetings of the National TAC; (b) approve agendas; (c) maintain required records on costs and membership; (d) ensure efficient operations; (e) maintain records for availability to the public; and (f) provide copies of council reports to the Department's Committee Management Officer for forwarding to the Library of Congress.

We believe that the commenter's concerns that a small group of people would have the power to drive assessment policies are unfounded. The National TAC is an advisory committee, not a policy-making body. As such, it will provide the Secretary with advice, which the Secretary will consider along with information from other resources within the Department and from outside sources.

Changes: None.

Comment: One commenter requested more detail on the creation, organization, and governance of the National TAC. The commenter requested information on who creates the internal governance procedures for the council; whether the procedures can be amended; and the parameters of the work of the council. Another commenter requested that the regulations elaborate on the National TAC members' specific duties and terms and the meetings that the National TAC will hold.

Discussion: We believe that the parameters of the National TAC's work are clearly stated in § 200.22(a). The Department followed all FACA requirements, including rules on governance, in establishing the National TAC. As required by FACA, the National TAC published a charter that includes detailed information about the purpose of the council, its structure, meetings, estimated annual cost, and reporting requirements. The Department filed the charter for the National TAC on April 7, 2008 with the relevant committees of the U.S. House of Representatives and the U.S. Senate, the Library of Congress, the Secretary, and the General Services Administration (GSA), as required by FACA. The charter is posted on the Department's Web site at *http://www.ed.gov/about/bdscomm/list/ntac/index.html*.

We believe that this detailed information is more appropriate for inclusion in the National TAC's charter and, therefore, decline to follow the commenter's recommendation to include these procedures in the regulations. In response to the commenter who asked about amending the National TAC's procedures, changing the National TAC's procedures would require amending the charter, which can be done if the need arises.

Changes: None.

Comment: One commenter encouraged the Department to permit ongoing and regular access to the National TAC by States and to allow States to bring forward complex issues for the National TAC to consider. Another commenter recommended changing the regulations to require that the findings and recommendations of the National TAC be publicly available through the Department's Web site.

Discussion: The Department will include time for public comment at each meeting of the National TAC. This will provide an opportunity for States, as well as the public, to have regular opportunities to comment on the work of the National TAC. We agree that the findings and recommendations of the National TAC should be publicly available through the Department's Web site, but decline to follow the recommendation to add a regulation to achieve this goal. We believe this action is unnecessary because the National TAC's charter states that the Council will, in lieu of an annual report, provide a summary of the proceedings, prepared by the DFO and reviewed and approved by the Council, to the public after every meeting. The meeting summary will, at a minimum, contain the topics discussed, a summary of the discussion, and recommendations for the Department, including, as appropriate, recommendations on research that the Department might undertake. The meeting summaries, along with a transcript of every meeting, will be posted on the Department's Web site. As noted previously, this Web site is *http://www.ed.gov/about/bdscomm/list/ntac/index.html*.

Changes: None.

Comment: One commenter stated that it is not clear what authority the National TAC will have and whether decisions made by the National TAC will be binding on the Department in its consideration of future policies.

Discussion: The National TAC operates under the rules and requirements of FACA. Under section 9(b) of FACA, agencies are not required to implement the advice or recommendations of their Federal advisory committees; advisory committees are by definition advisory and, therefore, the recommendations and advice of the National TAC are not binding on the Department.

Changes: None.

Commenter: A few commenters, while supportive of establishing the National TAC, questioned whether it was necessary to include the requirement to establish the National TAC in the Department's regulations. Another commenter noted that the Department published a notice in the **Federal Register** on March 18, 2008, establishing the National TAC, and stated that proposing the National TAC in the NPRM was unnecessary because it was clear that decisions about the National TAC had already been made.

Discussion: Although we did not necessarily need to codify the authority to establish the National TAC in our regulations, we chose to do so in the interest of transparency and continuity. We intended that, by including our proposals concerning the National TAC in the NPRM, the public would have a greater opportunity to comment and make recommendations on how the National TAC might be structured and operated. The input we received has been very helpful and, as a result of public comments, we have changed the regulations to require the National TAC to include members with expertise in standards, assessments, and accountability for students with disabilities and LEP students. Providing for the establishment of the National TAC in the regulations also will ensure that the Department continues to benefit from the advice of experts in the field and that the public continues to have the opportunity to provide input on overarching standards, assessment, and accountability issues. Just as States have established State technical advisory committees to advise them on the development and implementation of their State standards, assessments, and accountability systems, we believe that regular access to a group of experts will benefit the Department, States, and, ultimately, students in ensuring that State standards and assessments are of the highest technical quality and that State accountability systems hold schools and LEAs accountable for the achievement of all students.

Changes: None.

Sections 200.32 and 200.50 Identification of Schools and LEAs for Improvement

Comment: Many commenters supported our proposed changes to § 200.32 to codify current Department policy that an LEA may base identification of a school for improvement on whether the school did not make AYP because it did not meet the annual measurable objective (AMO) in the same subject for two consecutive

years, but may not limit such identification to those schools that did not meet the AMO in the same subject for the same subgroup for two consecutive years. We proposed a similar change to § 200.50, regarding State identification of LEAs for improvement.

Several commenters misunderstood the proposed regulation and thought that the regulation permitted LEAs to limit identification of schools for improvement to schools that did not meet the AMO in the same subject for the same subgroup every year. In addition, the majority of those who commented opposed the regulatory changes, stating that they are overly rigid and would restrict States' and LEAs' authority and flexibility to target LEAs and schools that are truly in need of improvement. Several commenters stated that the Department is exceeding its administrative authority by promulgating a regulation that is not expressly authorized in the statute.

Discussion: As stated in the preamble to the NPRM, we are codifying the Department's current policy in order to establish clear parameters for LEAs and States to use when identifying schools and LEAs for improvement. We believe that this policy and the final regulations are consistent with the statute, its emphasis on proficiency in separate subjects, and its requirement to include, in AYP calculations, separate participation rates for mathematics and reading/language arts assessments.

Section 1116(b)(1) of the ESEA requires an LEA to identify for school improvement any Title I school that fails, for two consecutive years, to make AYP as defined under section 1111(b)(2). Section 1116(c)(3) contains a similar requirement for identifying LEAs for improvement. There is flexibility in section 1111(b)(2) to permit an LEA to identify schools (and a State to identify LEAs) in need of improvement on the basis of not making AYP in the same subject for two consecutive years. This flexibility stems from other provisions in the statute that treat reading and mathematics independently (e.g., separate starting points and AMOs). These provisions recognize that student achievement in reading and mathematics in a State may start at very different points and, thus, that the State would need to establish different trajectories for reaching 100 percent proficiency in each subject. As a result, it makes sense to permit an LEA to identify schools (and a State to identify LEAs) in need of improvement based on not making AYP for two years in the same subject.

Subgroups, on the other hand, are not treated differently in the ESEA and, thus, the statute does not support identifying schools or LEAs for improvement on the basis of ''same-subgroup'' performance for two consecutive years. Moreover, such a policy would be inconsistent with the accountability provisions in section 1111(b)(2)(C) of the ESEA, which require that each subgroup meet the State's AMOs in each subject each year. The intent of school identification is not to lay blame on a particular group of students, as a ''same subgroup/same subject'' approach would do, but to identify the instructional and academic areas that need to be improved. A school or LEA that is identified for improvement should look to specific instructional remedies in the subject area, other indicator, or participation rate that resulted in its identification.

Changes: None.

Section 200.37 Notice of Identification for Improvement, Corrective Action, or Restructuring

Section 200.37(b)(4)(iv) Notification of Available School Choices

Comment: A number of commenters expressed support for the requirement in § 200.37(b)(4)(iv) that LEAs notify the parents of eligible students of their Title I public school choice options at least 14 calendar days before the start of the school year (14-day notification requirement). At the same time, a number of commenters objected to the 14-day notification requirement because, according to the commenters, most SEAs cannot release AYP data to LEAs in time for LEAs to determine students' eligibility for public school choice and notify families about their public school choice options 14 days before the start of the school year. Commenters stated that the 14-day notification requirement does not acknowledge the complexities of making AYP determinations, which involve scoring assessments, ensuring that test scores are received on time, verifying the accuracy of the data, and computing AYP for the seven required grades, all of which can result in delaying AYP determinations. Other commenters noted that, although parental notification is an LEA responsibility, LEAs do not control when test results or AYP data are available and would not be able to meet the 14-day notification requirement unless States provide AYP determinations to LEAs in a timely manner.

Some commenters expressed concern that States may need to amend their assessment policies or renegotiate their contracts with testing companies in order to meet the 14-day notification requirement. Other commenters suggested that the 14-day notification requirement would pressure States to test students too early in the school year or lead to increases in testing and scoring errors and less time to verify assessment results. One commenter suggested that the 14-day notification requirement would complicate LEAs' participation in the Department's SES pilot project, which permits certain LEAs to offer SES to students enrolled in schools that are in year one of improvement status.

Discussion: The Secretary strongly believes that early notification to parents of their public school choice options is essential for parents to have a genuine opportunity to exercise those options. At the same time, the Secretary recognizes the practical challenges that some LEAs may face in meeting the 14-day notification requirement and acknowledges that AYP determinations take time and that States may need to consider changes to their assessment policies and contracts. Nevertheless, the goal of the 14-day notification requirement is to ensure that parents have sufficient time, in advance of the school year, to make an informed decision about transferring their child to another school. The Secretary believes the 14-day notification requirement strikes a reasonable balance between the needs of parents for early notification and the practical realities of assessment reporting and AYP determinations.

With regard to the comment that the 14-day notification requirement would complicate LEAs' participation in the Department's SES pilot project, we disagree. LEAs participating in the SES pilot, which allows schools in the LEA to provide SES or choice to students enrolled in schools that are in year one of improvement status, must follow the same timelines as all other schools, including the 14-day notification requirement.

Changes: None.

Comment: A number of commenters recommended that the Department revise the 14-day notification requirement. Some commenters stated that 14 days should be the minimum time and that more time would be better, with some commenters recommending a 30-day notification requirement. One commenter recommended requiring LEAs to notify parents about their Title I public school choice options in the spring or early summer, at the same time LEAs offer other school choice programs. Another commenter recommended a 30-day

notification requirement, except when a State's late release of AYP determinations prevents an LEA from meeting this requirement. In such cases, the commenter recommended that an LEA base student eligibility for public school choice on the previous year's AYP data. One commenter suggested that the Department survey States to determine if they report assessment results in time for LEAs to meet the 14-day notification requirement; for States that do not report assessment results in time to meet the 14-day notification requirement, the commenter suggested giving LEAs an additional 30 days to notify parents of their public school choice options.

Several commenters recommended that the Department require, when the State does not notify its LEAs of the final AYP status of their schools at least 21 days in advance of the start of the school year, an LEA to notify parents no later than 14 days after the LEA receives AYP results from the State. One commenter recommended requiring States to give LEAs final AYP determinations for schools 21 or more days before the school year begins, and another recommended requiring LEAs to notify parents no later than seven days before the start of the school year. Another commenter suggested that the Department give States the flexibility to submit plans to the Department on how the State would ensure that more parents have timely information about a school's improvement status and parents' public school choice options; for example, States might propose requiring schools that are currently in school improvement to meet the 14-day notification requirement, while requiring schools that are newly identified for improvement to notify parents by the first day of school. Finally, a commenter suggested that, if an LEA is not able to execute parents' transfer requests within a 14- to 21-day time period, the LEA should be required to notify parents early enough to accommodate parents' requests in a timely manner.

Discussion: The Secretary appreciates the recommendations made by these commenters, all of which appear to reflect sincere efforts to address the complexity and variability in State accountability systems. However, most of the suggested alternatives primarily address the needs of States and LEAs, rather than the needs and concerns of parents with children struggling to reach proficiency in reading and mathematics in schools identified for improvement, corrective action, or restructuring. The result, in nearly every case, would be less time for parents to consider their transfer options before the start of the school year or, in some cases, a deferral of that process until well after the start of the school year, by which time few parents seriously consider transferring their children to a new school.

In sum, while we appreciate the differences in State accountability systems and the practical concerns of making timely AYP determinations, we believe that the 14-day notification requirement strikes the appropriate balance to ensure that parents have sufficient time to make an informed decision on whether to transfer their children to another public school.

Changes: None.

Comment: One commenter supported the 14-day notification requirement but stated that receiving 14 days' notice would not help parents in LEAs that do not offer the option to transfer to conveniently located public schools or cannot accommodate all eligible students who wish to transfer.

Discussion: The Department acknowledges that some LEAs may not be able to provide transfer options because: (1) The LEA only has a single school at a grade level; (2) all schools at a grade level are in school improvement; or (3) the distances between schools make changing schools impracticable. In such situations, section 1116(b)(11) of the ESEA requires that the LEA, to the extent practicable, enter into a cooperative agreement with neighboring LEAs to provide a transfer option. In addition, an LEA may offer SES to students attending schools in the first year of improvement (*see* § 200.44(h)(2)). However, under § 200.44(d), an LEA may not use lack of capacity as a reason to deny public school choice to students in schools identified for improvement, corrective action, or restructuring.

Changes: None.

Comment: Some commenters who objected to the 14-day notification requirement recommended that LEAs be required to comply with a specific notification requirement only for schools that were in improvement in the previous school year and will continue to be in improvement in the upcoming school year whether or not they make AYP. These commenters said that, for newly identified schools, LEAs should be required to provide notification of public school choice options to parents no later than the first day of school.

Discussion: We decline to accept the commenters' suggestion to require differential treatment of students who attend schools that have been previously identified for improvement and students who attend schools newly identified for improvement. The Department recognizes, however, that it would be much easier for LEAs and most beneficial for students and parents identified if LEAs provided early notice of available choice options to the parents of students attending schools already identified for improvement and whose obligation to provide public school choice would continue irrespective of their next AYP determination. We, therefore, encourage LEAs to take advantage of such situations and provide notice to parents of students in previously identified schools as early as possible, preferably in the spring or early summer, before the start of the school year.

Changes: None.

Comment: A number of commenters stated that unstable enrollments in high-poverty schools, such as Title I schools, often make it impossible for an LEA to know 14 days prior to the start of the school year which students are eligible for public school choice.

Discussion: High rates of student mobility in many high-poverty areas do not relieve an LEA of its responsibility to provide parents of eligible students with timely notification of public school choice options. Indeed, such students often are precisely those who would most benefit from the opportunity to transfer to another public school. Where high mobility makes it difficult to obtain accurate enrollment data prior to the beginning of the school year, an LEA must provide notice using the best available data to identify and notify eligible parents at least 14 calendar days before school starts.

Changes: None.

Comment: One commenter asked the Department to consider whether an LEA should be required to notify parents of students who enroll in a school after the LEA has already sent out public school choice and SES notifications.

Discussion: The Department encourages LEAs to be as flexible as possible with newly enrolled students. If a student enrolls in a school identified for improvement, corrective action, or restructuring early in the school year, we encourage the LEA to make every effort to accommodate parents who wish to transfer their child to another public school. Likewise, we encourage an LEA to offer SES to newly enrolled students who are eligible and who would have sufficient time remaining in the school year to complete an SES program. An LEA that provides two enrollment windows, as required under § 200.48(d)(2) for LEAs that wish to spend less than the amount needed to meet the 20 percent obligation, could accommodate, in many instances,

eligible students who enroll in a school after the start of the school year and wish to participate in SES. We believe that many LEAs will choose to provide two enrollment windows in anticipation of needing to meet this requirement in order to use unspent choice-related transportation and SES funds on other allowable activities. Finally, we note that the 14-day notification requirement applies only to public school choice and not to SES.

Changes: None.

Comment: A few commenters questioned whether the lack of timely notification is the primary reason that more parents do not choose to transfer their child to another public school under the Title I public school choice provisions. These commenters suggested that there are other explanations, such as parents believing that their child's school is doing well despite being identified for improvement, a desire to keep their child in the school closest to home, and a willingness to participate actively in school improvement efforts.

Discussion: The Secretary agrees that there are valid reasons unrelated to LEA notification practices, such as those described by the commenters, why eligible parents decide not to transfer their child to another public school under the public school choice provisions. However, evaluation data indicate that the timing of notification is a significant factor in influencing whether parents choose to transfer their child, and that LEAs that notify parents about their public school choice options prior to the first day of school have higher participation rates than LEAs that provide notification later.[13] The 14-day notification requirement in § 200.37(b)(4)(iv) is a direct response to the evaluation data and is intended to give families more time to make informed decisions about available public school choice options.

Changes: None.

Comment: One commenter expressed support for the 14-day notification requirement and recommended requiring LEAs to offer parents of eligible children detailed academic information on their public school choice options. The commenter suggested that LEAs could make available for each public school choice option the academic report cards required under section 1111(h) of the ESEA.

Discussion: Section 200.37(b)(4)(ii) already requires LEAs to provide parents of eligible children academic information on the school or schools to which their child may transfer. The Department believes that LEAs are in the best position to determine the academic information that would be most useful in helping families decide on transfer options. We note, for example, that the local report cards required under section 1111(h) are LEA report cards and, therefore, would include academic information on all schools in an LEA. Depending on the number of schools in an LEA, providing the LEA's report card may confuse parents who are interested only in the achievement data for their available public school choice options.

Changes: None.

Comment: A number of commenters stated that the 14-day notification requirement in proposed § 200.37(b)(4)(iv) conflicts with § 200.44(a), which implements section 1116(b)(1)(E)(i) of the ESEA and requires an LEA to provide all eligible students enrolled in the LEA with the option to transfer to another public school not later than the first day of the school year.

Discussion: The Department does not agree that the 14-day notification requirement conflicts with either statutory or regulatory language regarding the provision of public school choice to eligible students. Rather, the 14-day notification requirement defines, pursuant to the Secretary's regulatory authority in section 1901 of the ESEA, the minimum amount of time before the start of school that is required for notice of public school choice to be meaningful, *i.e.*, to give a parent sufficient time to make an informed decision about transferring his or her eligible child to another public school. We encourage LEAs to allow students to enroll in their school of choice as soon as possible following receipt of the transfer request from parents.

We agree that there is a discrepancy between the 14-day notification requirement in proposed § 200.37(b)(4)(iv), which was referenced in proposed § 200.44(a)(2)(ii), and the language in proposed § 200.44(a)(2)(i), which would have required an LEA to offer public school choice options not later than the first day of the school year. We have revised § 200.44(a)(2) to eliminate this discrepancy.

Changes: We have revised § 200.44(a)(2) to make clear that an LEA must offer parents the opportunity to transfer their child to another public school, through the notice required in § 200.37, so that students may transfer in the school year following the year in which the LEA administered the assessments that resulted in identification of the school for improvement, corrective action, or restructuring.

Comment: Several commenters stated that compliance with the 14-day notification requirement would create administrative burdens for LEAs. Two commenters asserted that the requirement would increase local administrative costs; one commenter contended that those costs would not be paid for with Federal funds. Another commenter asserted that in many LEAs there may not be sufficient staff available to produce the notifications 14 days before the start of the school year.

Discussion: The Secretary believes strongly that § 200.37(b)(4)(iv) is necessary so that parents have sufficient time, prior to the start of the school year, to make important decisions about the school their child will attend. We note that LEAs may use Title I, Part A funds, as well as other authorized Federal funds, to support the costs of notifying parents of their public school choice options. Additionally, we are adopting in these final regulations the changes we proposed in the NPRM to § 200.48(a)(2)(iii)(C). Under these changes, an LEA is allowed to count parent outreach costs toward the funds it is required to spend for choice-related transportation and SES, up to an amount equal to 0.2 percent of the LEA's Title I, Part A, subpart 2 allocation. Those funds may be used to implement the 14-day notification requirement.

Changes: None.

Comment: Several commenters argued that, in States that issue both preliminary and final AYP data, the regulations would require LEAs to send out multiple notices reflecting changes in public school choice options as a result of final AYP determinations. Two other commenters argued that, because final AYP determinations may not be made 14 days before the start of school, § 200.37(b)(4)(iv) could require LEAs to provide and pay for public school choice for students attending schools that ultimately are not identified for improvement, which would confuse parents, waste Title I funds, and not increase participation rates.

Discussion: The 14-day notification requirement is not intended to cause LEAs to offer public school choice before receiving final AYP determinations. We note that, under section 1116(b)(1)(B) of the ESEA, final AYP determinations must take place prior to the start of the school year. We encourage LEAs to prepare notices and

[13] Stullich, S., Eisner, E., & McCrary, J. (2007). *National Assessment of Title I: Final Report, Volume I: Implementation.* Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

make provisional transportation plans in advance of receiving final AYP determinations, when necessary, in order to expedite notifying parents of their child's eligibility for public school choice when final AYP determinations are available, in accordance with the 14-day notification requirement.

Changes: None.

Comment: Several commenters expressed concern about how the 14-day notification requirement would affect (1) year-round schools, (2) States with rolling start dates, rather than a single, statewide start date; and (3) schools that open in early August.

Discussion: In each of these situations, LEAs must notify parents of their public school choice options 14 days before the beginning of the ''school year,'' as that term is defined by the SEA or LEA.

Changes: None.

Comment: Two commenters stated that the proposed requirements in § 200.37, including the 14-day notification requirement and expanded notice requirements for both public school choice and SES, are an inappropriate attempt to ''micromanage'' schools and LEAs.

Discussion: The new requirements in § 200.37 respond to evaluation and monitoring data suggesting that public school choice and SES are poorly implemented by too many LEAs, more than six years after public school choice and SES options were first required by the ESEA. For example, evaluation data show that SES notifications often are confusing, incomplete, and even discourage the use of SES.[14] The final regulations are a direct response to these data and part of the Department's overall effort to promote more effective implementation of Title I public school choice and SES.

Changes: None.

Section 200.37(b)(5) Annual SES Notice

Comment: Several commenters expressed support for proposed § 200.37(b)(5)(ii)(C), which would require an LEA's annual notice to parents of the availability of SES to include an explanation of the benefits of receiving SES, and proposed § 200.37(b)(5)(iii), which would require this notice to be clear and concise and clearly distinguishable from other school improvement information sent to parents. One of these commenters recommended strengthening these requirements by encouraging LEAs to inform parents directly about the merits of particular SES programs.

Discussion: The Secretary appreciates the commenters' support for improved SES notice requirements. Regarding the comment to encourage LEAs to inform parents directly about specific SES programs, LEAs are currently required, under section 1116(e)(2)(A)(iii) of the ESEA and § 200.37(b)(5)(ii)(B), to provide parents with a brief description of the services, qualifications, and demonstrated effectiveness of each provider that is available within the LEA.

Changes: None.

Comment: One commenter interpreted the proposed changes to §§ 200.37(b)(5)(ii)(C) and 200.37(b)(5)(iii) as requiring LEAs to notify parents about the availability of SES prior to the start of the school year.

Discussion: The commenter appears to have misunderstood the proposed regulations. Although the Secretary supports timely notification to parents of their child's eligibility for SES, the regulations do not require that LEAs notify parents about SES prior to the start of the school year.

Changes: None.

Comment: Two commenters stated that the Department should require LEAs to include, in their annual notice of the availability of SES, information on whether available SES providers are qualified to serve students with disabilities and LEP students.

Discussion: Section 200.46(a)(4) requires an LEA to ensure that eligible students with disabilities and LEP students are able to receive appropriate SES and accommodations in the provision of those services. We agree that it would be helpful for parents to know whether particular SES providers are able to serve students with disabilities or LEP students. Therefore, we have revised § 200.37, regarding LEA notices, and § 200.47, regarding SEA responsibilities for SES.

Changes: We have revised § 200.37(b)(5)(ii)(B) to provide that an LEA's notification to parents regarding SES include an indication of those providers that are able to serve students with disabilities or LEP students. We also have restructured § 200.47(a)(3) and added a new paragraph (a)(3)(ii) requiring an SEA to indicate on its list of approved providers those providers that are able to serve students with disabilities or LEP students.

Comment: A few commenters suggested that LEAs include, in the notice on SES, information about whether there is independent evidence from an evaluation or scientifically based research about the effectiveness of each provider's services and indicate whether a provider has been removed from any State's list of approved providers.

Discussion: Section 1116(e)(2)(A)(iii) of the ESEA and § 200.37(b)(5)(ii)(B) already require LEAs to include information on providers' effectiveness in their notices to parents, and § 200.47(b)(3)(i) requires States to consider, in their approval of providers, whether a provider has been removed from another State's list. Additionally, under § 200.47(b)(2)(ii)(C), a State may not include a provider on the State's list of approved SES providers unless the provider agrees to ensure that the instruction it will provide is of high quality, research-based, and specifically designed to increase the academic achievement of eligible children. The Department does not believe further regulation is required in this area.

Changes: None.

Comment: Many commenters opposed the SES notice requirements in § 200.37(b)(5)(ii)(C) and § 200.37(b)(5)(iii). Some of these commenters stated that these requirements are examples of over-regulation by the Department. Other commenters argued that requiring the SES notice to be concise is illogical, given the numerous items required to be included in the notice. Some commenters argued that the requirements are ambiguous and that it would be difficult for LEAs to comply with them and for SEAs to monitor implementation by LEAs. A few commenters recommended that the Department provide a model notice for LEAs to use, while another commenter stated that using a model notice should be optional, not required.

One commenter argued that the proposed requirements would be burdensome because LEAs would need to send two notices to parents whose children are eligible for SES—one on SES and one with information about school improvement. Another commenter recommended that LEAs have flexibility to notify parents in the most appropriate manner for the communities they serve. One commenter recommended that the Department clarify that the SES notice may be sent to parents with other materials so long as it is clearly distinguishable from those materials.

Another commenter recommended eliminating the requirement that SES notification letters be ''clearly distinguishable'' from other information sent home to parents. This commenter suggested that the requirement would draw attention to the SES notice at the expense of other LEA and school information, and that it is not the Department's responsibility to tell LEAs

[14] *Id.*

and schools how to provide their notifications to parents.

Other commenters asserted that there is little evidence available on the benefits of SES. Another commenter recommended that the Department modify the regulations to require LEAs to include only those benefits of SES that are based on scientifically based research. Another commenter recommended that § 200.37(b)(5)(ii)(C) be changed to require an LEA to explain only the ''potential'' benefits of SES until there is research verifying that SES increases student achievement.

Discussion: The Secretary believes that it is important for LEAs' communication to parents of their SES options be as straightforward and easy for parents to understand as possible. During our monitoring and outreach visits, we have seen examples of LEAs' notices to parents that were unclear, incomplete, and negative in tone. We also know from evaluation data that parents of eligible students often report that they have not received a notice about SES from their LEA.[15] To address these problems, the Secretary believes it is necessary and in students' and parents' best interests to require LEAs to send parents SES notification letters that are clear and concise and explain the benefits of SES. In order to assist LEAs in meeting this requirement, we intend to provide, through Department guidance, one or more sample notification letters that include the elements required by these regulations.

Section 200.37(b)(5)(iii) does not require an LEA to send an SES notice that is separate from its school improvement notice; rather, the SES notice must be ''distinguishable'' from other improvement information. This does not preclude an LEA, therefore, from including the SES notice in the same mailing with other information about school improvement.

We believe that LEAs should have the discretion to determine what information on the benefits of SES to include in the notice to parents. In addition to benefits substantiated by research conducted by the Department or by States, LEAs, or other entities, an LEA's notice could include, for example, the fact that supplemental educational services are available at no cost to parents and make productive use of a student's out-of-school time in a safe environment; that parents may select the approved provider of their choice that best meets their child's academic needs; and that supplemental educational services have the potential to improve a student's academic proficiency.

Changes: None.

Comment: Several commenters recommended that all notices and information on public school choice and SES be provided to parents in a language parents can understand.

Discussion: Section 1116(b)(6) of the ESEA and § 200.36(b)(2) already require that, to the extent practicable, LEAs provide notices on public school choice and SES to parents in a language parents can understand. Therefore, it is unnecessary to regulate further in this area.

Changes: None.

Comment: One commenter recommended several changes to § 200.37 in order to improve access to public school choice and SES for ''disconnected'' youth. This commenter suggested that the regulations be revised to require LEAs to: (1) Provide public school choice and SES information to parents of disconnected youth whose cohort is either still in school or has graduated less than three years ago, and to parents of youth who have transferred from traditional high schools into alternative educational settings; and (2) encourage LEAs to be more proactive when informing parents and students of their SES options through provider fairs, SES informational sessions, and other means.

Discussion: The Secretary appreciates the commenter's concern for disconnected youth. Disconnected youth who are from low-income families and enrolled in a Title I elementary or secondary school in improvement status (in year two of improvement for SES eligibility), including an alternative high school, are eligible for public school choice and SES. Disconnected youth who are not enrolled in a public Title I school in improvement status, however, are not eligible. The Department strongly encourages LEAs to actively notify parents of their options for public school choice and SES using multiple methods and venues, such as those recommended by the commenter.

Changes: None.

Section 200.39 Responsibilities Resulting From Identification for School Improvement

Comment: A number of commenters expressed support for the Department's proposed amendments to § 200.39(c), which would require LEAs to post on their Web sites information on the number of students who were eligible for and the number of students who participated in Title I public school choice and SES, a list of the SES providers approved by the State to serve the LEA and the locations where services are provided, and a list of available schools for the current school year to which eligible students may transfer. One commenter stated, however, that, although the requirements in § 200.39(c) are not unreasonable, the commenter doubted that these requirements would lead to an increase in participation for public school choice and SES.

Discussion: The National Assessment of Title I (NATI) report (2007) and information from the Department's monitoring and outreach visits show that parents are more likely to be aware of and take advantage of Title I public school choice and SES options when they hear about their options from more than one source.[16] For this reason, the Department believes that expanding the mediums through which parents receive information on their public school choice and SES options will make it more likely that parents know about, understand, and take advantage of their options.

Changes: None.

Comment: A number of commenters stated that it would be difficult for LEAs to maintain an up-to-date list of SES providers and their locations, because this information changes over the course of a school year. One of these commenters raised similar concerns about keeping track of available public school choice options, which may change due to shifting enrollment and other factors. Precisely because the availability of SES providers can change throughout the year, another commenter recommended requiring LEAs to update their Web sites on an ongoing basis.

Two commenters recommended requiring LEAs to post the information no later than 30 days following the end of the previous school year. Another commenter stated that, while LEAs should be able to report information about SES providers at the beginning of a school year, data on the number of students who participate in SES would not be available until the end of the school year.

Discussion: The Department recognizes that information on SES providers may change during the school year; indeed, the primary reason we proposed § 200.39(c) was because Web sites can be easily updated with the most current information. However, we understand the administrative

[15] *Id.*

[16] Stullich, S., Eisner, E., & McCrary, J. (2007). *National Assessment of Title I: Final Report, Volume I: Implementation.* Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education.

challenges of continuously updating data on public school choice options and SES providers. Therefore, we have revised § 200.39(c)(1) to require LEAs to post the information required in § 200.39(c) in a timely manner to ensure that parents have current information on their public school choice and SES options. In addition, LEAs might request that SES providers submit regular updates about their locations to facilitate making useful and timely information available to parents.

Changes: Section 200.39(c)(1) has been revised to clarify that an LEA must post the information regarding choice and SES on its Web site ''in a timely manner to ensure that parents have current information.''

Comment: A number of commenters expressed concern that the requirements in § 200.39(c) would increase the reporting and administrative burden for schools and LEAs. Several commenters suggested that one way to alleviate the burden would be to permit an SEA to post the required information on its Web site and for LEAs to create appropriate links on their Web sites to their SEA's Web site.

One commenter recommended that, in addition to the information in proposed § 200.39(c), LEAs should be required to display on their Web sites information on the number of applications for SES, the number of students placed with SES providers, the number of students currently served by SES providers, and the number of students served by each SES provider.

Discussion: The Secretary does not agree that the requirements in proposed § 200.39(c) will add substantially to LEAs' reporting and administrative requirements. As indicated in the *Summary of Costs and Benefits* section, we estimate that it would take an LEA an average of 25 hours to prepare the information for its Web site. LEAs already report student eligibility and participation data on public school choice and SES to their States for inclusion in State reports to the Secretary. Additionally, under § 200.37(b)(4) and (b)(5), LEAs must provide information on SES providers and public school choice options to parents through written notifications. Therefore, although the requirement for LEAs to display this information on their Web sites is new, LEAs already are required to collect and report these data, which will minimize the administrative burden of the new requirements.

With regard to requiring LEAs to include additional SES data on their Web sites (e.g., the number of applications for SES, the number of students placed with SES providers, and the number of students served by each SES provider), LEAs would have to collect new data. We believe that requiring LEAs to collect and report these new data would add burden on LEAs with little added benefit for parents. Therefore, we decline to require LEAs to report on the additional data recommended by the commenter.

Finally, although some SEAs may display information on public school choice and SES on their Web sites, such information may not be easily accessible to parents seeking information about their own LEA. SEA Web sites typically include information about education at all levels across a State. As a result, many of these sites can be difficult to navigate. LEA Web sites, by contrast, generally are less complex and easier to navigate. In addition, parents are more likely to be familiar with LEA Web sites than SEA Web sites and are more likely to visit the former in order to obtain local school information (e.g., school menus, events calendars). Because the goal of § 200.39(c) is to make information about local Title I public school choice and SES options accessible to parents and other interested parties, we believe this information should be displayed directly on LEA Web sites. Therefore, we decline to permit LEAs to meet the requirements in § 200.39(c) by providing a link to the information on SEA Web sites.

Changes: None.

Comment: One commenter observed that many LEAs, particularly small, rural LEAs, do not have Web sites and asked whether these LEAs would be required to establish and maintain a Web site to comply with § 200.39(c). The commenter added that many of these same LEAs are not able to provide either public school choice or SES to their students and, thus, would have little or none of the information that § 200.39(c) would require them to post on their Web sites, even if they had one. Another commenter recommended that LEAs without Web sites be permitted to communicate the information required in § 200.39(c) through other means.

Discussion: The requirements in § 200.39(c) do not apply to LEAs that do not have to provide public school choice or SES options to their students, either because they do not have any schools identified for improvement, corrective action, or restructuring or because they are unable to provide such options due to a lack of available public school choice options or SES providers. However, for LEAs that provide public school choice and SES options to their eligible students, but do not have their own Web sites, we believe it would be appropriate and reasonable to require the SEA to display the LEA data required in § 200.39(c) on the SEA's Web site and have made this change in the regulations.

Changes: A new paragraph (c)(2) has been added to § 200.39, which provides that if an LEA does not have its own Web site, the SEA must include on the SEA's Web site the required information for the LEA.

Comment: One commenter asked the Department to clarify the requirement in proposed § 200.39(c)(1)(iii) that LEAs post on their Web sites information on the locations where SES services are provided. The commenter asked whether LEAs must post the specific addresses where services are provided or if they may post more general information about the types of locations where services are provided. The commenter noted that the location of services may change as locations are added to accommodate increasing SES enrollment. The commenter also expressed concern that the list of available schools offered as Title I public school choice options could be confusing to parents if, as is typically the case, their actual choices are limited to a few schools and not all schools on the list.

Discussion: Our rationale for requiring LEAs to post certain information related to public school choice and SES on their Web sites is to ensure that current information is readily available to interested parents. For this reason, the list of approved SES providers on LEA Web sites should include the most current information available, including the address or addresses where services are offered. The Department recognizes that requiring LEAs to update their Web sites continuously as provider information changes would be administratively burdensome and, as noted earlier, has revised the regulations to require in new § 200.39(c)(1) the posting of the information required in a timely manner to ensure that parents have current information.

In addition, we encourage LEAs to include, in their list of public school transfer options, any explanatory material necessary to ensure that parents understand the school choices available to their child.

Changes: As noted previously, § 200.39(c)(1) has been revised to clarify that an LEA must post the information required for choice and SES on its Web site in a timely manner to ensure that parents have current information.

Comment: Several commenters recommended requiring LEAs to post the information on public school choice and SES required in proposed

§ 200.39(c) on their Web sites in languages other than English. One commenter recommended requiring LEAs to post the information in any language spoken by any significant number of LEP parents. Two commenters also recommended requiring LEAs to make this information available in print, including in languages other than English, and to ensure that this information is sent home to parents.

Discussion: We decline to adopt the commenters' suggestion to require an LEA to post the information required in § 200.39(c) in languages other than English. We note that the notice requirements in § 200.37 are the primary means through which LEAs provide written notification to parents of the Title I public school choice and SES options for their eligible children. Section 200.36 requires that such notification be provided directly to parents, by such means as the U.S. mail, and, to the extent practicable, in a language that parents can understand. We believe that many LEAs serving large numbers of LEP students and their families provide notices and other materials for parents in multiple languages and will likely do the same in complying with § 200.39(c).

The purpose of § 200.39(c) is to ensure that, in addition to the written notification already required, LEAs make such information widely and publicly available by posting it on their Web sites. The Secretary believes that, to require home delivery of the information required in § 200.39(c) would be overly burdensome for LEAs. Again, the primary vehicle for informing parents of their options—the notice required in § 200.37(b)(4) and (5)—already must be provided directly to parents by such means as the U.S. mail.

Changes: None.

Comment: Two commenters expressed concern that LEA Web sites are not easily accessible to parents and individuals, particularly those from low-income families, seeking information about public school choice and SES options.

Discussion: The Secretary recognizes that not every family, particularly those with low incomes, has a personal computer with Internet access in the home. However, the number of families with Internet access is growing as the cost of both personal computers and Internet access continues to decline. In addition, libraries and community centers typically make available to the public, at no charge, computers connected to the Internet, and many of these facilities maintain evening and weekend hours that are convenient for working parents. Also, although LEAs have the flexibility to use a variety of strategies to notify parents, ranging from written materials delivered by mail or sent home with students, to newspaper announcements, enrollment fairs, or open houses, each of these strategies has the disadvantage of being a ''one-time only'' notification event, potentially making it difficult for a parent who missed the event to obtain the desired information. The Secretary believes that § 200.39(c) provides an additional, low-cost method of informing parents that has the advantage of making information about public school choice and SES options readily available to parents on an ongoing basis.

Changes: None.

Comment: One commenter asserted that the requirements in § 200.39(c) do not go far enough, and that posting information on LEA Web sites is not sufficient to ensure that parents and students receive the information they need in a timely manner. This commenter recommended that LEAs provide additional support to help low-income families learn about the educational options for their children.

Discussion: The final regulations, in their entirety, reflect the Secretary's strong agreement that multiple avenues of communication are needed to ensure that all parents of eligible students receive timely information that gives them a genuine opportunity to make an informed choice when selecting from available public school choice and SES options. For example, in addition to the new requirements in § 200.39(c), the final regulations in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) require LEAs, before using unspent choice-related transportation and SES funds for other allowable activities, to partner with outside groups, such as faith-based organizations, other community-based organizations, and business groups to help inform parents of their public school choice and SES options. Another criterion for effective implementation of SES in new § 200.48(d)(2)(i)(B)(*2*) (proposed § 200.48(d)(1)(ii)(B)) is ensuring that sign-up forms for SES ''are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families.'' Finally, the requirement in § 200.37(b)(4)(iv) that LEAs notify the parents of eligible students of their Title I public school choice options at least 14 calendar days before the start of the school year will help ensure that the parents of eligible low-income students also have sufficient time to make an informed decision about transferring their children to another public school. The Department believes that all of these provisions, in combination, go a long way toward providing the ''additional support to help low-income families learn about the educational options for their children,'' as recommended by the commenter, and declines to regulate further in this area.

Changes: None.

Comment: A number of commenters recommended requiring LEAs to include on their Web sites the names of SES providers that have been removed from the lists of approved providers in other States. Two commenters also recommended requiring LEAs to identify SES providers that evaluations have shown to be effective, as well as SES providers that do not serve LEP students or students with disabilities. Other commenters recommended requiring LEAs to post information on whether providers are able to serve LEP students and students with disabilities.

Discussion: Section 200.47(b)(3) requires an SEA, in approving SES providers, to consider information from a provider on whether the provider has been removed from any State's approved provider list, as well as evaluation results, if any, demonstrating that the provider's instructional program has improved student achievement. The SEA must also determine that the prospective provider has a demonstrated record of effectiveness in increasing the academic achievement of students. Thus, it is an SEA's responsibility to consider this information in approving prospective providers. Once an SEA has made a decision to approve a provider, we do not believe this information is pertinent to LEAs.

As we noted in our discussion of § 200.37, we agree that it is important for parents to know which SES providers are able to serve students with disabilities or LEP students. Accordingly, we have added a requirement in § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) that an LEA and SEA, respectively, indicate on its list of approved SES providers those providers that are able to serve these students.

Changes: Sections 200.37(b)(5)(ii)(B) and 200.47(a)(3)(ii) have been revised to require an LEA and SEA, respectively to indicate on its list of approved SES providers those providers that are able to serve students with disabilities or LEP students.

Comment: Two commenters expressed concern that the public school choice and SES participation

information that LEAs will be required to post on their Web sites under § 200.39(c) could be misleading due to the limited funding to support such options.

Discussion: The Secretary agrees that raw participation data may not always be a true measure of an LEA's success in implementing public school choice and SES because, in an LEA with many schools identified for improvement, the number of students eligible for SES and choice may greatly exceed the number that may be served with available funds. However, LEAs are free to explain, along with the participation data required in § 200.39(c), how available funding may affect the number of students transferring to new schools or obtaining SES.

Changes: None.

Comment: Two commenters claimed that public reporting on eligibility and participation in public school choice and SES, as required in § 200.39(c), would be misleading without an explanation of the personal and private factors that influenced parental decision-making.

Discussion: The Secretary believes that information on student eligibility and participation in public school choice and SES are useful both for increasing parental awareness of the availability of these options and for providing a rough measure of how well LEAs are implementing the public school choice and SES requirements. LEAs are free to add an explanation of the factors that they believe contribute to or explain participation rates.

Changes: None.

Comment: Two commenters stated that publicly posting a list of approved SES providers is meaningless because the general public does not participate in SES.

Discussion: It may be true that the general public may not be particularly interested in information about SES providers, but the purpose of § 200.39(c) is to ensure that information on SES providers is broadly disseminated, publicly available, and easily accessible to those who are interested. The Secretary believes it is important to provide these additional sources of information for parents seeking to obtain SES for their eligible children.

Changes: None.

Comment: One commenter expressed concern that posting the names of SES providers on LEA Web sites could be viewed as endorsing the providers, yet LEAs have no way of holding these providers accountable.

Discussion: LEAs are free to provide the information about SES providers in a manner that clearly conveys that no endorsement of individual providers is implied. We disagree that LEAs do not have a way to hold SES providers accountable. Under section 1116(e)(3)(C) of the ESEA, LEAs are responsible for terminating an agreement with an SES provider if the provider fails to meet the goals and timetables in that agreement.

Changes: None.

Comment: A number of commenters recommended requiring LEAs to disaggregate the public school choice and SES data posted on their Web sites by student subgroups, grade level, school, and provider. One commenter recommended requiring LEAs to post the total amount of funding they make available for public school choice and SES, as well as their per-child allocation for SES. Two commenters suggested requiring SEAs to publish the per-child allocations for each LEA, as well as the minimum each LEA must spend on public school choice and SES.

Discussion: The Secretary agrees that such additional information could be useful in identifying specific problems or challenges related to implementing public school choice and SES. However, we believe that requiring LEAs to disaggregate their public school choice and SES data by student subgroup, grade level, school, and provider would require nearly all LEAs and SEAs to change their data collection processes to support disaggregated reporting and, therefore, would be overly burdensome and costly. Therefore, we decline to require LEAs to disaggregate their public school choice and SES data.

In contrast, the amount an LEA must spend on choice-related transportation and SES (an amount equal to at least 20 percent of the LEA's Title I, Part A allocation (the LEA's 20 percent obligation)) and the maximum per-child allocation for SES for each LEA receiving Title I, Part A funds (the LEA's Title I, Part A allocation divided by the number of children in low-income families as determined by the Bureau of the Census) are easily calculated from data the SEA already collects. Posting this information on the SEA's Web site would require adding two columns to the tables that SEAs already prepare showing their final Title I, Part A allocations to LEAs (one column showing 20 percent of each LEA's final allocation and one column dividing the final allocation by the number of students from low-income families in the LEA as determined by the Bureau of the Census). Therefore, because of the minimal burden involved, and because the Secretary believes such information would help give all stakeholders a better understanding of the resources available to support Title I public school choice and SES, we have added a requirement in § 200.47 for each SEA to post on its Web site these amounts for each LEA. However, we believe that making such information available on SEA Web sites is sufficient, and decline to add a similar new requirement for LEAs because it would be unnecessarily duplicative. We also decline to require either SEAs or LEAs to post the statutory minimum allocations for choice-related transportation and SES. The Secretary does not believe that this additional information would be as useful.

Changes: We have added new § 200.47(a)(1)(ii)(B)(*1*) and (*2*) to require each SEA to post on its Web site, for each LEA, the amount that equals 20 percent of the LEA's Title I, Part A allocation that is available for choice-related transportation and SES, as required in § 200.48(a)(2), and the maximum per-child amount available for SES calculated under § 200.48(c)(1).

Comment: One commenter stated that, due to the small number of students participating in public school choice and SES, posting the participation data required in § 200.39(c) on LEA Web sites could disclose personally identifiable information about individual students.

Discussion: When publicly reporting any data, care must be taken not to reveal personally identifiable information about individual students, in accordance with the requirements in FERPA. In the vast majority of LEAs required to comply with § 200.39(c), posting public school choice and SES participation data on their Web sites will likely not reveal such information. In the limited number of cases in which such a violation could occur, LEAs should follow FERPA's requirements to ensure that personally identifiable information is not disclosed.

Changes: None.

Section 200.43 Restructuring

Comment: Several commenters expressed support for the proposed changes in § 200.43, stating that the changes would help schools make AYP and exit restructuring as soon as possible. The commenters agreed with the Department that restructuring is not always being implemented effectively. Many commenters expressed concerns about the general statutory requirements for restructuring. Some stated that the statutory options for alternative governance are not supported by research; some stated that the options are too ''extreme,'' while others stated that the statute takes a ''cookie-cutter'' approach to improvement that is not

appropriate. Other commenters stated that staffing changes should not be made as part of restructuring and school improvement in general.

Some commenters requested that the statutory restructuring requirements not be enforced until the ESEA is reauthorized. One commenter suggested that a school should not enter restructuring unless the percentage of students scoring below proficient in a subgroup exceeds 35 percent of a school's enrollment. Another commenter stated that the restructuring requirements, in particular, and NCLB, in general, are designed to address the problems of schools in urban areas and not rural schools in high-poverty areas because in rural areas access to SES providers is limited, public school choice is not realistic, and private management companies are not interested in managing rural schools.

Discussion: The purpose of the proposed regulations is to clarify the intent of the statute, which is that restructuring must be a significant change in the governance of a school that has not made AYP for five years. General concerns about the school improvement timeline in section 1116 of the ESEA and the specific requirements of restructuring should be addressed through the reauthorization process, not these regulations. We disagree that the statute should not be enforced until the ESEA is reauthorized.

Changes: None.

Comment: Several commenters asked the Department to improve its monitoring of States' implementation of the restructuring requirements. One commenter specifically suggested that the Department monitor and enforce the provisions of the ESEA requiring parent involvement in the restructuring process.

Discussion: The Secretary agrees with the commenters that monitoring is critical to ensuring that the restructuring requirements are implemented effectively and that parents should be involved in the restructuring process. The Department's monitoring protocol requires States to provide evidence of how they ensure that LEAs carry out their responsibilities for schools in improvement, corrective action, and restructuring. In preparation for the current monitoring cycle, the Department strengthened its monitoring of restructuring implementation by placing greater emphasis on how statewide systems of support and LEAs work with schools to determine the restructuring option that will be implemented by each LEA. The Department also added LEAs to its on-site monitoring to specifically examine the implementation of parental involvement requirements, including how parents are involved in corrective action and restructuring efforts.

Changes: None.

Comment: Two commenters stated that the proposed changes to § 200.43 exceed the Department's legal authority and should instead be left to Congress to address during the reauthorization of the ESEA. One commenter further stated that the regulations violate section 553(b)(2) of the Administrative Procedure Act.

Discussion: The Secretary believes that the proposed changes to § 200.43 merely clarify the intent of the statute and do not exceed the boundaries of the ESEA. Therefore, they are consistent with the Secretary's rulemaking authority, and do not violate the Administrative Procedure Act.

Changes: None.

Comment: Several commenters recommended that LEAs be required to involve educators, administrators, and parents, at a minimum, in the restructuring planning process.

Discussion: The statute and regulations already require, in section 1116(b)(8)(C) of the ESEA and § 200.43(b)(4), that LEAs provide parents and teachers with an opportunity to comment before the development of a proposed restructuring plan and an opportunity to participate in the development of that plan.

Changes: None.

Comment: Several commenters expressed concerns about the proposed changes in § 200.43(a)(1) and (a)(5) regarding the definition of restructuring. The commenters stated that the proposed regulations in paragraph (a)(1) exceed the statute by requiring ''fundamental reforms'' in instructional programs in addition to alternative governance arrangements. One commenter asserted that the Department misinterpreted the provisions of the ESEA by applying the language in section 1116(b)(8)(v) to the definition of restructuring, noting that it is not appropriate to require instructional reform in addition to alternative governance and staffing changes. Other commenters stated that our proposal in paragraph (a)(5) to require a restructuring plan to ''address the reason for the school's being in restructuring'' was not appropriate because the options for schools under restructuring are alternative governance arrangements, not educational interventions. Other commenters stated that the limited options available under restructuring make it difficult or impossible to address the specific reasons a school has been identified for restructuring.

Discussion: The Secretary disagrees that it is not appropriate to use the term ''fundamental reforms'' in the definition of restructuring. Contrary to the commenter's assumption, the term ''fundamental reforms'' does not imply required changes in instructional programs in addition to changes in governance. Rather, § 200.43(a)(1) provides that restructuring must include a major reorganization of the school's governance arrangement that, among other things, must include fundamental reforms to improve academic achievement in a school that has not made AYP for five years. Clearly, the options in § 200.43(b)(3)(i) through (iv), by definition, meet that standard. An LEA must ensure that, if it restructures a school under § 200.43(b)(3)(v), the restructuring makes fundamental reforms in the governance of the school.

Similarly, we disagree with the commenters who suggested that defining restructuring as needing to ''address the reason for the school's being in restructuring'' is not appropriate because the options for schools under restructuring are alternative governance arrangements, not educational interventions. First, it is unlikely that an LEA would deliberately select a restructuring option that did not best address the reasons the school is in restructuring. Second, and more importantly, it would be imprudent for an LEA to ignore a restructured school's instructional programs. As the Department notes in its 2006 non-regulatory guidance on LEA and school improvement (available at *http://www.ed.gov/policy/elsec/guid/schoolimprovementguid.doc*), ''the restructuring intervention will likely not address all of the identified needs of a school and cannot substitute for a coherent plan for systemic change. The intervention an LEA chooses should be viewed as one strategy in a school's comprehensive plan for improvement.'' The overriding requirement of the statute is that a school in restructuring has the tools to improve achievement, make AYP, and exit restructuring status. Ignoring instruction and curricular issues during restructuring is setting the stage for failure and will not enable the school to improve student achievement and exit restructuring as quickly as possible. The intent of restructuring, in particular, is to make fundamental reforms in the governance of a school—along with improving instructional changes—to provide children in the school with a quality education that enables them to meet State standards; schools and LEAs that merely focus on

doing just enough to comply with the letter of the law will not likely implement strategies that are effective in helping that school.

Changes: None.

Comment: Many commenters expressed concerns regarding proposed § 200.43(a)(4), which would require restructuring interventions to be ''significantly more rigorous and comprehensive'' than those taken as part of corrective action. Many commenters stated that this requirement would weaken the corrective action phase of the school improvement timeline. They argued that, because there is a fair amount of overlap between what is permitted for corrective action and for restructuring, the proposed requirement would discourage LEAs from being proactive and instituting rigorous interventions during corrective action, given that they would have to implement significantly more rigorous interventions if they entered the restructuring phase of school improvement. For example, schools might delay making significant staffing changes until they entered restructuring. Several commenters asked whether a school that made significant staffing changes during the corrective action phase would be required to implement significant staffing changes again in restructuring. The commenters also stated that, under proposed § 200.43(a)(4), schools would have to abandon interventions begun during corrective action before they were able to have any effect and noted that, according to research, significant improvements in academic achievement are unlikely to be observed after one year of implementing a new intervention. Other commenters stated that schools could see improvement after implementing effective interventions during corrective action, but not enough to make AYP. Some commenters stated that the current options available under restructuring would not be permissible under § 200.43(a)(4), which would further limit options for schools and LEAs. Several of these commenters stated that the proposed regulatory language in § 200.43(a)(4) was too vague to be helpful and questioned how the phrase ''significantly more rigorous and comprehensive'' would be defined. One commenter stated that the use of the term ''rigorous'' might lead to a focus on consequences and punishments rather than data-driven and research-based interventions.

Discussion: The Secretary appreciates the concerns of commenters who do not want the Department to create incentives for LEAs to weaken corrective actions or delay significant staffing changes or other restructuring options. The purpose of proposed § 200.43(a)(4) was not to add a new requirement, but to clarify the intent of the statute. By the time a school has not made AYP for six years, section 1116(b)(8) of the ESEA requires schools to implement alternative governance arrangements or significant staffing changes. States and LEAs are free to implement these changes on an earlier timeline. Furthermore, it was not our intent, in proposing § 200.43(a)(4), that schools abandon actions undertaken during corrective action before they have had a chance to take effect. If a school implements significant staffing changes, or takes other actions that meet the requirements for restructuring during corrective action, the Secretary agrees that the school should not be required to take further action when it enters restructuring. Further, when an LEA implements corrective actions that appear to be promising in improving student achievement, those actions or interventions should be continued as part of the restructuring plan. Restructuring should build on the previous efforts implemented to turn around a school during any phase of the school improvement process. If previous efforts do not appear to hold promise of improving student achievement, however, the LEA may need to take an altogether different approach during restructuring.

We have revised § 200.43(a)(4) to clarify that, if an LEA implements a restructuring action that meets the requirements in § 200.43(b) during corrective action, the LEA does not need to implement a significantly more rigorous and comprehensive reform once the school is in restructuring status. In such cases, the LEA should closely examine the school's achievement data to ensure that the interventions implemented during corrective action are having a positive effect on student achievement, and make adjustments as necessary.

We also recognize that there are many reasons that schools may be identified for restructuring and that some schools will need more significant changes than others. Restructuring should not be a ''one-size-fits-all'' response; rather, schools and LEAs should consider new approaches to professional development of teachers, instruction, and effective organization and management of instruction. We expect that the progression in interventions will look different depending on the reasons for a school entering restructuring.

Changes: We have revised § 200.43(a)(4) to provide that the restructuring must be significantly more rigorous and comprehensive than the corrective action implemented by the LEA unless the school has begun to implement one of the other restructuring options in § 200.43(b) as a corrective action.

Comment: One commenter recommended that the regulations require schools in restructuring to develop plans that include multiple components and not to rely on one approach alone to turn around a school.

Discussion: The Secretary agrees that it is important that there be multiple strategies in a restructuring plan. We believe that the language in § 200.43(a)(5), as well as the provisions in § 200.43(b)(3)(v), will help ensure that an LEA takes a comprehensive approach when developing a school's restructuring plan.

Changes: None.

Comment: One commenter stated that the proposed regulations are not based on scientific evidence. Several commenters recommended that the only restructuring options that should be available to schools and LEAs are those based on scientific evidence. Another commenter recommended that an LEA be required to provide evidence that the selected interventions are effective at addressing the reasons a school has been identified for improvement. Other commenters stated that the Department should provide more technical assistance and disseminate information on research-based practices for restructuring.

Discussion: There is a tremendous need for technical assistance on research-based practices for restructuring, as well as more research on effective methods of turning around low-performing schools. To assist States and LEAs in their efforts, IES' What Works Clearinghouse released a practice guide in May 2008 entitled *Turning Around Chronically Low Performing Schools*. This guide is available online at *http://ies.ed.gov/ncee/wwc/pdf/practiceguides/20072003.pdf*.

In addition, the National Center for Education Research (NCER) is currently designing a study to identify promising models for turning around chronically low-performing schools and to provide multiple design options for rigorously evaluating the identified schools' restructuring programs. The results of this study will help inform the field, as well as policy makers, as to what strategies are most effective in turning around low-performing schools.

The Department's Comprehensive Centers are also available to provide assistance to low-performing schools and LEAs. The centers provide technical

assistance and research findings to States on approaches to turning around school performance. The Center on Innovation and Improvement in particular focuses its work on school improvement and restructuring (*see http://www.centerii.org/*).

We disagree with commenters that the absence of research should obviate the responsibility of States and LEAs to implement any restructuring requirements. Although we recognize the importance of such research and are investing in an evaluation of restructuring approaches, we believe that students in persistently low-performing schools cannot wait for research to be completed before significant actions are taken to turn around their schools.

Changes: None.

Comment: Many commenters objected to proposed § 200.43(b)(3)(ii) and (v), which state that significant staffing changes ''may include, but may not be limited to, replacing the principal.'' These commenters argued that, in many cases, replacing the principal might be the best option and that, with effective leadership, existing school staff may be able to turn around a low-performing school. Several commenters stated that there is more research supporting the efficacy of principal replacement than there is supporting the efficacy of other significant staffing changes. One commenter noted that IES' recent practice guide, *Turning Around Chronically Low Performing Schools*, highlights evidence on the effectiveness of principal replacement and leadership change as a means of turning around chronically low-performing schools. Some commenters argued that States and LEAs need the flexibility to tailor restructuring to the needs of the school in order to implement meaningful interventions and to differentiate consequences; they asserted that the Department has no basis for restricting restructuring in this manner. One commenter stated that proposed § 200.43(b)(3)(ii) and (v) are inconsistent with the principles of the Department's differentiated accountability pilot, which recognizes that there is a need to give States more flexibility in shaping school interventions.

Discussion: The Department agrees that, for some schools, the only staffing change that may be necessary is replacing the principal. Our intent in proposing § 200.43(b)(3)(v) was to ensure that a school does not simply replace the principal, without also implementing other reforms. For the restructuring option in § 200.43(b)(3)(ii), however, we do not believe that a school could simply replace the principal and meet the requirement to replace ''all or most of the school staff (which may include the principal),'' since that restructuring option is focused on staff replacement, including but clearly not limited to the principal, as the primary means of turning around a school.

Section 200.43(b)(3)(v) provides schools with the flexibility to develop different strategies for implementing alternative governance arrangements. Staffing changes may be a part of that approach, and only replacing the principal would be permissible, so long as that is *not* the *only* change that the school implements as part of its restructuring plan. We have, therefore, revised proposed § 200.43(b)(3)(v) to clarify that the major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

Changes: We have removed the parenthetical ''(which may include but not be limited to, replacing the principal)'' in § 200.43(b)(3)(v) and revised the sentence to provide that major restructuring of a school's governance may include replacing the principal, so long as this change is part of a broader reform effort.

Comment: One commenter suggested that the Department establish a new restructuring option that would allow States to meet the restructuring requirements if they create community schools, which could include a variety of components such as an extended school day and year, health and social services, local government partnerships, and coordination with the juvenile justice system.

Discussion: LEAs might incorporate some elements of the concept of ''community schools'' in a restructuring plan, so long as the totality of the restructuring plan meets the regulatory definition and requirements for restructuring in § 200.43.

Changes: None.

Section 200.44 Public School Choice

Comment: Two commenters suggested that proposed § 200.44(a)(2)(i), which would allow an LEA to offer public school choice as late as the first day of the school year, conflicts with the 14-day notification requirement in § 200.37(b)(4)(iv), which was referenced in proposed § 200.44(a)(2)(ii).

Discussion: As we noted in our discussion of § 200.37, we have modified the language in § 200.44(a)(2) to clarify that an LEA must offer, through the notice required in § 200.37, all students eligible for public school choice the option to transfer to another public school. Consistent with § 200.37(b)(4)(iv), this notice must be made sufficiently in advance of, and not later than 14 calendar days before, the start of the school year so that parents have adequate time to exercise their public school choice option before the school year begins.

Changes: We have revised § 200.44(a)(2) to clarify that an LEA must offer public school choice, through the notice required in § 200.37, so that a student may transfer in the school year following the school year in which the LEA administered the assessments that resulted in the identification of the student's school for improvement, corrective action, or restructuring.

Section 200.47 SEA Responsibilities for Supplemental Educational Services

General

Comment: A number of commenters expressed support for one or more of the proposed amendments in § 200.47 regarding SEA monitoring of LEA implementation of SES requirements and State approval and monitoring of SES providers. Some commenters stated that the new requirements would hold SEAs and LEAs accountable for providing a more open process to approve qualified SES providers. One commenter stated that the requirements would provide the public with better information on the effectiveness of tutoring in increasing student achievement and on the compliance of LEAs and providers with SES implementation requirements. However, some commenters expressed concern about the potential costs of implementing the proposed regulations and argued that SEAs would need to divert resources from services to students (or from providing technical assistance to schools and LEAs in improvement status) in order to pay for monitoring the implementation of SES unless Congress appropriates more funds. These commenters expressed concern that SEAs with limited staff and resources will not be able to meet the requirements in § 200.47. A few commenters requested that Congress provide funds to implement the requirements in § 200.47 before the regulations become effective. One commenter suggested that the requirements in § 200.47 be structured as mandates for providers, rather than for SEAs, so as not to establish unfunded mandates on SEAs.

Discussion: The Secretary believes that any additional costs for implementing the requirements in § 200.47 for approving and monitoring providers will be minimal (as discussed in detail in the *Summary of Costs and*

Benefits section) because States are already required, under section 1116(e)(4)(D) of the ESEA, to develop and implement standards and techniques to monitor the quality and effectiveness of SES and to have a process in place to publicly report on those standards and techniques. The Secretary believes that the regulations in § 200.47 will give more meaning and clarity to this statutory requirement and address concerns, raised during the Department's monitoring, about the inconsistencies across States in their monitoring of SES providers. Likewise, the Secretary does not believe that monitoring LEAs' implementation of SES will add costs because SEAs must already monitor their LEAs' compliance with statutory and regulatory requirements under 34 CFR 80.40.

We do not believe that implementing these regulations will diminish the amount of funding available to serve students because SEAs will not support their monitoring efforts with funds that would otherwise be distributed to LEAs and used for services to students. Rather, SEAs will use their State administrative reservations under Title I, Part A to support the strengthened monitoring efforts required by § 200.47. For that same reason, we do not believe the requirements in § 200.47 represent an unfunded mandate. In addition, the Department notes that SES providers serve students; efforts to ensure the quality and effectiveness of approved providers should not be viewed as a diversion of resources from services to students.

Finally, we do not believe it would be appropriate to structure the new regulations as provider mandates rather than as criteria for SEAs' approval and monitoring of providers. As noted earlier, section 1116(e)(4) of the ESEA clearly assigns SEAs responsibility for approving entities to provide SES in a State and for developing, implementing, and publicly reporting on standards and techniques for monitoring the quality and effectiveness of the services offered by approved providers. The regulations merely clarify what it means for SEAs to implement those statutory requirements.

Changes: None.

Monitoring LEAs' Implementation of SES

Comment: One commenter questioned the intent of the requirements related to State monitoring of LEAs' implementation of SES. Another commenter recommended that there be a ''gatekeeper'' at the Federal level to monitor States' compliance with their responsibilities regarding the implementation, management, and enforcement of SES requirements at the local level. Another commenter asked what an SEA must do in order to meet the requirement to develop, implement, and publicly report on the States' standards and techniques for monitoring the quality and effectiveness of the services offered by each SES provider. The commenter asked whether a State could meet the requirements by providing, on its Web site, information on the standards and techniques it uses for monitoring LEAs' implementation of SES, or if the Department expects a State to include this information on report cards or disseminate the information in other ways. Another commenter supported using rigorous and clear criteria when monitoring LEAs' implementation of SES, but did not believe that these criteria should be publicly reported. One commenter stated that SES is well implemented in the commenter's State and that it is not necessary to require that SEAs monitor LEA implementation, as proposed in § 200.47(a)(4)(iii).

Discussion: The Secretary believes it is necessary for States to report publicly on the criteria they use to monitor LEAs in order to ensure that all parties involved in SES—including SEAs, LEAs, schools, parents, and providers—understand and are aware of these criteria. The Department already includes SES implementation in its regular monitoring of Title I programs and, therefore, there is no need for an additional ''gatekeeper'' at the Federal level to monitor SES implementation, as suggested by one commenter.

A State's criteria for monitoring LEAs' implementation of SES should ensure that LEAs meet the requirements in section 1116(e) of the ESEA and § 200.46. We believe that States should have the flexibility to determine how best to share this information with the public, which may include, among other methods, posting the information on a State's Web site.

While many LEAs may be implementing SES requirements effectively, we do not believe that this is uniformly the case in all States. As we stated in the preamble to the NPRM, we believe that requiring States to develop, implement, and publicly report on the criteria they use to monitor LEAs' implementation of SES will help ensure that all SEAs set rigorous and clear expectations for their LEAs, which, in turn, will lead to more effective implementation of SES.

Changes: None.

Comment: Some commenters suggested that the Department require States to take additional actions to monitor LEAs' implementation of SES. One commenter recommended requiring States to report to the public and the Department on whether LEAs: (1) Develop agreements with providers that include specific student achievement goals, progress measures, and timelines for achieving the goals; and (2) terminate agreements with providers that fail to meet achievement goals and timelines. Another commenter suggested requiring States to conduct focus groups with families eligible for SES in order to gather information on how SES policies are implemented at the local level.

Discussion: An LEA is required under the ESEA to develop student agreements that include a provider's goals and timelines for achieving those goals, and provisions for terminating the agreements if the goals or timelines are not met. Accordingly, an SEA should assess the LEA's compliance with these requirements during the SEA's periodic monitoring. Given these requirements, we believe that requiring States to collect data and report on the agreements that LEAs enter into with each provider would be time consuming and of limited value. Therefore, we decline to require States to report to the public the information recommended by the commenter.

Regarding the recommendation that States conduct focus groups with families to obtain information on SES implementation at the local level, the Secretary believes that parents can provide important information and insights on ways to improve the implementation of SES and encourages States to meet with parents to hear about their experiences with LEA implementation of SES. We believe that States are in the best position, however, to decide how best to obtain feedback from families on LEA implementation practices.

Changes: None.

Approval and Monitoring of SES Providers

Comment: Some commenters stated that the requirements for approving and monitoring SES providers extend beyond the Department's regulatory authority.

Discussion: We do not agree. Section 1116(e)(4)(D) of the ESEA requires SEAs to develop, implement, and publicly report on standards and techniques for monitoring the quality and effectiveness of supplemental educational services. This requirement clearly assigns to SEAs the responsibility to hold SES providers accountable for the quality of the services they provide and the results they achieve, and for withdrawing

approval of providers that are ineffective.

All the requirements in § 200.47(c) are based on the statutory requirements related to the provision of SES. The requirement in § 200.47(c)(1)(i), which requires an SEA to monitor whether a provider's instructional program is consistent with the instruction provided and the content used by the LEA and the SEA, reflects the nearly identical statutory requirement in section 1116(e)(5)(B) of the ESEA. Likewise, the requirement in § 200.47(c)(1)(ii) that SEAs monitor whether a provider's instructional program addresses students' individual academic needs reflects the requirement in section 1116(e)(3)(A) that an LEA develop, in consultation with parents and the provider, a statement of the specific achievement goals the student will achieve through SES. The requirement in § 200.47(c)(1)(iii) that SEAs monitor whether a provider's services are contributing to students' academic proficiency reflects the statutory requirements in sections 1116(e)(4)(D) (withdrawal of approval of providers that do not contribute to increasing the academic proficiency of students served) and 1116(e)(12)(C) (supplementary educational services must be specifically designed to increase the academic achievement of eligible children). Finally, the requirement in § 200.47(c)(1)(iv) that SEAs monitor the alignment of SES with the State's academic content and student academic achievement standards is consistent with the requirement in section 1116(e)(5)(B) of the ESEA. Given the direct statutory authority for each regulatory provision, the Secretary has clearly not exceeded her regulatory authority in section 1901 of the ESEA.

The requirements in § 200.47(c)(2) are conditional, in that they require the information to be considered by an SEA in monitoring approved providers only if such information is available. For example, while results from parent surveys can provide important information about the quality of a provider's services, § 200.47(c)(2)(i) does not require an SEA to conduct a parent survey. Rather, § 200.47(c)(2)(i) requires that an SEA take this information into consideration if such information exists. As a result, these regulatory provisions also do not exceed the Secretary's regulatory authority.

Changes: None.

Comment: One commenter recommended that, instead of monitoring providers for effectiveness, States should monitor for program quality.

Discussion: Section 1116(e)(4)(D) requires an SEA to monitor the ''quality and effectiveness of the services offered by approved providers.'' Thus, the statute requires that an SEA monitor both for effectiveness and program quality. The ultimate measure of a provider's program quality and effectiveness is improved student achievement.

Changes: None.

Comment: One commenter asked whether formal alignment studies must be completed in order for SEAs to comply with § 200.47(b)(2)(ii)(B) and (c)(1)(iv), which require the SEA to ensure that a provider's instructional program is aligned with State academic content and student academic achievement standards. Another commenter recommended amending § 200.47(b)(2)(ii)(B) and (c)(1)(iv) to prohibit States from approving providers that do not make available rigorous evidence of how their instruction and content are aligned with State content and achievement standards.

Discussion: Formal alignment studies are one way for a provider to demonstrate that its instructional program is aligned with State academic content and student academic achievement standards. However, the Secretary believes that States should have discretion in determining the evidence that must be provided to demonstrate that the instruction the provider gives and the content the provider uses are aligned with State academic content and student academic achievement standards. Therefore, we decline to amend § 200.47(b)(2)(ii)(B) and (c)(1)(iv) in the manner recommended by the commenter.

Changes: None.

Comment: One commenter requested clarification of the term ''research-based'' in § 200.47(b)(2)(ii)(C), which provides that, in order for an SEA to include a provider on the State's list of approved SES providers, the provider must agree to ensure that the instruction the provider gives and the content the provider uses are research-based.

Discussion: Section 1116(e)(12)(C)(ii) of the ESEA requires that supplemental educational services be of high quality, research-based, and specifically designed to increase the academic achievement of eligible children on the academic assessments required under section 1111 of the ESEA and enable those children to attain proficiency in meeting the State's academic achievement standards. We believe, after further consideration, that the regulatory language should adhere more closely to the statutory requirement and have made this change in § 200.47(b)(2)(ii)(C). We decline to promulgate a specific regulatory definition of ''research-based,'' as we do not believe there is a single definition that would be appropriate in all circumstances. Rather, we believe that States should have flexibility in implementing the statutory requirement in a manner that reflects their individual circumstances and the variety of studies conducted on the effectiveness of SES programs.

Changes: We have amended § 200.47(b)(2)(ii)(C) to require that a provider agree to ensure that the instruction it provides and the content it uses ''are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children'' in place of the proposed language requiring a provider to agree to ensure that its instruction and content ''are research-based.''

Comment: One commenter supported the changes in § 200.47 and agreed that the effectiveness of SES providers should be monitored more closely, but stated that supplemental educational services should be aligned with students' areas of academic need. The commenter argued that, at times, parents choose providers that offer tutoring in reading, for example, when their child's academic need is in mathematics.

Discussion: The requirements in section 1116(e) and current § 200.46(b)(2) help ensure that supplemental educational services are aligned with students' areas of academic need. Section 200.46(b)(2) requires LEAs to enter into an agreement with each provider selected by a parent and develop, in consultation with the parent and the provider, a statement that includes specific achievement goals for the student, a description of how the student's progress will be measured, and a timetable for improving achievement. LEAs also are required to describe the procedures for regularly informing the student, parents, and teachers of the student's progress and to terminate the agreement if the provider is unable to meet the goals and timetables specified in the agreement (§ 200.46(b)(2)(ii) and (iii)). Ideally, through this agreement, parents and LEAs will develop goals in the areas that best address the student's needs. Ultimately, however, it is the parents' prerogative to select the provider of their choice, even if the provider does not provide services in the area of the student's greatest need.

Changes: None.

Comment: Several commenters opposed, as burdensome and

impractical, proposed § 200.47(c)(1)(i), which would require an SEA to examine evidence that a providers' instructional program is consistent with the instruction provided and the content used by the LEA and SEA. One commenter proposed that a provider's instructional programs address a student's individual needs as described in the student's SES plan.

Discussion: Section 1116(e)(12)(B)(ii) of the ESEA requires a provider to provide SES that is consistent with the instructional program of the LEA and the academic standards of the State. Similarly, section 1116(e)(5)(B) of the ESEA requires a provider to ensure that the instruction it provides and the content it uses are consistent with the instruction provided and content used by the LEA and the State and are aligned with the State's academic achievement standards. Section 200.47(c)(1)(i) merely requires an SEA, during its approval of providers, to ensure that each provider meets these important instructional requirements. Although an SEA cannot guarantee, through its State-level approval process, that a provider's instructional programs address each student's individual needs, an LEA, through its agreement with the provider, can and must do so.

Changes: None.

Comment: One commenter applauded the Department's proposal to require SEAs to consider the results of parent surveys in approving providers and recommended that the regulations provide incentives to ensure that parent recommendations are considered. However, one commenter stated that requiring States to use information from parent recommendations and surveys in approving providers would be inconsistent with the statutory requirement to use objective approval criteria to determine whether a provider has a demonstrated record of effectiveness in increasing the academic proficiency of students. The commenter stated that results from parent surveys are not a valid measure of whether the provider's instructional program increases student achievement and, instead, may reflect parent approval of non-academic benefits of SES. Another commenter questioned the usefulness of parent surveys for making decisions about approving providers and expressed concern that parent surveys are not reliable. One commenter stated that the use of parent surveys is not consistent with other aspects of NCLB in which accountability is defined by students' academic performance. Another commenter stated that parent surveys rely on accurate reporting by providers and asked what the Department would consider to be suitable evidence for satisfying this requirement.

Discussion: The Secretary believes that parents can be objective and reliable sources of information for States to consider in approving providers. Parents have an interest in ensuring that reputable, effective providers are approved by a State and retained on the State's list of approved providers and, thus, it seems unlikely that parents would want a State to approve or retain a provider that did not have a demonstrated record of effectiveness. However, we agree that information from parent surveys would not, by itself, offer complete information on whether a provider's program is successful in raising student achievement. We included this requirement in the regulations because we believe that parent feedback, in addition to evaluation results, is an important source of information, if available, that SEAs should consider in approving and monitoring providers. The requirement that States consider the results from parent surveys, if any, does not mean that this information has to be supplied by a provider. This information could come from other sources. The regulations simply provide that a State must consider parent recommendations or the results of a parent survey regarding the success of a provider's instructional program in increasing student achievement if such recommendations or surveys exist.

Regarding concerns that parent surveys may reflect parent approval of non-academic benefits of SES or be inconsistent with NCLB's focus on student academic performance, § 200.47(b)(3)(ii) and (c)(2)(i) specifically requires that a State consider parent surveys and recommendations (if any) regarding the success of the provider's instructional program in increasing student achievement. We do not believe that the regulations should include incentives to ensure that parent surveys are considered in approving providers. Section 200.47(b)(3)(ii) and (c)(2)(i) clearly states that SEAs must consider parent recommendations or results from parent surveys, if any are available.

With regard to the question of what the Department would consider suitable evidence for satisfying the requirement to consider parent surveys or recommendations, if any, we believe that a State should have the discretion to determine the evidence that is most appropriate and suitable given the manner in which SES is implemented in its LEAs. For example, a State that has providers from small, local community-based organizations might obtain parent recommendations in a manner that differs from a State that has a few large, for-profit providers.

Changes: None.

Comment: One commenter requested clarification regarding § 200.47(b)(3)(iii) and (c)(2)(ii), which would require States, in approving or renewing the approval of a provider, to consider evaluation results, if any, demonstrating that the provider's instructional program has improved student achievement. The commenter suggested defining acceptable evaluations as ones that are conducted by independent researchers using scientifically valid methods. Two commenters asked what it means for a provider to improve student achievement. These commenters recommended that the Department, in order to assist States in meeting their responsibility to monitor providers' effectiveness, establish a definition of improved student achievement and the methods that a State may use to demonstrate such improvement. Another commenter recommended that States consider only objective evaluations of SES providers.

One commenter expressed concern that the monitoring and evaluation of providers could be based on evidence from the provider's own evaluations and feedback from parents, with minimal regard for rigorous, high-quality, and valid evaluations. Several commenters expressed concern that providers would be permitted to use self-reported data to demonstrate effectiveness, rather than results on State assessments. However, one commenter recommended that SEAs be prohibited from taking into consideration student performance on State assessments when they consider whether to continue or withdraw approval of a provider. The commenter stated that the number of hours of service provided through SES is not sufficient to affect student achievement on a State assessment. Another commenter suggested that SEAs establish the minimum number of hours of SES that a student must receive before the student's test scores are included in an evaluation of a provider's effectiveness.

Discussion: It is important to note that, in approving and monitoring SES providers, SEAs must consider evaluation results only if they are available. Moreover, SEAs have considerable latitude in determining the type of evaluation results they will consider. While SEAs should consider only evaluations that they believe have used objective methodologies and should give preference to those that have used scientifically valid methods,

we believe it would be inappropriate for the Department to regulate on the types of evaluation results SEAs may use in determining whether SES providers are successful in raising student achievement.

The requirement to consider evaluation results, if any are available, should not be confused with the requirement to evaluate the quality and effectiveness of each provider. Using evaluation results is one, but by no means the only, way to judge a provider's effectiveness. We agree that the results of student performance on State assessments may not, by themselves, be a complete and satisfactory indicator of the effectiveness of SES. However, nothing in the statute or regulations would prevent a State from considering student performance on a State assessment to evaluate provider effectiveness, or establishing a minimum number of hours of SES to be completed before the student's test scores are included in an evaluation of providers. We believe these decisions are best left to the discretion of each SEA and, therefore, decline to define the specific evaluation methods States may use in evaluating the success of a provider's instructional program in improving student achievement.

Changes: None.

Comment: One commenter expressed concern that requiring providers to ensure that their instruction is research-based and requiring SEAs to consider parent recommendations or results from parent surveys in approving providers would discriminate against new or smaller providers that may not have the experience or resources to provide lengthy analyses to meet these requirements. Another commenter stated that meeting these requirements would be overly burdensome on new SES providers or non-corporate providers.

Discussion: Section 1116(e)(12)(B)(i) of the ESEA requires providers to have a demonstrated record of effectiveness in increasing student academic achievement. In addition, section 1116(e)(12)(C)(ii) requires supplemental educational services to be of high quality and research-based. Therefore, all providers, including new or smaller providers, must ensure that their instruction is of high quality and research-based. However, the Secretary recognizes that new or smaller providers may not have the same data or evaluation results as larger and longstanding providers to demonstrate the success of their instructional programs in improving student achievement. That is why § 200.47(b)(3)(ii) and (iii) and (c)(2)(i) require an SEA to consider parent recommendations or results from parent surveys and evaluation results, *if any are available*.

Changes: None.

Comment: One commenter recommended that the regulations specify that States may not use providers' financial or staffing information in evaluating whether providers have contributed to improving student achievement. Another commenter recommended requiring States to consider the opinions of educators and administrators in making decisions to approve providers.

Discussion: Section 1116(e)(12)(B)(iii) of the ESEA requires providers to be financially sound. Therefore, the Secretary believes it is reasonable for a State to request a provider's financial information in deciding whether to approve the provider, although not when evaluating the effectiveness of a provider's program. However, the Secretary does not believe that additional regulation in this area is needed. With regard to using staffing information to evaluate a provider's program, we believe that information about the qualifications of the individuals hired to provide SES is a reasonable factor that an SEA may want to consider in approving an SES provider although, again, we note that the issue of whether the instructors employed by a provider have adequate qualifications is separate from the issue of whether the provider's program is bringing about higher student achievement. We note that a State may not require a provider, as a condition of approval, to hire only staff who meet the ''highly qualified teacher'' requirements in §§ 200.55 and 200.56, consistent with § 200.47(b)(3).

We agree that input from teachers and administrators, particularly those who have direct experience with providers and who are in a position to assess the effectiveness of their instructional programs, could contribute valuable information to the provider approval process. However, the Secretary believes that SEAs are in the best position to decide on the additional criteria they will use to evaluate a provider's instructional program and, therefore, declines to require all States to consider staffing information or recommendations from teachers and administrators in evaluating a provider's program.

Changes: None.

Comment: One commenter recommended that the Department require SES providers to submit to the SEA records of complaints received by the SES provider, so that the SEA can use those records in considering a provider's approval or renewal. The commenter also recommended that completion rates and other performance indicators be considered when a State is renewing a provider's approval.

Discussion: The Secretary proposed § 200.47(c) in order to specify and clarify the evidence that SEAs must consider, *at a minimum*, in monitoring the effectiveness of a provider's instructional program. States are free to include other criteria that they believe would be useful in evaluating the effectiveness of a provider's program.

Changes: None.

Comment: Two commenters recommended that the regulations require SEAs, in determining whether to approve or renew the approval of a provider, to consider evidence that the provider does not discriminate in its employment practices and agrees to be subject to the same anti-discrimination laws and regulations that apply to recipients of Federal funds.

Discussion: Current § 200.47(b)(2)(iii) already requires an SEA to determine, before it can approve a provider, that the provider meets all applicable Federal, State, and local health, safety, and civil rights laws. The Department has clarified, in its *Supplemental Educational Services Non-Regulatory Guidance* (June 13, 2005), how Federal civil rights laws apply to SES providers (*see* question C–3 in the guidance, which is available at *http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc*).

Changes: None.

Comment: Some commenters stated that LEAs should have the authority to monitor or ensure the quality of SES providers. Another commenter stated that LEAs should be permitted to terminate contracts with SES providers that fail to adhere to contract provisions or fail to raise student achievement. One commenter recommended that a procedure be established to allow LEAs to file complaints against SES providers.

Discussion: Section 1116(e)(4)(D) of the ESEA clearly gives SEAs the responsibility to monitor the quality and effectiveness of the services offered by approved SES providers and to withdraw approval from providers that fail, for two consecutive years, to contribute to increasing the academic proficiency of the students they serve. We do not have the authority to alter this basic requirement through these regulations. Additionally, the Secretary does not believe it would be advisable to create, through regulations, a separate role for LEAs in monitoring and enforcing SES quality because doing so could result in overlapping monitoring

actions that would unnecessarily complicate accountability for SES. The Secretary does, however, support SEA efforts to involve LEAs in their monitoring efforts, for instance by having LEAs collect and report participation and assessment data to the SEA.

Regarding an LEA's ability to terminate a provider, section 1116(e)(3)(C) of the ESEA permits LEAs to terminate an individual student's agreement with a provider if the provider is unable to meet the goals and timetables in the agreement established with the provider. LEAs may also terminate a contract if the provider violates other provisions in the contract, such as provisions regarding student progress reports, invoicing payment for services, preserving student privacy, and complying with applicable health, safety, and civil rights laws. Further, LEAs may terminate a contract if a provider fails to meet additional administrative or operational terms that may be included in the contract, such as conducting background checks on the provider's employees, provided those terms are reasonable, do not subject the provider to more stringent requirements than apply to other contractors of the LEA, and do not have the effect of inappropriately limiting educational options for students and their parents. However, it is not within an LEA's authority to remove a provider from the approved provider list or to terminate an agreement with a provider for failing to raise student achievement unless the provider has failed to meet the goals and timetables specified in the individual agreement. Only an SEA may withdraw approval of a provider if, for two consecutive years, the provider does not contribute to increasing the academic proficiency of the students it serves (see section 1116(e)(4)(D) of the ESEA).

We decline to adopt the suggestion of one commenter that we establish procedures to allow LEAs to file complaints against SES providers with the SEA. Although it is essential that States facilitate open communication between their LEAs and providers so that disagreements can be resolved quickly and appropriately, we believe that States must have the discretion to establish procedures to receive feedback from their LEAs regarding a provider's actions in delivering SES.

Changes: None.

Comment: One commenter recommended that a national clearinghouse be established to collect and disseminate information on whether a provider has been removed from a State's list of approved providers. Another commenter suggested that the Department maintain a database with this information, as well as information on States' evaluations of the effectiveness of instructional programs provided by SES providers. One commenter stated that it would be difficult for an SEA to know if a provider was removed from another State's list of approved providers and argued that it would be inappropriate for a State to base its decision on another State's data.

Discussion: We decline to adopt the commenter's suggestion that the Federal government establish and maintain a national clearinghouse or database identifying providers that have been removed from States' approved provider lists and the results of any State evaluations of provider instructional programs. Rather, we believe it is sufficient that a provider that seeks approval from a State inform the State whether it has been removed from another State's list of approved providers and include any relevant information regarding such removal. If a State needs additional information or clarification, it may contact the State that removed the provider directly. We note that whether a provider has been removed from another State's list of approved providers is only one of the standards that a State must use in approving or renewing approval of providers under § 200.47(b) and (c).

Changes: None.

Comment: One commenter suggested that a provider be removed from a State's approved provider list if the provider gives false information on whether it has been removed from another State's list of approved providers.

Discussion: The Secretary agrees that there could be cause for removal from a State's approved provider list if a provider makes false claims about its removal from another State's list of approved providers. Ultimately, however, the decision to remove a provider from a State's list of approved providers remains with the State.

Changes: None.

Comment: One commenter recommended that the Secretary require SEAs, in approving SES providers, to: (1) Identify a pool of providers that demonstrate effectiveness in engaging with ''disconnected youth'' and reinforce State standards in developing workforce skills; (2) identify and remove barriers that hinder the approval and participation of local community-based organizations as SES providers; and (3) include specific selection criteria for providers to address workforce and youth development needs.

Discussion: The primary purpose of SES is to increase the academic achievement of eligible students on State assessments and help students attain proficiency in meeting the State's academic achievement standards. A State with a particular need for SES providers to serve eligible disconnected youth could develop and use criteria in addition to the approval criteria in § 200.47(b)(2) and (b)(3) in order to identify a pool of providers that can effectively engage with disconnected youth to help them meet the State's academic achievement standards. However, the Secretary does not believe that all providers should be required to have that particular expertise and declines to establish specific selection criteria related to serving disconnected youth.

The Secretary agrees that it is important to engage community-based organizations in providing SES. Section 1116(e)(4)(A) of the ESEA and § 200.47(a)(1)(i) already require a State to consult with LEAs, parents, teachers, and other interested members of the public in order to promote maximum participation by providers so that parents have as many choices of SES providers as possible. We believe it is extremely important for parents, teachers, and members of the public to encourage and recruit community-based organizations to apply to their State to become approved SES providers. In addition, States should ensure that they create ways to tap this potential pool of SES providers.

Changes: None.

Comment: A number of commenters recommended that the Department require States to approve an adequate number of SES providers who are trained to provide services to students with disabilities, including students with the most significant cognitive disabilities and students with low-incidence disabilities (e.g., students with mental retardation, deaf students, students who are blind). Other commenters recommended that all approved providers be required to serve students with disabilities and LEP students. Similarly, some commenters recommended that a provider's instruction and content be appropriate for and accessible to all students, including students with disabilities and LEP students. One commenter recommended adding a requirement that States consider, as part of their approval process, the ability of SES providers to provide quality services to LEP students. Some commenters recommended that States be required to indicate, on their lists of approved

providers, the providers that are trained to serve students with disabilities.

Discussion: Current § 200.47(a)(5) and (a)(6), respectively, requires SEAs to ensure that eligible students with disabilities under the IDEA and students covered under section 504 of the Rehabilitation Act of 1973, as amended (Section 504), receive appropriate supplemental educational services and accommodations in the provision of those services, and that eligible LEP students receive appropriate supplemental educational services and language assistance in the provision of those services. These regulations clearly require SEAs to ensure that an adequate number of providers in the State have the capability to provide services to students with disabilities and LEP students. Moreover, as indicated in the Department's *Supplemental Educational Services Non-Regulatory Guidance* (June 13, 2005), if no provider is able to provide SES to eligible students with disabilities, students covered under Section 504, or LEP students, an LEA would need to provide these services, with necessary accommodations and language assistance, either directly or through a contract (*see* questions C–4 and C–5 in the guidance available at *http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc*).

SES providers include a wide variety of agencies and organizations, including LEAs, large national operators, and small local organizations that focus on providing SES to particular groups of students. For example, a small community-based organization might have particular expertise in serving LEP students in one specific language group; another might focus on students with a specific disability. Requiring all prospective providers to serve students with the full range of disabilities or students with the full range of second-language needs would undoubtedly result in disqualifying many potentially effective providers from the program. Therefore, we decline to require that all providers be able to serve students with disabilities and LEP students.

As we noted in the discussion of the comments on § 200.37, the Secretary agrees that State and LEA lists of approved providers should include information on providers who serve students with disabilities and providers who serve LEP students. We, therefore, have added language to § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) to make this clear.

Changes: As noted previously, we have revised § 200.37(b)(5)(ii)(B) and § 200.47(a)(3)(ii) to require LEAs and States, respectively, to indicate on the list of approved SES providers those providers that are able to serve students with disabilities or LEP students.

Comment: One commenter recommended that States be required to monitor providers' data and performance with students with disabilities and LEP students. Another commenter suggested that, as part of a State's monitoring of providers, the State should be required to consider the effectiveness of SES providers in serving LEP students.

Discussion: Section 1116(e)(4)(D) of the ESEA is clear that the SEA is responsible for monitoring the quality and effectiveness of the services offered by approved providers. A provider that serves students with disabilities or LEP students should be monitored by the SEA in the same manner as the SEA monitors other providers.

Changes: None.

Section 200.48 Funding for Choice-Related Transportation and Supplemental Educational Services

Section 200.48(a) Costs for Outreach and Assistance to Parents

Comment: Several commenters supported proposed § 200.48(a)(2)(iii)(C), which would allow an LEA to count its costs for parent outreach and assistance toward the requirement to spend an amount equal to at least 20 percent of the LEA's Title I, Part A allocation on choice-related transportation and SES (the ''20 percent obligation''). This change would permit an LEA to allocate up to 0.2 percent of its Title I, Part A allocation, (i.e., 1.0 percent of the 20 percent obligation), in that manner (the 0.2 percent cap). However, other commenters objected to this proposal. One commenter stated that this provision would increase the procedural ''hoops'' through which LEAs must jump and dilute needed classroom services. Similarly, another commenter stated that the provision would ''tie the hands'' of LEAs in their expenditure of local dollars.

Discussion: The commenters objecting to the new flexibility to count parent outreach and assistance funds toward meeting the 20 percent obligation appear to have misunderstood the proposal. The new regulation would not create any new procedural requirements for LEAs or tie their hands in spending funds; rather, § 200.48(a)(2)(iii)(C) provides additional flexibility that should make it easier for LEAs to finance the provision of outreach and other assistance to parents to help them take advantage of their Title I public school choice and SES options. Although LEAs should already be undertaking parent outreach activities and providing parent assistance related to public school choice and SES, LEAs' inability to count the cost of those activities toward meeting the 20 percent obligation may have limited the extent of that outreach. Section 200.48(a)(2)(iii)(C) should encourage LEAs to provide needed outreach and assistance to parents and may also make it easier for LEAs to meet their 20 percent obligation.

Changes: None.

Comment: A number of commenters expressed concern that the 0.2 percent cap on parent outreach and assistance would be insufficient for LEAs to engage in significant outreach activities. Other commenters stated that the 0.2 percent cap should not be limited to outreach expenses and recommended that the final regulations allow other administrative expenses to count toward meeting the 20 percent obligation. The commenters also suggested that such expenses be subject to a larger cap or not be capped at all.

Discussion: In order to increase participation in public school choice and SES, the Secretary believes that LEAs need to devote sufficient effort to notifying parents of available public school choice and SES options. The Secretary proposed to permit LEAs to count a portion of their public school choice and SES outreach expenses toward meeting the 20 percent obligation in order to ensure that LEAs provide parents the information they need to make the best, most informed decisions for their children. This amount is capped at 0.2 percent of an LEA's Title I, Part A allocation. The Secretary believes that this amount is sufficient to support meaningful outreach activities in many LEAs. We believe that expanding the size of the cap or extending it to cover other administrative expenses related to public school choice and SES might lead to a reduction in the number of students who could take advantage of these options. Therefore, we decline to allow other administrative expenses to count toward meeting the 20 percent obligation or to permit no cap or a higher cap. Moreover, LEAs already have great flexibility in the use of their Title I, Part A allocations to administer all aspects of their local Title I programs.

Changes: None.

Comment: Two commenters recommended that transportation be provided to children who enroll in SES and that LEAs be allowed to count the costs of that transportation toward meeting the 20 percent obligation.

Discussion: Although section 1116(b)(9) of the ESEA requires LEAs to provide transportation or pay for the cost of transportation for students taking advantage of the public school choice option under Part A of Title I, it does not include a similar requirement with respect to SES. In addition, current § 200.48(a)(2)(iii)(B) does not allow an LEA to include transportation costs for SES to count toward meeting the 20 percent obligation. The Secretary believes that funds made available for SES should be used to pay for actual services and not transportation costs. We, therefore, decline to make the changes requested by the commenter.

Changes: None.

Comment: One commenter supported the proposal allowing LEAs to count funds used for parent outreach toward meeting the 20 percent obligation but suggested that the Department publish a list of allowable uses of those funds. The commenter also expressed opposition to any provision requiring States to track and report LEAs' use of outreach funds. Another commenter recommended that the final regulations require LEAs to prepare a plan detailing and justifying the use of the funds for parent outreach and assistance.

Discussion: The Secretary believes that LEAs are in the best position to determine the most effective means of providing parent outreach and assistance related to public school choice and SES. Therefore, we do not believe that it is necessary to specify in the regulations the types of parent outreach and assistance activities that LEAs may implement with funds counted toward meeting the 20 percent obligation under § 200.48(a)(2)(iii)(C). We believe it is best left to LEAs to determine the methods of outreach and assistance that meet the needs of the parents and students they serve. We also believe that a requirement for LEAs to prepare a detailed plan for the use of the outreach funds would create unnecessary burden without sufficient corresponding benefit.

The Department notes that Title I, Part A funds expended to meet the 20 percent obligation, like other Title I, Part A funds, would be auditable expenses and that LEAs should account for them as they would other Federal funds. The Department is not, at this time, intending to collect data on the use of these funds.

Changes: None.

Section 200.48(d) 20 Percent Obligation

Comment: A number of commenters supported proposed § 200.48(d)(1), which would have required an LEA, before using unspent funds from its 20 percent obligation for other purposes, to demonstrate to the SEA success in meeting the following criteria:

(a) Partnering with community-based organizations or other groups to help inform eligible students and their families of the opportunities to transfer or to receive supplemental educational services;

(b) Ensuring that eligible students and their parents had a genuine opportunity to sign up to transfer or to obtain SES, including by—

(i) Providing timely, accurate notice as required in §§ 200.36 and 200.37;

(ii) Ensuring that sign-up forms for SES are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families; and

(iii) Allowing eligible students to sign up to receive SES throughout the school year; and

(c) Ensuring that eligible SES providers are given access to school facilities, using a fair, open, and objective process, on the same basis and terms as are available to other groups that seek access to school facilities.

Other commenters opposed the proposed regulations. Some commenters asserted that the changes in proposed § 200.48(d) were inconsistent with the statute and that the Secretary does not have the authority to require LEAs to carry over unexpended public school choice and SES funds.

Discussion: The Secretary believes that the regulations are fully consistent with section 1116(b)(10) of the ESEA, which requires an LEA to spend, each year, an amount equal to at least 20 percent of its Title I, Part A allocation for choice-related transportation and SES unless a lesser amount is needed to satisfy all demand. Thus, unless an LEA has met all demand, this statutory obligation continues to exist, and the LEA must fulfill its obligation in the subsequent fiscal year. This is true with respect to any statutory set-aside requirement. For example, section 1118(a)(3) of the ESEA requires an LEA to reserve not less than one percent of its Title I, Part A allocation each year for parent involvement activities. If an LEA does not spend the full one percent for parent involvement activities in the year for which its Part A allocation was appropriated, the LEA must spend the unspent portion in the subsequent year for parent involvement activities, in addition to meeting its statutory obligation for that subsequent year. There are two differences, however, between most set-aside requirements and the 20 percent obligation: (1) The 20 percent obligation need not be met with Title I, Part A funds; and (2) the 20 percent obligation is dependent on demand, which may, in fact, result in an LEA spending less than the full statutory amount if it has met all demand for choice-related transportation and SES. We proposed the criteria in § 200.48(d)(1) (new § 200.48(d)(2)(i)) to encourage LEAs to devote sufficient effort to ensuring they have met the demand for public school choice and SES by notifying parents of their available public school choice and SES options and to making SES conveniently available in order to afford parents a genuine opportunity to participate. We believe the Secretary has the authority to make these changes under section 1901(a) of the ESEA, which authorizes the Secretary to ''issue such regulations as are necessary to reasonably ensure that there is compliance with [Title I].''

Changes: None.

Comment: One commenter objected to the criteria in proposed § 200.48(d)(1) because, according to the commenter, they would decrease LEA flexibility to spend Title I funds on plans that LEAs know will work best for the students in their schools. Other commenters stated that the proposed regulations would result in ''micromanaging'' LEAs and inappropriately blame LEAs for parental decisions not to transfer their child to a new school or obtain SES for their child. One commenter asserted that proposed § 200.48(d) would result in ''favorable treatment'' of Title I public school choice and SES options relative to the ''regular'' Title I program.

Discussion: The Secretary understands the need to balance the demand for SES and public school choice with the desire of LEAs to use all available funds to implement effective Title I programs. However, evidence from a wide range of sources, including participation data reported by States in their Consolidated State Performance Reports, data on participation rates and notification practices from the NATI report, and the Department's monitoring of public school choice and SES notification and enrollment practices, suggests that, in many LEAs across the country, low demand for public school choice and SES is related to poor-quality implementation. The regulations are not intended to prevent LEAs from appropriately using unspent choice-related transportation and SES funds on other allowable activities or to favor one part of Title I over another, but to ensure that, before using these funds for other

purposes, parents of all eligible students are given a genuine opportunity to request a school transfer or sign up to receive SES.

Changes: None.

Comment: One commenter recommended that LEAs that spend an amount equal to at least 10 percent of their Title I, Part A allocations on choice-related transportation and SES should not have to meet the criteria in proposed § 200.48(d)(1).

Discussion: The Department believes it would be inconsistent with the statute to exempt from compliance with the requirements in § 200.48(d) an LEA that spends less than its 20 percent obligation on choice-related transportation and SES. Section 1116(b)(10) of the ESEA clearly requires that an LEA spend an amount equal to at least 20 percent of its Title I, Part A allocation on choice-related transportation and SES unless it has met all demand for public school choice and SES with a lesser amount. Moreover, the purpose of the requirements in § 200.48(d) is not to ensure that an LEA spends any particular proportion of its 20 percent obligation on choice-related transportation and SES, but to promote effective implementation of Title I public school choice and SES options. For example, one LEA meeting all of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) may experience demand requiring only one-quarter of its 20 percent obligation, while another LEA spending half of its 20 percent obligation, the proportion recommended by the commenter, may well be ignoring significant additional demand for public school choice and SES if it is not meeting the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)).

Changes: None.

Comment: Several commenters objected to proposed § 200.48(d) because, according to the commenters, this provision does not take into account situations in which an LEA may have a legitimate reason for either not spending the full 20 percent obligation or not being able to meet one or more of the criteria in proposed § 200.48(d)(1). Some commenters noted, for example, that many rural LEAs are not able to provide public school choice because they have only one school at each grade level and are not able to provide SES because there are so few SES providers in the area. Another commenter provided an example of an LEA that has one school in corrective action and that, even assuming all eligible students took advantage of their public school choice and SES options, would need to spend only one-third of its 20 percent obligation to meet the needs of those students. Yet another commenter offered an example of an LEA that for the past two years has set aside the full 20 percent obligation, over-enrolled students in SES, and then not spent all of its 20 percent obligation due to the failure of particular providers to serve students or to complete services according to the contracted schedule. This commenter objected to being forced to carry over dollars that were not spent because providers did not provide the contracted services. One commenter claimed that States are better positioned than the Department to understand these local circumstances and determine whether LEAs are appropriately implementing the public school choice and SES requirements.

Discussion: The Department believes these commenters are misinterpreting the requirements in § 200.48(d), which would not apply to LEAs that, for legitimate reasons, cannot spend their full 20 percent obligation. In general, the Department agrees that States would have the authority, under existing law and regulation, to determine that the provisions in § 200.48(d) do not apply in the circumstances cited by the commenters. For example, the provisions in § 200.48(d) would not apply to LEAs that are not able to provide public school choice because they have only one school at each grade level or to LEAs that are not served by SES providers and, thus, are not able to make SES available to students who otherwise would be eligible for such services.

Similarly, the requirements in § 200.48(d) do not apply if an LEA enrolls sufficient numbers of eligible students to spend all funds reserved for choice-related transportation and SES, but has funds left over at the end of the year because one or more providers did not fulfill their contractual obligations or because enrolled students did not begin or complete services. However, if an LEA experiences significant student attrition in its SES program early in the school year, leading to lower than anticipated expenditures, it would be expected to hold a second enrollment period and sign up sufficient students to use the full 20 percent obligation.

In the case of an LEA that is able to provide public school choice and SES to all eligible students without spending its full 20 percent obligation, the requirements in § 200.48(d) apply only to the funds that are reserved to serve eligible students. For example, if an LEA can serve all eligible students with an amount equal to 10 percent of its Title I, Part A allocation, it would be required to reserve only that amount for choice-related transportation and SES and would be able to use the other half of its 20 percent obligation immediately for other allowable activities. Note, however, that an LEA seeking to exempt a portion of its 20 percent obligation from the requirements in § 200.48(d) must base the amount that it reserves for choice-related transportation and SES on the assumption that *all* eligible students will choose to transfer schools or obtain SES. If the amount reserved in this manner is less than the full 20 percent obligation, then the requirements in § 200.48(d) apply only to this lesser amount. Finally, any LEA that is already providing public school choice and SES to all eligible students would not be subject to § 200.48(d).

Changes: None.

Comment: A large number of commenters expressed concern about the effect of the provisions in § 200.48(d) on LEAs' Title I, Part A allocations. These concerns appeared to be based primarily on the potential interaction of the requirements in § 200.48(d) with the statutory limitation in section 1127(a) of the ESEA that prohibits LEAs from carrying over more than 15 percent of their Title I, Part A allocations from one fiscal year to the next fiscal year. Some commenters stated that the proposed regulations could lead to the loss of millions of dollars appropriated for Title I and, as a result, prevent LEAs from operating quality programs. Two commenters requested clarification of what happens when funds are carried over, including the possibility that unspent choice-related transportation and SES funds are carried over repeatedly for a number of years. Finally, other commenters recommended various measures to avoid such losses, such as allowing States to waive the criteria in proposed § 200.48(d)(1) for LEAs that otherwise would lose access to Title I funds due to the 15 percent carryover limitation. Another commenter recommended excluding funds from the 20 percent obligation from the 15 percent carryover limitation and not restricting any funds that are carried over as a result of this exclusion for choice-related transportation or SES.

Discussion: LEAs, like other recipients of Federal education funds, are subject to a variety of requirements governing the availability and use of those funds. If LEAs do not meet these requirements, for whatever reason, it is possible to lose access to the funds. However, LEAs have considerable flexibility in managing their Federal allocations, including those received under Title I, Part A of the ESEA, and the Department does not believe that the

application of § 200.48(d) is likely to lead to a loss of Title I funding. The Department also believes that the commenters have exaggerated the number of LEAs, even under the proposed regulation, that would be required to carry over unspent choice-related transportation and SES funds and thus potentially be subject (assuming they are carrying over Title I funds) to the 15 percent Title I carryover limitation. The vast majority of LEAs seeking to use unspent choice-related transportation and SES funds for other allowable activities are likely to take whatever measures are required to meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), use unspent funds as needed, and thus avoid any potential problems that could be created by carrying over a significant amount of Title I funds from one year to the next. Those that do carry over Title I funds are likely to employ ''first in-first out'' accounting practices under which affected LEAs would spend any carried over ''prior-year'' funds first, before using current year funds, in order to avoid lapsing any prior-year funds due to the end of the period of availability.

Under the final regulation, the LEAs that are likely to carry over unused choice-related transportation and SES funds are those that have not met the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)). However, even these LEAs would be unlikely to lose Title I funds due to the 15 percent Title I carryover limitation or other Federal accounting requirements, for several reasons. First, under section 1127(b) of the ESEA, an LEA may apply to the State for a one-year exemption (available once every three years) from the 15 percent Title I carryover limitation. This exemption is one reason that the Department believes that other measures proposed by commenters to ensure that an LEA does not lose unspent choice-related transportation and SES funds due to the 15 percent Title I carryover limitation, such as a waiver of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) or excluding funds from the 20 percent obligation from the 15 percent Title I carryover limitation, are unnecessary.

The second reason the 15 percent Title I carryover limitation should not lead to the loss of an LEA's Title I funds is that § 200.48(d) focuses on the amount that must be spent on choice-related transportation and SES, not the specific funds or source of funds that an LEA uses to satisfy that amount. In other words, what is actually ''carried over'' is a funding commitment, not actual funds. LEAs not meeting the criteria must add the amount of any unused portion of the 20 percent obligation to the amount that must be spent on choice-related transportation and SES in the subsequent year. Thus, an LEA that does not meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), and that has, for example, $100,000 in unused fiscal year 2009 Title I, Part A funds that were reserved as part of the LEA's 20 percent obligation in the 2009–2010 school year, does not have to carry over those specific Title I funds to the next school year. The LEA could use that $100,000 in fiscal year 2009 Title I funds for other Title I activities in the 2009–2010 school year, so long as it adds the same $100,000 amount—from any Federal, State, or local source—to its 20 percent obligation for the 2010–2011 school year. The third reason that LEAs in this situation would be unlikely to allow carried-over Title I funds to lapse is that they are likely to use ''first in-first out'' accounting rules, as described earlier in this discussion.

For all of these reasons, the Department believes that the concerns expressed by commenters about the potential loss of Title I funds due to the interaction of the requirements in § 200.48(d) and the 15 percent Title I carryover limitation are unwarranted. Moreover, it is not the intention, or the expectation, of the Secretary that any LEA will lose access to any portion of its Title I, Part A allocation due to the requirements in § 200.48(d). Rather, these requirements are intended to promote, consistent with the authorizing statute, maximum participation by eligible students in Title I public school choice and SES.

Changes: None.

Comment: One commenter asserted that the criteria in proposed § 200.48(d)(1) that an LEA must meet in order to carry over unused funds from its 20 percent obligation are inconsistent with the current 15 percent Title I carryover limitation because the primary purpose of that limitation is to ensure that most Title I funds are spent in the program year for which the funds were appropriated.

Discussion: Assuming proper implementation of public school choice and SES, the Secretary expects that, consistent with the intent of the carryover limitation in section 1127 of the ESEA, all funds from an LEA's 20 percent obligation should be spent in the school year for which these funds are appropriated. However, if proper implementation does not happen, we believe it is appropriate to require LEAs to redouble their efforts in the following year, even if that requires carrying over some portion of their 20 percent obligation. Also, as described in detail in the previous comment and discussion, § 200.48(d) does not require LEAs to carry over any specific funds. Rather, any LEA not meeting the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) for a given school year must, in the following school year, spend on choice-related transportation and SES an amount equal to its 20 percent obligation for that school year *plus* the amount of any unspent choice-related transportation and SES funds from the previous school year. Meeting the requirements in § 200.48(d) does not require carrying over funds from one year to the next.

Changes: None.

Comment: One commenter warned that the 15 percent Title I carryover limitation could allow LEAs to evade the requirements in § 200.48(d). More specifically, the commenter stated that, if an LEA was already carrying over other Title I funds close to or exceeding the 15 percent Title I carryover limitation, it would not be able to carry over any unused funds from its 20 percent obligation and, thus, would not be able to add these unused funds to the amount required to be spent on choice-related transportation and SES in the subsequent year. To avoid this possible outcome, the commenter recommended that the final regulations exclude unused funds from the 20 percent obligation from the 15 percent Title I carryover limitation and require affected LEAs to disclose publicly the amount of any funds carried over due to failing to meet the criteria in proposed § 200.48(d)(1).

Discussion: While the Department understands the commenter's concern that some LEAs may attempt to use the 15 percent Title I carryover limitation to evade the requirements in § 200.48(d), we believe the commenter's analysis is incorrect in several ways. First, the Department believes that there are few, if any, LEAs that would prefer simply to lose access to a significant portion of their Title I allocation rather than comply with the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) that can help raise student achievement and help schools and LEAs make AYP. Second, if an LEA already is carrying over 15 percent of its Title I, Part A allocation (before the addition of any unspent portion of its 20 percent obligation to the carryover total), it would first need to use those funds to meet unmet requirements, such as the 20 percent obligation. Finally, as with section 1116(b)(10) of the ESEA, which refers not to specific funds but to ''an amount equal to'' 20 percent of an

LEA's Title I, Part A allocation, new § 200.48(d)(1)(i) (proposed § 200.48(d)(1)) requires an LEA that does not meet the criteria ''to spend the unexpended *amount* in the subsequent school year'' (emphasis added) on choice-related transportation, SES, or parent outreach and assistance. This means that, regardless of the loss of access to specific Title I or non-Title I funds due to carryover limitations or other requirements governing the use of such funds, the LEA remains obligated to add the ''unexpended amount'' to the 20 percent obligation for public school choice and SES in the following year, and would have to identify another source of funding to replace any funds lost due to the 15 percent Title I carryover limitation. Because it is the requirement to spend this ''unexpended amount,'' and not the specific funds originally reserved to meet the 20 percent obligation, that is carried over to the following year, there is no need to exempt unused funds from an LEA's 20 percent obligation from the statutory 15 percent Title I carryover limitation, a change that in any case would not be possible through regulatory action alone. As for the recommendation that LEAs publicly disclose any unexpended amount that is carried over to the subsequent year, the Department believes that such disclosure would be subject to misinterpretation and would not necessarily provide useful information to parents.

Changes: None.

Comment: Two commenters expressed concern about the potential impact that the criteria in proposed § 200.48(d)(1) would have on private school students receiving equitable services under Title I. One commenter stated, for example, that § 200.48(d) would require an LEA to carry over all unspent funds to the following year for the exclusive use of public schools, thereby eliminating the opportunity for private school students to benefit from their equitable share of the unspent funds. The second commenter recommended that any unspent funds be made available as soon as possible during the school year so that nonpublic school students can receive their fair share under the equitable participation requirements of the ESEA.

Discussion: Section 1120 of the ESEA requires an LEA to provide equitable Title I services to eligible students enrolled in private elementary and secondary schools, their teachers, and their families. Funds to provide these services are generated by students from low-income families who reside in a participating public school attendance area and attend a private school. Equitable services for private school students generally apply to Title I funds spent for instruction for elementary and secondary school students, professional development, and parent involvement. They do not apply, however, to all uses of Title I funds. For example, they do not apply to preschool services, because preschool is generally not considered to be elementary education under State law, and they do not apply to Title I funds reserved for choice-related transportation and SES, because private schools are not subject to school improvement and private school students do not receive SES. Thus, if an LEA carries over unspent Title I funds to the subsequent year for particular purposes such as SES, the application of the equitable services requirements depends on the purpose for which those carryover funds are used.

For this reason, the Department does not believe that the provisions in § 200.48(d), which potentially require an LEA with unused funds from its 20 percent obligation to carry over those funds for expenditure on choice-related transportation and SES in the subsequent school year, unlawfully or otherwise inappropriately affect the amount of carryover funds available for equitable services for private school students. It is important to note that the requirement to spend an amount equal to at least 20 percent of an LEA's Title I, Part A allocation for choice-related transportation and SES applies even if an LEA does not use Title I, Part A funds to meet its 20 percent obligation. However, assuming an LEA does use Title I, Part A funds, those funds are not subject to the equitable services requirement, as noted previously, because they are specifically used to provide choice-related transportation, SES, and parent outreach to eligible students in schools in need of improvement, corrective action, and restructuring—requirements that do not apply to private schools or services that private school students receive under Title I, Part A, just as they do not apply to services for students in public schools that are not identified for improvement. The regulations in § 200.48(d) merely require an LEA that did not spend the requisite amount in a given year on choice-related transportation, SES, and parent outreach to spend the unexpended amount on those same activities in the following year (unless the LEA meets the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)). If an LEA reserved Title I, Part A funds for those activities and can demonstrate that spending an amount less than the 20 percent obligation is warranted, the Title I, Part A funds that the LEA then may use for other allowable activities would be subject to the equitable services requirements, as applicable. The revised criteria in new § 200.48(d)(2)(i), particularly in new paragraph (d)(2)(i)(B)(*3*) relating to two enrollment ''windows,'' should enable an LEA to determine by mid-year whether it has met all demand for choice-related transportation and SES and, thus, can spend any unspent funds on other allowable activities. After it makes this determination, the LEA must consult with appropriate private school officials pursuant to section 1120(b) of the ESEA as to what equitable services the LEA will provide to eligible private school students with funds remaining from its 20 percent obligation.

Changes: None.

Comment: One commenter claimed that forcing LEAs to carry over unused State or local funds that were part of an LEA's 20 percent obligation would violate the unfunded mandates provision in section 9527(a) of the ESEA. Another commenter requested clarification on the potential impact of § 200.48(d) on any non-Title I funds reserved to meet an LEA's 20 percent obligation.

Discussion: The claim that the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) violate the so-called ''unfunded mandates'' provision in section 9527(a) of the ESEA is incorrect. Section 9527(a) prohibits the Secretary from mandating that a State or LEA ''spend any funds or incur any costs not paid for under [the ESEA].'' As noted previously, the 20 percent obligation for choice-related transportation and SES created by section 1116(b)(10) of the ESEA does not require the use of any particular Federal, State, or local funds; instead, it requires an LEA with schools identified for improvement, corrective action, or restructuring to spend an amount equal to at least 20 percent of its Title I, Part A allocation on choice-related transportation and SES unless a lesser amount is needed. An LEA has complete discretion as to the source of funds, and the Secretary is not mandating through § 200.48(d) that an LEA use State or local funds to meet this requirement. Likewise, an LEA that does not meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) would not be required to carry over any specific unused State or local funds it has set aside to meet its 20 percent obligation, but would add the *amount* of those unused funds to its 20 percent obligation for the subsequent year.

Changes: None.

Comment: One commenter requested that the Department clarify in the final regulations that the standard used to determine the amount that an LEA must spend on SES before using unspent funds for other purposes is based on an amount equal to 15 percent of the LEA's Title I, Part A allocation, rather than the current five percent minimum. Other commenters recommended that we clarify in the final regulations that this 5 percent minimum is all that an LEA must spend on SES under the statute.

Discussion: These comments appear to have been based on a misunderstanding of current law and regulations. Under section 1116(b)(10) of the ESEA, an LEA is required to spend a minimum of an amount equal to five percent of its Title I, Part A allocation on SES only in situations where the LEA faces such strong demand for choice-related transportation that it otherwise might spend the full 20 percent obligation only on choice-related transportation and not offer SES to any eligible students. Current law and regulations already require LEAs to spend the equivalent of 20 percent of their Title I, Part A allocation on choice-related transportation, SES, or a combination of the two, assuming there is sufficient demand for these options. Within that 20 percent, the statutory requirement in section 1116(b)(1) to spend at least 15 percent on SES would continue to apply if an LEA spends no more than five percent on choice-related transportation.

Changes: None.

Comment: One commenter opposed the requirements in § 200.48(d), recommending instead that any unused funds from the 20 percent obligation be redirected to Title I schools that have been identified for improvement.

Discussion: The purpose of the requirements in § 200.48(d) is to help ensure that LEAs improve their implementation of Title I public school choice and SES and thereby increase participation in these options. Redirecting unused portions of an LEA's 20 percent obligation to school improvement purposes, rather than requiring those portions to be carried over and used to support public school choice and SES in the subsequent year, would be inconsistent with this purpose.

Changes: None.

Comment: One commenter recommended that the Department require an LEA to spend any unused funds from its 20 percent obligation to provide additional SES.

Discussion: We interpret this comment to mean that an LEA should not be permitted to spend unused funds from its 20 percent obligation for other allowable activities. However, section 1116(b)(10)(A) of the ESEA clearly anticipates situations in which an LEA may legitimately spend less than the full 20 percent obligation on choice-related transportation and SES and may then redirect such funds to other allowable activities.

Changes: None.

State Review Process

Comment: Several commenters claimed that ensuring compliance with the requirements in § 200.48(d) would impose a significant and unnecessary burden on States, with some commenters recommending that compliance be enforced through State monitoring rather than through an advance approval process. One commenter argued that the provisions in proposed § 200.48(d) appear to penalize all LEAs for the failures of a few, and that a better approach would be to investigate allegations of poor implementation of public school choice and SES. Another commenter observed that not meeting the full 20 percent obligation is not necessarily a sign of ''bad faith'' and recommended that the criteria apply only in cases where Federal or State monitoring efforts identify substantial problems in an LEA's implementation of the public school choice and SES requirements.

Discussion: Proposed § 200.48(d) was not intended to punish any LEA, but to help ensure that LEAs devote sufficient effort to notifying parents of available public school choice and SES options. The Secretary believes that many LEAs already make good-faith efforts to implement the public school choice and SES requirements and will have little difficulty meeting the new criteria if they want to use unspent funds from their 20 percent obligation for other purposes.

As for the recommendation that proposed § 200.48(d) apply only where Federal or State monitoring has found problems with LEA implementation of public school choice and SES requirements, the Department believes that the appropriate response to findings from State performance reports, evaluations, and Federal monitoring reports documenting continuing low participation rates in the face of a potentially increasing number of eligible students is not to continue to rely solely on routine monitoring. Although the Secretary does not agree that the requirements in proposed § 200.48(d) would have created significant and unnecessary new administrative burden for States, she does agree that the goal of the proposed regulation—improved implementation of Title I public school choice and SES provisions—can be met through a more targeted approach to enforcement. For this reason, and to reduce administrative burden on States and LEAs, we have restructured and made several changes to proposed § 200.48(d). First, LEAs are not required to submit evidence of compliance with the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) to their SEA, or to receive SEA approval before using unspent choice-related transportation and SES funds for other allowable activities. Instead, the final regulations only require an LEA seeking to use unspent choice-related transportation and SES funds for other allowable activities to (1) maintain records showing that it has met the criteria in new § 200.48(d)(2)(i), (2) notify the SEA that it has met those criteria, and (3) notify the SEA that it intends to spend the remainder of its 20 percent obligation on other allowable activities and indicate the amount of that remainder. An SEA will not be required to review and approve each LEA's use of unspent funds from its 20 percent obligation but generally will ensure LEA compliance through its regular monitoring process. However, in addition to its regular monitoring, an SEA must review any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other activities, and (2) has been the subject of multiple complaints, supported by credible evidence, regarding the LEA's implementation of the public school choice and SES requirements. The SEA must complete the required review of such LEAs before the beginning of the next school year. We also note that an SEA may target for review any LEA that it believes is not implementing public school choice and SES in accordance with the law and regulations.

If an SEA finds during its monitoring and review that an LEA failed to meet any of the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)), the LEA must (1) add the amount of any unspent choice-related transportation and SES funds (i.e., the ''remainder'' specified in new § 200.48(d)(2)(iii)(B)) to its 20 percent obligation for the next school year or (2) meet the criteria in new § 200.48(d)(2)(i) and obtain permission from the SEA before spending any portion of this total amount on activities other than choice-related transportation, SES, or parent outreach and assistance. In addition, the SEA must confirm the LEA's compliance with the criteria in new

§ 200.48(d)(2)(i) (proposed § 200.48(d)(1)) for the subsequent year before it grants this permission.

The final regulations also clarify that the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) are the minimum criteria that LEAs must meet before spending any portion of their 20 percent obligation on other allowable activities. An SEA may establish additional criteria for the effective implementation of Title I public school choice and SES options. We note, however, that any other criteria used by an SEA to review LEA compliance with the requirements in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) must be in addition to, and may not serve as a substitute for, the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)).

Changes: For purposes of clarification, we have revised § 200.48(a)(2)(iii)(C) to define ''20 percent obligation'' as an amount equal to 20 percent of an LEA's Title I, Part A allocation. We have restructured § 200.48(d) and included the minimum criteria that an LEA must meet before using unspent funds from its 20 percent obligation for other allowable activities in new paragraph (d)(2)(i)(A) through (C) (proposed paragraph (d)(1)(i) through (iii)). A new § 200.48(d)(2)(ii) has been added to require an LEA seeking to spend less than its 20 percent obligation on choice-related transportation, SES, and parent outreach and assistance to maintain records demonstrating compliance that it has met the criteria in new § 200.48(d)(2)(i). A new § 200.48(d)(2)(iii) has been added to also require the LEA to notify the SEA that it has met these criteria, and that it intends to spend the remainder of its 20 percent obligation on other allowable activities and indicate the amount of that remainder. A new paragraph (d)(3) has been added to require each SEA, in addition to enforcing § 200.48(d) through its regular monitoring of LEA Title I programs, to review for compliance with new § 200.48(d)(2)(i) any LEA that (1) the SEA determines has spent a significant portion of its 20 percent obligation for other activities, and (2) has been the subject of multiple complaints, supported by credible evidence, regarding its implementation of public school choice or SES requirements. A new paragraph (d)(3)(ii)(B) has been added to require the SEAs to complete the review of such LEAs before the beginning of the next school year.

Proposed § 200.48(d)(2) has been redesignated as new § 200.48(d)(1)(ii) and a new paragraph (d)(4) has been added to provide that if an SEA determines, either through its regular monitoring or through the review required by new paragraph (d)(3)(ii), that an LEA has failed to meet any of the criteria in new paragraph (d)(2)(i), the LEA must (1) spend an amount equal to the remainder specified in its notice to the SEA under new § 200.48(d)(2)(iii)(B) in the subsequent school year, in addition to its 20 percent obligation for that year on choice-related transportation costs, SES, or parent outreach and assistance or (2) meet the criteria in new § 200.48(d)(2)(i) and obtain permission from the SEA before spending less than this total amount (the remainder plus the new 20 percent obligation) on choice-related transportation, SES, or parent outreach and assistance. The SEA must confirm that the LEA has complied with the criteria in new paragraph (d)(2)(i) for that subsequent school year before granting such permission.

Comment: One commenter recommended that we revise the regulations to provide authority for SEAs to waive LEA compliance with any of the criteria in proposed § 200.48(d)(1).

Discussion: As noted earlier in this section, § 200.48(d) is intended to improve implementation of Title I public school choice and SES requirements by LEAs with large numbers of eligible students and low participation rates. After more than six years of NCLB implementation, a considerable body of evidence on existing implementation practices argues strongly for less, rather than more, flexibility in this area. This is why new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) identifies several ''best practices'' associated with effective implementation of and greater participation in public school choice and SES and generally requires that an LEA follow these practices before using unspent funds from its 20 percent obligation for other allowable activities. The Department also believes, as noted earlier in this preamble, that States already have the authority, under existing law and regulations, to determine that the provisions in § 200.48(d) do not apply under certain circumstances, such as in LEAs that are not able to make available public school choice or SES options to their students due to a lack of such options in their geographic area. However, States do not have the authority to waive compliance with a specific criterion for an LEA to which § 200.48(d) does apply.

Changes: None.

Comment: One commenter recommended that the evidence submitted to an SEA by an LEA to demonstrate success in meeting the criteria in proposed § 200.48(d)(1) be publicly available, and that such evidence include a separate breakout of the funds spent on choice-related transportation and SES, the amount of the unspent funds, and a justification for how the funds would subsequently be used.

Discussion: The final regulations do not require LEAs to submit evidence that they have met the criteria in new § 200.48(d)(2)(i) (proposed § 200.(d)(1)) before using unspent choice-related transportation and SES funds for other allowable activities. The Secretary made this change, in part, to alleviate SEA and LEA concerns about administrative burden, and declines the commenter's recommendation to increase that burden by adding new data collection and disclosure requirements to the final regulations.

Changes: None.

New § 200.48(d)(2)(i)(A) (Proposed § 200.48(d)(1)(i)) Partnering With Outside Organizations

Comment: We received a number of comments on the proposal that an LEA, before using unspent choice-related transportation and SES funds for other purposes, demonstrate success in partnering with community-based organizations (CBOs) or other groups to help inform eligible students and their families of the opportunities to transfer to another public school or to receive SES. One of these commenters recommended that this requirement be optional because some communities have few CBOs that are available or interested in partnering with LEAs.

Discussion: The Department proposed this requirement based on findings from the NATI report and other evaluation data that participation in public school choice and SES is higher when parents learn of these options from multiple sources within their communities.[17] However, the Department recognizes that in some communities, particularly in rural or geographically isolated areas, it may be difficult to identify a willing partner for educational outreach activities. We, therefore, have revised § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) to require LEAs to partner with a CBO or other groups for the purpose of promoting participation in Title I public school choice and SES ''to the extent practicable.'' We have also expanded the examples of such groups to include faith-based organizations (FBOs), other CBOs, and business groups.

[17] *Id.*

Changes: We have added ''to the extent practicable'' to the criterion in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) regarding partnering with outside groups and have also added examples of such outside groups to include faith-based organizations, other community-based organizations, and business groups.

Comment: Two commenters stated that an LEA should not be required to demonstrate success in partnering with CBOs as a criterion for reallocating unspent funds from its 20 percent obligation because, according to the commenters, this requirement would increase administrative costs. One of these commenters added that the requirement to partner with CBOs would be an excessive burden on public schools already mandated to provide information on Web sites, in newsletters, and in letters to parents.

Discussion: The Department recognizes that meeting the criterion in new § 200.48(d)(2)(i)(A) (proposed § 200.48(d)(1)(i)) could entail additional administrative costs, but believes that such costs, as described in the *Summary of Costs and Benefits* section, would be minimal and would be far outweighed by the potential benefits of more effective implementation of and participation in Title I public school choice and SES. These requirements also reflect evidence from the NATI report and other sources that pursuing multiple avenues of communicating with parents about public school choice and SES is one of the most effective strategies for increasing participation in these options. In addition, the Department believes that partnering with outside groups is one of the most cost-effective ways to promote SES, as FBOs, CBOs, and business groups already have a presence in the community and thus, gives LEAs a way to tap existing resources in their effort to reach out to parents about Title I public school choice and SES options. However, as discussed previously, the Department acknowledges that partnering with outside groups may be challenging for some LEAs, and we have revised the regulations to provide that an LEA establish such partnerships ''to the extent practicable.''

Changes: None.

Comment: One commenter recommended that the Department prescribe in the final regulations specific requirements for an LEA to meet in establishing a partnership with CBOs for the purpose of this section, such as responsibility for choosing the CBO partners, the elements of an adequate partnership, and the appropriate division of authority between the LEA and its partners.

Discussion: The Secretary believes that LEAs are in the best position to decide how to develop and structure partnerships with outside groups in their communities. Establishing requirements for such partnerships through these regulations would create a ''one-size-fits-all'' approach that would likely stifle the development of cooperative and innovative partnerships.

Changes: None.

Comment: One commenter objected to requiring LEAs to partner with CBOs because, according to the commenter, it should be sufficient for LEAs to make parents aware of their public school choice and SES options through written notifications sent by mail.

Discussion: The Secretary does not dispute that sending written information through the U.S. mail is a standard and widely accepted practice, used by a variety of Federal, State, and local government agencies, including LEAs, for communicating with the public. However, as discussed in the preamble to the NPRM, there is evidence that, regardless of the method of transmission, mailings and other written materials alone are often insufficient to make eligible parents aware of their Title I public school choice and SES options. For example, the NATI report found that, in the 2004–2005 school year, while nearly 70 percent of LEAs provided written notification of public school choice options and 94 percent of LEAs used written materials to inform parents of SES options, surveys of parents in eight large urban LEAs showed that just over a quarter (27 percent) of eligible parents reported receiving notification about public school choice and about half of parents (53 percent) reported receiving notice of SES options.[18]

One problem with using written materials alone to communicate with parents is that such materials can vary widely in content and clarity. The NATI report also found that, although some notification letters were easy to read and presented public school choice and SES options as a positive benefit for eligible students, others were confusing, discouraged parents from changing schools, or appeared to be biased in favor of certain SES providers.[19] Finally, the families of many students attending the high-poverty schools served by Title I, particularly in urban areas, often are highly mobile and, thus, hard to reach at a fixed address via U.S. mail.

For all of these reasons, the Secretary believes that it is important for LEAs to use multiple methods for informing eligible parents of their public school choice and SES options. The Secretary believes that partnering with CBOs is an effective, low-cost strategy for LEAs to help ensure that eligible parents learn about and take advantage of public school choice and SES options for their children.

Changes: None.

Comment: One commenter recommended adding language ensuring that the criteria in proposed § 200.48(d)(1), and more specifically the criteria to partner with CBOs and to permit enrollment in SES throughout the school year, take into account the needs of homeless, migrant, foster, and other highly mobile students.

Discussion: The Secretary agrees that it is important for LEAs to reach out to all eligible students in order to provide a genuine opportunity for all eligible students to obtain SES. This is one reason the final regulations include multiple criteria that LEAs must meet before spending any unused funds from their 20 percent obligation for other allowable activities. These criteria require an LEA that wishes to use unspent funds from its 20 percent obligation for other allowable activities to engage in broader outreach efforts that must include, to the extent practicable, partnering with outside groups (such as CBOs serving homeless, migrant, foster, and other mobile students), hold a minimum of two SES enrollment periods so that a student who starts school after the beginning of the school year has at least one opportunity to sign up for SES, and afford greater opportunities to obtain SES in school facilities—a convenient, safe location for students who otherwise might not be able to access SES. We believe that implementation of these ''best practices'' will greatly benefit homeless, migrant, foster, and other mobile students and increase their participation in public school choice and SES. However, we believe that LEAs should have flexibility to meet the criteria in new § 200.48(d)(2)(i) (proposed § 200.48(d)(1)) in ways that best meet the needs, and accommodate the circumstances, of their students, and we decline to add references to any particular student group in this section.

Changes: None.

[18] *Id.*

[19] *Id.*

New § 200.48(d)(2)(i)(B)(2) (Proposed § 200.48(d)(1)(ii)(B)) SES Enrollment Forms

Comment: One commenter suggested that the Secretary modify proposed § 200.48(d)(1)(ii)(B) to require that sign-up forms for SES be distributed through the Department-funded Parent Training and Information Centers and Parent Information and Resource Centers.

Discussion: New. § 200.48(d)(*2*)(i)(B)(*2*) (proposed § 200.48(d)(1)(ii)(B)) provides that, to ensure that eligible students and their parents have a genuine opportunity to sign up to transfer or to obtain SES, an LEA must, among other things, ensure that SES sign-up forms are distributed directly to all eligible students and their parents and are made widely available through broad means of dissemination, such as through public agencies serving eligible students and their families. The Secretary prefers to give LEAs flexibility in selecting those public agencies that are in the community and able to assist the LEA, rather than mandating that each LEA work with a specific agency or center. In many LEAs, there will be no Parent Training and Information Center or Parent Information and Resource Center present and available to work with the LEA on the distribution of sign-up forms.

Changes: None.

New § 200.48(d)(2)(i)(B)(3) (Proposed § 200.48(d)(1)(ii)(C)) SES Enrollment Period

Comment: Many commenters opposed the criterion in proposed § 200.48(d)(1)(ii)(C) that LEAs provide opportunities for enrollment in SES throughout the school year. For example, one commenter asserted that meeting this criterion would effectively prevent an LEA from ever using unspent funds from its 20 percent obligation for other instructional purposes because funds would have to be reserved through the end of the school year. Another commenter claimed that offering year-round services would be a resource and staffing burden for LEAs. An SES provider expressed similar concerns, stating that continuous or open enrollment throughout the school year would be administratively burdensome because it is difficult to schedule services on short notice and because services may begin too late in the year for students to finish an SES program. This commenter recommended that LEAs instead be required to offer three enrollment windows during which parents and students could sign up to receive SES. Another commenter recommended that States be permitted to set their own dates for releasing unused funds from an LEA's 20 percent obligation.

Discussion: The Secretary recognizes that the proposed full-year SES enrollment criterion, although desirable as a way of maximizing opportunities for parents to obtain SES for their eligible children, could be difficult for LEAs to implement and could hamper the provision of effective SES programs. In addition, as the commenters noted, to meet this criterion an LEA would have to reserve funding for SES until very late in the school year, making it difficult to spend unused funds for other purposes. Setting a requirement that could severely restrict an LEA's use of unspent funds from its 20 percent obligation could have the unintended effect of serving as a disincentive to undertake good-faith efforts to promote public school choice and SES. On the other hand, simply setting a fixed date in the school year for release and use of unspent choice-related transportation and SES funds could encourage half-hearted enrollment practices by LEAs seeking to maximize the amount of funds that could be used for other allowable Title I activities.

To address these concerns, while continuing to pursue the goal of expanding SES enrollment opportunities for eligible students and their parents, the final regulations require LEAs to provide a minimum of two enrollment windows at separate points in the school year. In addition, we have added language requiring that these enrollment windows be of sufficient length to enable parents to make informed decisions about requesting SES and selecting a provider. We note that to help ensure that parents have a genuine opportunity to sign up for SES, enrollment windows should be at times and places that are convenient for the parents of eligible students, including working parents and single parents. One approach, for example, would be to link enrollment windows to the end of grading periods and the associated parent-teacher conferences that typically create a natural opportunity to encourage and promote SES enrollment. Multiple enrollment windows will also help ensure that students who enroll after the beginning of the school year have an opportunity to sign up for SES.

Changes: We have revised the criterion in new § 200.48(d)(2)(i)(B)(*3*) (proposed § 200.48(d)(1)(ii)(C)) to require an LEA to provide a minimum of two enrollment windows, at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting SES and selecting a provider.

Comment: Two commenters suggested that the Department modify proposed § 200.48(d)(1)(ii)(C) to require an LEA to allow eligible students to sign up to receive SES not only throughout the school year but also through summer learning programs before being permitted to use unspent funds from its 20 percent obligation for other allowable activities.

Discussion: The Department encourages LEAs to begin SES at the beginning of the school year because, as stated in section 1116(e)(12)(C) of the ESEA, the primary purpose of SES is to increase the academic achievement of eligible children on the State's academic assessments. The Department's guidance permits summer SES programs, but in most cases it will be preferable to provide services that take place over the course of the school year. In addition, the Department recognizes that waiting until late in the school year, or even until the summer, before beginning the process of spending unused choice-related transportation and SES funds could result in less effective use of those funds. For these reasons, the Department believes that the decision to offer SES late in the school year or in the summer is best left to the discretion of individual LEAs.

Changes: None.

Comment: One commenter recommended that the Department require an LEA to maintain a student waiting list for SES in order to ensure that the LEA meets all demand for SES before using unspent funds from its 20 percent obligation for other allowable activities.

Discussion: Maintaining a waiting list for SES essentially requires continuous or open enrollment in SES throughout the school year (and perhaps into the summer months). As we have discussed in our responses to other comments, we no longer believe we should require an LEA to provide continuous or open enrollment throughout the school year.

Changes: None.

New § 200.48(d)(2)(i)(C) (Proposed § 200.48(d)(l)(iii)) SES Provider Access to School Facilities

Comment: Several commenters expressed concern that proposed § 200.48(d)(1)(iii), which requires LEAs to offer SES providers fair access to school facilities on the same basis and terms as are available to other groups, may conflict with State and local prerogatives and authority governing access to public facilities. Another commenter recommended that LEAs be permitted to differentiate among for-

profit and non-profit groups and organizations, including SES providers, in granting access to school facilities.

Discussion: The intention of the fair provider access criterion in new § 200.48(d)(2)(i)(C) (proposed § 200.48(d)(1)(iii)) is not to override State and local policies with respect to determining the terms of access to school facilities, but to ensure that all SES providers are treated fairly under those policies. The Secretary recognizes that many municipalities and LEAs may have access policies that differentiate among public and private and non-profit and for-profit organizations seeking to use school facilities. However, the Department believes that those policies must take into account both the educational purpose of SES and the requirement to implement SES fairly as part of an LEA's overall Title I program. In this context, the Department believes it is reasonable to require that State and local municipalities ensure that their policies do not unfairly exclude SES providers, regardless of their profit-making status, from school facilities.

Changes: None.

Comment: One commenter stated that meeting the criterion in proposed § 200.48(d)(1)(ii)(C) to offer the opportunity to enroll in SES throughout the school year, and the criterion under which an LEA would have to provide SES providers with access to school facilities in proposed § 200.48(d)(1)(iii) could create capacity concerns for LEAs. Another commenter asserted that many LEAs simply do not have the capacity to offer access to school facilities for SES because of the extensive after-school programs already offered on school sites.

Discussion: The Secretary recognizes that LEAs have limited space and times available for organizations seeking use of school facilities. In particular, we recognize that access to school facilities in any particular LEA may depend on such factors as the size of those facilities, the number of organizations seeking access, and the cost of keeping facilities open outside of the regular school day. The final regulations, however, simply provide that, when making facilities available, LEAs use a fair, open, and objective process that offers access to SES providers on the same basis and terms that are available to other groups seeking access to school facilities. In addition, the final regulations in new § 200.48(d)(2)(i)(B)(*3*) reduce facilities planning burdens on LEAs by modifying the proposed SES ''full-year enrollment'' criterion to require, instead, a minimum of two enrollment ''windows'' at separate points in the school year.

Changes: None.

Comment: One commenter expressed concern that the fair provider access criterion in proposed § 200.48(d)(1)(iii) could lead some LEAs to implement or raise fees charged to other (non-SES provider) organizations for access to school facilities.

Discussion: We understand that many LEAs currently make school facilities available to community groups and other organizations at little or no cost, and that increased demand for facility space from SES providers and regulatory pressure to equalize access may lead some LEAs to adopt more restrictive space-use policies, including the possible imposition of new or higher fees for using school space. The Secretary believes that such changes would be detrimental both to SES and to non-SES-related organizations. However, the Secretary believes that in most cases LEAs will endeavor to make fair arrangements for all entities seeking access to school facilities and that any additional cost or other limitations on such access for non-SES-related organizations must be balanced against the benefits potentially gained through greater student access to SES at school sites.

Changes: None.

Comment: Two commenters expressed concern that the proposed criterion that an LEA provide fair and open access to school facilities for SES providers could force LEAs to grant access to organizations that present a danger to students or other school personnel and that LEAs should not have to provide space for ''unproven services.''

Discussion: The criterion in new § 200.48(d)(2)(i)(C) (proposed § 200.48(d)(1)(iii)) would not require an LEA to grant access to school facilities to any organization that presents a danger to students, teachers, or other school personnel. It merely provides that an LEA choosing to take advantage of the flexibility offered in the regulations implement a policy, if it does not already have one, that provides fair and open access to school facilities by SES providers on the same basis and terms as are available to other groups. Moreover, the assertion that SES providers, in general, represent a threat to school safety has no basis in either fact or experience. SES providers are approved by the SEAs of the States in which they operate and typically are required as part of that approval process to conduct criminal background checks on their employees. Providers operate openly in the communities they serve, often recruit by word of mouth, hire public school teachers as tutors, and even serve students in their own homes in many locations. SEAs monitor SES providers, typically with assistance from LEAs, and the Department is not aware of any significant safety issues arising with the SES program since it began nearly six years ago.

With respect to the claim that SES services are ''unproven,'' under § 200.47(b), an SEA may only grant approval to providers with a ''demonstrated record of effectiveness,'' and final regulations in § 200.47 would strengthen the process for approving and renewing and withdrawing approval of SES providers.

Changes: None.

Section 200.56(d) Definition of ''Highly Qualified Teacher''

Comment: Two commenters expressed concern about proposed § 200.56(d), which would include a cross-reference to the definition of ''highly qualified special education teacher'' in 34 CFR 300.18(d) of the IDEA regulations. The commenters stated that the Department should not incorporate by reference a regulation from one law (IDEA) into a regulation for another law (ESEA) that contains no reference to special education teachers. The commenters stated that, as a matter of law, the requirements for highly qualified special education teachers may be applied and enforced only under the IDEA, not under the ESEA. Other commenters supported including the cross-reference in § 200.56. One commenter, however, said that it did not make sense to add more regulations for special education teachers seven years after NCLB was enacted. Other commenters stated that the proposed regulation would weaken the requirements for highly qualified teachers and should not be adopted.

Discussion: Section 1119(a) of the ESEA requires that *all* teachers, which includes special education teachers, teaching core academic subjects be ''highly qualified'' by the 2005–2006 school year. In 2004, Congress amended the IDEA and established, in section 602(10), requirements governing the qualifications of special education teachers that differ from those in the ESEA. The ''highly qualified special education teacher'' definition in section 602(10) of the IDEA requires all special education teachers, including those who teach core academic subjects, to meet a State's special education certification or licensure requirements. In addition, if special education teachers are teaching core academic subjects, they must demonstrate subject-matter competency.

Under the IDEA, the ways in which some special education teachers can demonstrate subject-matter competency also differ from the regulations under the ESEA. For example, with respect to new special education teachers who are teaching multiple core academic subjects and who are highly qualified in mathematics, language arts, or science, section 602(10)(D) of the IDEA allows those teachers up to two years from the date of employment to demonstrate competence in the other core academic subjects that they teach. Section 602(10)(F) of the IDEA also provides that a teacher who is highly qualified under the IDEA will be considered highly qualified for purposes of the ESEA.

Our intent in the NPRM was to reference the definition of ''highly qualified special education teacher'' in 34 CFR 300.18 of the IDEA regulations so as to clarify, consistent with section 602(10)(F) of the IDEA, that the flexibility in meeting the highly qualified requirements afforded some special education teachers under the IDEA applies to determinations of whether they are highly qualified under the ESEA. The language in the preamble to the NPRM, however, might have implied that special education teachers who do not teach core academic subjects would be covered by the ESEA regulations. Such an implication would be inaccurate because the term ''highly qualified'' in the ESEA is only used with regard to teachers who are teaching core academic subjects. The preamble to the NPRM might also have implied that special education teachers would have to meet the highly qualified requirements in the IDEA in order to be highly qualified under the ESEA, even if they met the requirements in § 200.56. We did not intend to change the requirements for highly qualified teachers under the IDEA or the ESEA or imply that the requirements for all highly qualified special education teachers would be enforced under the ESEA. We merely wanted to clarify that, if a special education teacher is highly qualified under 34 CFR 300.18, that teacher is considered highly qualified under § 200.56, recognizing that the term ''highly qualified'' in the ESEA is used only with regard to teachers who are teaching core academic subjects. Therefore, we are revising § 200.56(d) to make clear that a special education teacher is a highly qualified teacher for purposes of the ESEA if the teacher is a ''highly qualified special education teacher'' under 34 CFR 300.18. Special education teachers who meet the requirements in § 200.56(a) and (b) or (c) are also highly qualified under the ESEA even if they do not meet the requirements under the IDEA.

Changes: We have revised § 200.56(d) and the introductory language in § 200.56 to make clear that a special education teacher is highly qualified under § 200.56 if the teacher is a ''highly qualified special education teacher'' under 34 CFR 300.18.

Implementation Timeline

Comment: Some commenters stated that the effective date of the proposed regulations could inhibit meaningful implementation because the regulations take effect in the middle of school year 2008–2009.

Discussion: The NPRM was not clear on when States and LEAs would need to begin implementing the various sections of the regulations. Therefore, we are including a table (Table 1) that provides a detailed timeline for implementing the final regulatory requirements. The timeline includes provisions for which States or LEAs must take action and does not include voluntary provisions (e.g., § 200.20 incorporating growth in calculating AYP) or provisions that do not require actions by States and LEAs (e.g., § 200.22 National TAC).

We are also including another table (Table 2) that provides a detailed timeline for implementing the graduation rate requirements.

TABLE 1—IMPLEMENTATION TIMELINE

Regulatory requirement	Implementation date
§ 200.7—Review of minimum group size, confidence intervals, etc. Each State must submit revisions to its Accountability Workbook.	In time for changes to be effective for AYP determinations based on 2009–2010 assessment results.
§ 200.11—Reporting NAEP data on report cards	Report cards issued in 2009–2010 for 2008–2009 school year data (with NAEP data from the most recent year available).
§ 200.19—Other Academic Indicators	
Implementing transitional graduation rate	AYP determinations based on 2008–2009 assessment results.
Establishing a goal and targets/continuous and substantial improvement for AYP.	AYP determinations based on 2009–2010 assessment results.
Reporting of four-year adjusted cohort graduation rate	Report cards providing assessment results for the 2010–2011 school year.
Reporting of extended-year adjusted cohort graduation rate	The first year for which a State separately calculates such a rate.
Implementing four-year adjusted cohort graduation rate for AYP purposes, in the aggregate and disaggregated.	AYP determinations based on 2011–2012 assessment results.
Accountability Workbook revisions	In time for changes to be effective for AYP determinations based on 2009–2010 assessment results.
Request for extension of the deadline for reporting four-year adjusted cohort graduation rate.	March 2, 2009.
§ 200.37—Notice of identification	
14-day notice for choice	Before start of 2009–2010 school year.
New provisions for SES notice	Beginning with 2009–2010 notice.
§ 200.39—Responsibilities regarding improvement (publication of data on LEA Web site).	In a timely manner to ensure that parents have current information on their public school choice and SES options.
§ 200.47—SEA responsibility re: SES	
SEA posting of data on Web site for LEAs	Before the start of the 2009–2010 school year.
Develop, implement, and publish standards for monitoring LEAs	Before the start of the 2009–2010 school year.
Approving providers using new criteria	Beginning with next approval cycle.
Monitoring providers using new criteria	Beginning with next monitoring cycle of SES.
§ 200.48(d) 20 percent obligation	Beginning with funds expended during 2009–2010 school year.

TABLE 2—IMPLEMENTATION TIMELINE FOR GRADUATION RATES

	School year and regulatory requirements			
	2008–2009	2009–2010	2010–2011	2011–2012
	AYP based on 2008–2009 assessment results	AYP based on 2009–2010 assessment results	AYP based on 2010–2011 assessment results	AYP based on 2011–2012 assessment results
AYP	States must calculate high school graduation rate for AYP determinations in the aggregate using an approved transitional rate or the four-year adjusted cohort graduation rate and any extended-year adjusted cohort graduation rate			States must calculate high school graduation rate for AYP, in the aggregate and disaggregated by subgroup, using the four-year rate and any extended-year rate.
Reporting	States must report disaggregated graduation rate data using an approved transitional rate or the four-year rate (any extended-year rate must be reported separately)		Beginning with report cards providing assessment results for the 2010–2011 school year, States must report disaggregated graduation rate data using the four-year rate (any extended-year rate must be reported separately).	
Goal and Targets	States may use current goals and targets.	States must have a single goal and targets that meet the criteria in the regulations. States may need to change their goal and targets when they begin using the four-year rate for AYP.		

To read this chart: For example, for the 2008–2009 school year, a State must (a) calculate high school graduation rate for AYP determinations using an approved transitional rate or the four-year adjusted cohort graduation rate (that meets the requirements in the regulation); (b) report its graduation rate disaggregated by subgroup; and (c) may use its current goal and targets.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

Summary of Costs and Benefits

The Department believes many of the regulatory changes included in these final regulations will not impose significant costs on States, LEAs, or other entities that participate in programs funded under Part A of Title I. Other changes will impose costs, but the Department believes that the benefits resulting from the regulations will greatly exceed those costs. Although many commenters claimed that the proposed regulations would increase State or local burden (and one commenter stated specifically that the cost-benefit analysis included in the NPRM underestimated the costs of implementing the proposed regulations), commenters did not provide alternative estimates of the costs of implementing the various proposals. Therefore, this final cost-benefit analysis generally continues the Department's original estimates, making revisions only to reflect changes in the regulations or in other places where the Department determined that revisions were needed.

The major benefit of these regulations, taken in their totality, is a Title I, Part A program in which clearer accountability and implementation requirements (particularly in the areas of high school graduation rate, public school choice, and SES) will be coupled with greater flexibility in implementation (particularly in the use of measures of individual student academic growth in calculating AYP). These regulations will, thus, add to the contributions that NCLB has made to the creation of a system in which schools, LEAs, and States expect to educate all children to high standards and are held accountable for doing so. The regulations will support the attainment of increases in student achievement that build on the improvements that the Nation has seen in the last several years. The benefits to the United States of having a more educated citizenry have been plentiful and will continue to be so as the reforms implemented as a result of NCLB (and as supported through these regulations) continue to take hold.

The Department's analysis of the costs and benefits of implementing specific provisions of the regulations follows. The costs to implement specific provisions of the regulations are included in the tables at the end of the *Paperwork Reduction Act of 1995 section of this notice*.

Accountability Workbook (Minimum Group Size and Graduation Rate)

The regulations in § 200.7 clarify that State definitions of AYP must include a minimum group size that is based on sound statistical methodology, that yields statistically reliable information for each purpose for which disaggregated data are used, and that ensures that, to the maximum extent practicable, all student groups are included, particularly at the school level, in accountability determinations. The Department has previously reviewed each State's minimum group size and believes that some States already meet the requirements of § 200.7. Some States, however, may need to revise their minimum group size and other components of the State's AYP definition based on the final

regulations and on feedback from the new peer review.

All States are required to revise their Accountability Workbook and explain how their minimum group size meets the requirements in § 200.7 and to provide certain other information on their minimum group size and AYP definition (information on how other components of the State's AYP definition, in addition to its minimum group size, interact to affect statistical reliability and ensure the maximum inclusion of all students and student subgroups in AYP determinations as well as information on the exclusion of students and subgroups from those determinations). States are required to submit to the Department, for technical assistance and peer review, a revised Accountability Workbook that reflects these new requirements in time for AYP determinations based on 2009–2010 assessment results.

Under the regulations in § 200.19(b)(6), States will also need to revise their Accountability Workbook in order to include: (a) The State's current graduation rate definition, (b) the State's progress toward meeting the deadline for calculating and reporting the four-year adjusted cohort graduation rate, (c) the State's graduation rate goal and targets, (d) an explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and of how the State's targets demonstrate continuous and substantial improvement toward meeting or exceeding the goal, and (e) the graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate). If a State decides to use an extended-year adjusted cohort graduation rate as part of its AYP definition, the State must also describe, in its Accountability Workbook, how it will use that rate with its four-year adjusted cohort graduation rate to determine whether its schools and LEAs have made AYP. These requirements are somewhat different from what the Department proposed in the NPRM.

We have revised our earlier estimates (included in the NPRM) of the cost to States of submitting a revised Accountability Workbook in order to include the time necessary to prepare and submit the information related to graduation rates. The Department estimates that each State would, on average, require 276 hours of staff time to complete this effort, including 80 hours for development and analysis of a proposed minimum group size policy (within an overall definition of AYP), 132 hours for the development of new graduation rate definitions and policies, and an additional 64 hours for actual preparation of the Accountability Workbook. We further estimate that SEAs' cost for that activity will be $30 an hour. For the 50 States, the District of Columbia, and Puerto Rico, the estimated cost of revising and submitting their Accountability Workbook would thus be $430,560. These estimates incorporate an assumption that some States will need to do additional work on their Accountability Workbook as a result of feedback from the peer review.

In response to the NPRM, one commenter stated that our cost estimates severely underestimated the time and resources States would expend to revise their Accountability Workbook. However, the commenter did not provide alternative estimates for the Department to consider. Moreover, this cost-benefit analysis includes a ''sensitivity analysis'' (discussed later in this section) that subjects the cost calculations to alternative (and higher) assumptions about the amount of time that will be required for compliance.

The Department believes that the benefits of the change in minimum group size policy, in terms of greater accountability that would result from a State's use of a minimum group size that meets the regulatory criteria, would greatly outweigh the minimal costs of compliance.

Participation in NAEP

In the NPRM, the Department projected that States and LEAs would be able to implement at minimal cost the requirement to include NAEP data on State and LEA report cards. The Department made this projection because State NAEP results are available on the NCES Web site and through other sources, and obtaining those data should not pose a significant burden. Neither should including the data on report cards, as the NAEP results would be a minor addition to the data already so included.

Several individuals who commented on the NPRM stated that it would be burdensome for SEAs and LEAs to ensure the accurate and appropriate use of NAEP results and some said, more specifically, that the incorporation of NAEP results on State report cards would require significant staff time and resources because States must seek input from stakeholders, obtain State Board of Education approval, and pay the costs for reproduction. Other commenters stressed that LEAs would need to clarify, on their report cards, that only limited comparisons can be made between NAEP and State assessments because of the differences between the two assessments.

In consideration of these comments, the Department reiterates that NAEP data are readily available and that it should not be a significant burden for States and LEAs to obtain and include those data on their report cards. However, the Department also acknowledges that there will be some cost, particularly in the first year, of making the transition to including NAEP data on State and local report cards. The Department's final estimate is that, in the first year, each SEA will require 24 hours to incorporate NAEP data on State report cards and, thereafter, each SEA will require the 5 hours annually that the Department estimated in the Paperwork Reduction Act analysis included in the NPRM. At $30 per hour, the estimated cost of implementation for 52 States is, thus, $37,440 in the first year and $7,800 in each succeeding year.

Similarly, at the local level, the Department also estimates 24 hours of burden in the first year and 5 hours thereafter. For approximately 14,000 LEAs, at $25 per hour, the total cost will be $8,400,000 in year one and $1,750,000 annually thereafter.

These estimates take into consideration the changes made in the final regulations, which provide greater specificity on the NAEP data that must be reported and no longer require LEAs to publish disaggregated NAEP results. The Department does not believe that those changes will add measurably to the cost of compliance.

We note that the NAEP reading and mathematics assessments are administered only once every two years. In the second year of a cycle, the costs to SEAs and LEAs of including NAEP data on their report cards should be particularly low. Further, the Department assumes that, in many States, the SEA will prepare summaries of the NAEP data (largely from the ''snapshots'' provided by NCES and accessible on the NCES Web site) and provide them to LEAs, which in turn will be able to include those summaries on their report cards with little investment of time or effort. The Department, thus, does not believe that the cost of including NAEP data on the report cards will be any greater than what is estimated above.

The Department believes that these minimal costs of implementing the requirements to include NAEP data on report cards will be greatly outweighed by the benefits of providing the public with important additional information

on student achievement with which to compare State assessment results.

High School Graduation Rate

The final regulations restructure the regulations in § 200.19 on ''Other Academic Indicators'' and, in particular, require States to adopt a ''four-year adjusted cohort graduation rate'' and, at a State's option, an ''extended-year adjusted cohort graduation rate,'' for the purpose of reporting no later than school year 2010–2011 and for the purpose of making AYP determinations no later than school year 2011–2012. Prior to those deadlines, States will use either the four-year adjusted cohort graduation rate or a transitional graduation rate, which for most States will be the rate they currently use, for those two purposes. (Unlike the NPRM, the final regulations do not require States to implement an ''Averaged Freshman Graduation Rate'' during the interim period.) The regulations also require the use of disaggregated graduation rate data for AYP determinations beginning with the determinations based on school year 2011–2012 assessment results (with the exception that ''safe-harbor'' determinations, which are already required to include disaggregated data, would continue to include them). In addition, the final regulations require a State to include in its AYP definition (a) a single graduation rate goal that the State expects all high schools in the State to meet, and (b) annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the goal. To make AYP beginning with determinations based on 2009–2010 assessment results, any school or LEA that serves grade 12, and the State, must meet or exceed the graduation rate goal or annual target.

In order to meet the deadlines for implementation of the four-year adjusted cohort graduation rate, States will need to have in place a data system that can track students who emigrate to another country, transfer to another school, or die. States also will need to collect four years of student data through those systems in order to implement the new rate by the deadline established in the final regulations.

In 2005, all 50 States agreed to the NGA's *Graduation Counts: A Compact on State High School Graduation Data,* which calls for each State to develop a longitudinal graduation rate. A recent publication by the NGA [20] reports that 36 States already have the information systems needed to collect student longitudinal data and are tracking cohorts of students as they progress through school. Within four years, according to this report, 49 States should have the high school cohort data needed to implement an adjusted cohort graduation rate, although States will still need to provide guidance to local officials who collect and report the data and to take other actions to ensure data quality and accuracy. This activity reflects policies the States have adopted, and actions they have taken, in the absence of Federal regulations. Based on this information, we believe that the regulations on development and implementation of a four-year adjusted cohort graduation rate will not impose significant costs on the great majority of States that they were not likely to assume in the absence of the regulations. That is, in light of the progress by almost all States in developing the systems needed to calculate a four-year adjusted cohort graduation rate, it would not be appropriate to attribute to the regulations the costs that States are assuming in this area.[21] Moreover, the Federal government supports States' development of longitudinal student data systems through the Department's Statewide Longitudinal Data Systems program. For the fiscal years 2005 (when the program began) through 2008, the Congress appropriated more than $122 million for this program and, through fiscal year 2007, 27 States have received these grants.

At the local level, the major cost of implementing the new regulations on graduation rate will be in determining whether students who have left the schools of an LEA have transferred to another LEA or school or have dropped out. We estimate that each LEA will require 50 hours annually to meet this responsibility. For approximately 14,000 LEAs nationally, at $25 per hour, the cost of implementation will be approximately $17.5 million.

We believe the benefits of the changes regarding graduation rate definitions and the use of disaggregated graduation rate data in AYP calculations will be significant. A uniform and accurate method of calculating graduation rate is needed to raise expectations and to hold schools, LEAs, and States accountable for increasing the number of students who graduate on time with a regular high school diploma, as well as to provide parents and the public with more accurate information. By requiring all States to use a more rigorous and accurate graduation rate calculation, the Department can ensure greater accountability and transparency on this important indicator. In addition, we need to have a uniform and accurate method of calculating high school graduation rate to improve our understanding of the scope and characteristics of those students dropping out of school or taking longer to graduate. Finally, the use of disaggregated graduation rate data in AYP calculations will help ensure that schools and LEAs do not allow overall success in graduating students in four years (or less) to mask low graduation rates for individual student groups.

Growth Models

The final regulations allow States to use measures of individual student academic growth in school and LEA AYP determinations and, thus, provide States with greater flexibility without burdening them with significant additional costs. To receive permission to incorporate individual student academic growth into its AYP definition, a State will have to have implemented a longitudinal data system that tracks student progress from grade to grade. However, as discussed earlier under the heading *High School Graduation Rate,* almost all States are developing student longitudinal data systems in the absence of Federal regulations; this is the case because the benefits of having a longitudinal student data system are much greater than just having the ability to support the use of individual student academic growth in calculating AYP. States have found such systems to be valuable in numerous ways,[22] including in tracking the educational progress of students as they progress through grades and across schools and school systems; more accurately determining whether students graduate from high school; calculating accurate student dropout

[20] National Governors Association. (2008). *Implementing Graduation Counts: State Progress to Date, 2008.* Washington, DC: Author.

[21] More specifically, we estimate that 36 States will require an average of 240 hours to complete the development or refinements of their data systems for the purpose of computing the four-year adjusted cohort graduation rate consistent with the regulations, for a total of 8,640 hours nationally. Based on information from the NGA reports, we believe the additional 16 States will not need to assume those costs because they have already completed that work. Further, we assume that the 52 States will require an average of 120 hours to compute the extended-year adjusted cohort graduation rate, should all decide to adopt such a rate, for a total of 6,240 hours. At $30 per hour, the total cost of implementing these requirements would be $446,400, or approximately $8,585 per State.

[22] Ewell, P., & Boeke, M. (2007). Tracking student progression: The State of the States; Retrieved October 10, 2008 from *http://www.nchems.org/c2sp/sur/SURSurveyReport.pdf.*

rates; holding schools and LEAs accountable for results; targeting assistance to those schools and LEAs most in need; determining whether the content their secondary schools offer is well aligned with college-preparedness requirements; identifying strengths and weaknesses in teacher preparedness; and measuring the educational performance of the State as a whole. Therefore, the Department believes it would be inappropriate to assign the costs States incur in designing and implementing longitudinal data systems as a cost of complying with this section of the final regulations.

In order to implement an AYP definition that includes measures of student academic growth, an SEA will need to submit a request to the Department that describes that definition and meets certain other requirements. We estimate that a State would need 240 hours to prepare such a request. If all 52 States prepare such requests, the total cost would be $374,720 (again assuming $30 per hour).

Public School Choice and Supplemental Educational Services

The final regulations make a number of changes to the current regulations on public school choice and supplemental educational services.

First, in § 200.37, the regulations require LEAs to notify parents of eligible students of the option to transfer their child to another school, sufficiently in advance of, but no later than 14 calendar days before, the start of the school year in order to give those parents adequate time to exercise their public school choice option. As stated in the NPRM, the Department believes that this regulation would not increase LEA costs because it would affect merely the timing of the parental notification. Two commenters on the NPRM disagreed, stating that this change in the regulations would result in increased local administrative costs. However, the commenters did not offer any facts or estimates to support that comment, so we decline to amend our analysis.

Under § 200.37, the regulations also require that an LEA's notice to parents of students eligible for SES: (a) Explain the benefits of SES, (b) be clear and concise, and (c) be clearly distinguishable from the other school improvement information sent to parents under § 200.37. The final regulation, unlike the NPRM, also requires that this notice include an indication of those providers that are able to serve students with disabilities or LEP students. The Department does not believe this change will add significantly to LEAs' compliance burden because information on providers that are able to serve students with disabilities and LEP students will be available from the SEAs; LEAs will not need to collect that information themselves.

We note that LEAs may assign costs related to meeting this requirement to the amount equal to 0.2 percent of their Title I, Part A allocation that the regulations permit LEAs to use for outreach and assistance to parents on public school choice and SES.

Data from the ESEA Consolidated State Performance Report indicate that approximately 2,000 LEAs nationally have at least one Title I school in year two of school improvement (or in a later stage of the Title I accountability timeline). These are the schools with students eligible for SES that would technically be covered by this new requirement. However, some of these LEAs are not able to offer SES and, thus, are not affected by the proposed notice requirement. For example, rural and other small or isolated LEAs often do not have any approved SES providers serving their area. For this reason, our analysis assumes that 80 percent of the estimated 2,000 LEAs with at least one Title I school in year two of improvement or later, or 1,600 LEAs, will be subject to the notice requirement annually. We estimate that these 1,600 LEAs will each require an average of 12 hours of staff time to prepare the notice to parents and that the cost for this time will average $25 per hour. Under this assumption, the cost for the preparation of this notice will be $480,000 annually.

Further, in the 2006–2007 school year, in the States for which the Department has data, approximately 3.7 million students were eligible for SES.[23] Assuming that approximately 3.7 million students continue to be eligible each year, we project that: (1) The parents of one half of these students would receive the SES information by mail, in a separate mailing, and (2) the remaining parents would receive that information through notices that students bring home from school, in a mailing that includes other information already required to be provided to parents (in § 200.37), or by other means that impose very small costs on LEAs. For the parents who would receive the separate notices by mail, the cost of providing the notice (assuming continuation of current postage rates) would be $756,000, bringing the total cost for the implementation of the proposed SES notice requirement to $1,236,000.

These estimates are the same as those the Department included in the NPRM (with the exception of an adjustment to reflect a subsequent change in the first-class postage rate). Although one commenter stated that implementation of these requirements in the regulations would be burdensome, no commenters challenged these cost estimates.

The regulations in § 200.39 require LEAs to post on their Web sites information on their implementation of the public school choice and SES requirements, including information on the number of students who were eligible for and who participated in the public school choice and SES options, information on approved SES providers operating in the LEA and on the locations where services are provided, and a list of schools available to students who wish to take advantage of the public school choice option. If an LEA does not have its own Web site, the SEA is required to include on its Web site the information otherwise required of LEAs.

Based on data from the ESEA Consolidated State Performance Report, approximately 3,000 LEAs have a Title I school in year one of improvement or later and, thus, are technically required to offer either public school choice, or both public school choice and SES, to their eligible students. However, as with the SES notice requirement, some of those LEAs would not be affected because they are unable to offer public school choice and SES due to a lack of choice options (for instance, rural and other small LEAs frequently have only one school at a particular grade span) or the absence of an approved SES provider serving their area. We estimate that 80 percent of the 3,000 LEAs with a Title I school in year one of improvement or later, or 2,400 LEAs, would need to post the new information on their Web site. We further estimate that these LEAs would require an average of 25 hours of staff time to prepare the data for the Web site, at a cost of $25 per hour, for an estimated national cost of $1,500,000 to meet the new requirement to post public school choice and SES information on LEA Web sites. Therefore, the total estimated cost for implementation of the new SES and Web site notice requirements is $2,736,000. These estimates are unchanged from those the Department included in the NPRM (again, with the exception of a minor adjustment because of a change in the postage rate). Although some commenters opposed the proposed requirements as burdensome, none challenged the

[23] U.S. Department of Education. (2007). *Consolidated State Performance Report, 2006–07.* Unpublished raw data.

Department's cost estimates. In addition, the Department does not believe that the changes made since the NPRM (exempting LEAs that do not have a Web site from the requirement to post the information on public school choice and SES, but requiring that their SEA post that information) will make a significant difference in the cost of compliance.

We have also estimated the cost to SEAs of posting the public school choice and SES information for LEAs that do not have their own Web sites. The Department projects that 47 States will need to post this information and that this effort will require five hours annually. At $30 per hour, the estimated total national cost is $7,050.

The benefits of these provisions are that parents and others will have more and better information about public school choice and SES and, thus, parents might be more likely to take advantage of those options (with attendant benefits for their children) and that LEA implementation of the public school choice and SES requirements will be more transparent. We also note that LEAs may assign costs related to meeting this requirement to the amount equal to 0.2 percent of their Title I, Part A allocations under § 200.48(a)(2)(iii)(C).

The final regulations in § 200.47 require SEAs to post information on their Web sites on the amount that each LEA must spend for public school choice and SES (that is, an amount equal to 20 percent of the LEA's Title I allocation) and, for each LEA, the per-child amount for SES. SEA Web sites must also indicate which SES providers are able to serve students with disabilities or LEP students. The Department added these provisions to the final regulations in response to comments on the NPRM. The Department believes that the information called for will be readily available to most SEAs and, thus, should be inexpensive to post. (A few SEAs may have to revise their application instructions in order to gather some of this information, but the cost of making such revisions should be minimal.) The Department estimates that it will require four hours annually for an SEA to post this information. For 52 SEAs at $30 an hour, the total annual cost will be an estimated $6,240.

The regulations in § 200.47 also clarify the SEA's responsibilities for SES, by stating that those responsibilities include developing, implementing, and publicly reporting on the SEA's standards and techniques for monitoring LEAs' implementation of SES. States should already have such standards and techniques in place because they are required under 34 CFR 80.40 to monitor LEA activities. The burden of publicly reporting on them, such as by posting information about them on the SEA's Web site, should be minimal. Specifically, we estimate that the total cost of implementation will be $62,400, based on an assumption that each of the 52 SEAs will require 40 hours to fulfill these responsibilities, at a cost of $30 an hour. The benefit of these regulations will be greater transparency of how SEAs monitor LEAs' implementation of SES.

The regulations in § 200.47 also clarify that, in order to be approved as an SES provider, an entity must provide the State with evidence that the instruction it would provide and the content it would use are aligned with the State's academic content and student academic achievement standards and are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children. In addition, a State must consider, at a minimum, (1) whether the entity has been removed from any State's approved provider list; (2) parent recommendations or results from parent surveys, if any, regarding the success of the entity's instructional program in increasing student achievement; and (3) evaluation results, if any, demonstrating that the instructional program has improved student achievement. The Department believes that these requirements will result in improvements in States' SES provider approval procedures leading to high-quality SES and improved student achievement, and that the cost of compliance will be very minimal.

The regulations in § 200.47 also further specify the evidence that States must consider when monitoring the quality and effectiveness of the services offered by an approved provider in order to inform decisions on renewal or withdrawal of approval of the provider. The statute and current regulations already require States to approve SES providers with a demonstrated record of effectiveness, and to develop and apply objective criteria for monitoring and withdrawing approval of providers. The regulations may add minimal costs to States if they need to revise their applications or monitoring protocol in order to comply with the requirements, or if a revised application or protocol results in more labor-intensive application review or monitoring. The regulations will only add costs to SES providers if they are not already providing this information to States in their applications for approval and renewal. The Department believes that the minimal costs to States and SES providers will be outweighed by the benefits of having a clear outline of the evidence that States must consider both before providers begin serving students in the State and as their programs are monitored and being considered for renewal or termination.

A number of commenters expressed concern about the costs of implementing the changes proposed for § 200.47, but did not offer specific estimates of the cost of implementation. For example, some commenters stated that the cost of SEA monitoring of SES providers would diminish direct services to students. The Department responded, in the *Analysis of Comments and Changes* section of this preamble, that State monitoring is required under the ESEA and that the regulations merely clarify the elements of effective monitoring. Moreover, SEA monitoring is financed with Title I funds that SEAs reserve for State administration, not with funds that would otherwise be used for services to students. Other commenters expressed concern about the new requirement for SEAs to consider, in their monitoring and in their review of SES provider applications, evaluation results and parent surveys; these commenters were concerned that the regulations would require SEAs to conduct costly surveys and evaluations. The Department pointed out that the regulations require consideration of parent surveys and evaluations only when they are available. After consideration of these comments, the Department's assessment of the cost of compliance for the § 200.47 revisions is largely unchanged.

The regulations on funding for public school choice and SES in § 200.48 allow LEAs to count costs for parent outreach and assistance toward the requirement to spend the equivalent of 20 percent of the LEA's Title I, Part A allocation (the ''20 percent obligation'') on choice-related transportation and SES. This provision permits an LEA to allocate up to 0.2 percent of its Title I, Part A allocation (1.0 percent of the 20 percent obligation) in that manner. Allowing LEAs to count toward meeting the 20 percent obligation a limited amount of funds for parent outreach and assistance will help ensure that LEAs provide parents the information they need to make the best decisions for their children. The new provision will not impose costs on LEAs, as they would, at their discretion, support the parental outreach and assistance activities by using funds from other activities.

The amendments to § 200.48 also require an LEA that uses unspent funds

from its 20 percent obligation for other allowable activities to meet the following criteria:

(1) Partner, to the extent practicable, with outside groups, such as faith-based organizations, other community-based organizations, and business groups, in order to inform eligible students and their families about their opportunities for public school choice and SES.

(2) Ensure that eligible students and their families have a genuine opportunity to transfer to schools or to receive SES. The language clarifies that providing such an opportunity includes (a) providing timely and accurate notice to those students and their families, as required under §§ 200.36 and 200.37; (b) ensuring that sign-up forms for SES are distributed directly to all eligible students and are made widely available and accessible; and (c) providing a minimum of two SES enrollment ''windows'' at separate points in the school year that are of sufficient length to enable parents of eligible students to make informed decisions about requesting SES and selecting a provider.

(3) Ensure that approved SES providers are given access to school facilities through a fair, open, and objective process.

In response to comments on the NPRM, the Department revised the proposed language to require an LEA that is using funds from its 20 percent obligation for other purposes: (1) To maintain records that it has met the criteria listed above, and (2) to notify the SEA that it has met those criteria and of the amount remaining from its 20 percent obligation that it intends to spend on other allowable activities. These requirements replace language in the NPRM that would have required LEAs to obtain permission from the SEA before using unspent funds for other purposes. The final regulations also: (1) Revise the proposed language on partnering to provide examples of outside groups with which an LEA may partner and to clarify that this activity must take place only to the extent practicable; and (2) replace a requirement that LEAs permit eligible students to sign up for SES throughout the school year with a requirement for two enrollment ''windows'' at separate points in the school year. All of these changes should result in reduced compliance costs.

The Department believes that most of the costs that LEAs will incur in meeting these requirements will be minimal. The most tangible costs will be for developing a clearly distinguishable notification (on eligibility and the benefits of SES) to parents of eligible students (which has been accounted for in the cost estimate for § 200.37) and in maintaining records and informing the SEA that an LEA has met the various outreach and access criteria in § 200.48(d) if it wishes to use unspent funds from its 20 percent obligation for other allowable activities. We estimate these additional LEA documentation costs related to § 200.48(d) as follows.

As noted earlier, we project that 2,400 LEAs annually will be required to offer public school choice, or both public school choice and SES, to their eligible students. Further, based on data for 378 LEAs reported to the Department's ED*Facts* data system, we estimate that 10 percent of those LEAs (240) will use the full 20 percent obligation for choice-related transportation and SES and, thus, will not be affected by the regulations.[24] Further, based on the ED*Facts* data, we estimate that an additional 15 percent of the LEAs (360) will not meet the 20 percent obligation but will choose to spend the remaining funds for choice-related transportation and SES in the following year, rather than meeting the criteria in new § 200.48(d)(2)(i), compiling and maintaining the required records, and informing the SEA of their actions.[25]

The remaining 1,800 LEAs, under our assumptions, will decide to use unspent funds from their 20 percent obligation for other allowable activities and, thus, will need to maintain records demonstrating that they have met the criteria in § 200.48(d)(2)(i) and inform the SEA that they have met those criteria and of the amount they intend to spend on other allowable activities. We estimate that the annual cost of this effort will be $540,000, based on an assumption that each LEA will require 12 hours to meet these requirements and that LEAs' costs for this effort will be $25 per hour.

The final regulations also revise the language in the NPRM on SEA responsibilities related to an LEA's use of any unspent portion of its 20 percent obligation. In place of the proposed requirement for SEAs to approve LEA requests to spend less than the 20 percent obligation, the final regulations require that SEAs ensure, through their regular monitoring process, LEAs' compliance with the criteria in new § 200.48(d)(2)(i). The regulations also require SEAs to review certain LEAs (those that have spent a significant portion of their 20 percent obligation on other allowable activities and have been the subject of multiple complaints, supported by credible evidence, related to public school choice or SES) and to complete each such review by the beginning of the next school year. The Department estimates that most of the costs of meeting these requirements will be minimal, as SEAs are already monitoring LEAs' implementation of the public school choice and SES requirements and should be able, at minimal cost, to incorporate the new requirements into their monitoring procedures. However, the requirement to complete a review of certain LEAs before the beginning of the next school year will likely result in SEAs having to undertake additional monitoring and review activities. The Department estimates that, of the projected 1,800 LEAs that will elect to spend less than their 20 percent obligation on choice-related transportation and SES, five percent (90) will be covered by § 200.48(d)(3)(ii)(A) and, thus, will be required to be reviewed by the SEA prior to the beginning of the next school year. The Department further estimates that 80 percent of these reviews (72) will be reviews that the State would not have carried out in the absence of this new requirement. Finally, the Department estimates that the cost of carrying out each review (including staff time, travel, and other expenses) will average $1,220 (based on 24 hours of staff time per review, at $30 an hour, plus $500 per review for travel and additional expenses). Thus, the estimated total cost of implementation will be $87,840 annually.

Finally, the regulations require that, if an SEA determines that an LEA has failed to meet the three criteria related to implementation of public school choice and SES, the LEA must spend, in the next year, the ''unexpended'' amount needed to meet the 20 percent obligation, in addition to the 20 percent required in that subsequent year. Such an LEA must also request SEA permission before spending less than the unexpended amount and the 20 percent obligation in the subsequent

[24] The ED*Facts* data from 2005–2006 indicate that 8.2 percent of LEAs used the equivalent of at least 20 percent of their Title I allocation to fund SES. Unfortunately, the data do not include expenditures for choice-related transportation. We assume that the inclusion of expenditures for choice-related transportation would bring the total to approximately 10 percent.

[25] This estimate is based on the assumption that LEAs that spend close to the 20 percent will find it more efficient to spend the remaining funds the following year than to compile and maintain the records and inform the SEA of their use of those funds for other purposes. The ED*Facts* data from 2005–2006 indicate that 11.6 percent of LEAs used the equivalent of at least 16 percent (but less than 20 percent) of their Title I allocations for SES. Again, the data do not include expenditures for choice-related transportation; we assume that if those expenditures were included, approximately 15 percent of LEAs will elect to spend the remaining funds of their obligation in the succeeding year.

year, and the SEA may not grant such permission unless it has confirmed the LEA's compliance with the criteria in § 200.48(d)(2)(i). The Department believes that few LEAs will be covered by these provisions and, thus, that the cost of compliance will be low. Our estimate is that 10 percent (240) of the 2,400 LEAs required to implement public school choice and SES will be covered and that one half of those LEAs will apply to the SEA for permission to spend the unused funds. (The other half will add the unexpended amount to the 20 percent obligation in the succeeding year). We further estimate that each such LEA will require 12 hours (at $25 per hour) to prepare a request to the SEA to spend the unused funds. The total estimated annual cost of implementing these requirements at the LEA level is, thus, $36,000. We further estimate that SEAs will require 12 hours to review each request. At $30 per hour, the total estimated annual cost for SEAs is $43,200.

Overall, the total estimated cost of implementing the regulations on public school choice and SES is $3,519,060.

Although our cost estimates for the public school choice and SES regulations are necessarily speculative (because of the limited availability of relevant data), the estimated costs are low even if some of the assumptions are changed significantly. For example, if the number of hours required at each stage of implementing the new public school choice and SES regulations were doubled, the total annual cost would increase only to $6,245,460. These costs, even when combined with the estimated $27,188,800 attributable to implementation (in the first year) of the regulations on minimum group size, high school graduation rates, submission of revised Accountability Workbooks, the inclusion of NAEP data on report cards, and implementation of AYP definitions that include measures of student growth are an extremely small amount within the context of the $13.9 billion Title I program.

The Department believes that the regulations on public school choice and SES will result in significant benefits, in terms of providing more students with access to public school choice and SES under Title I and students and their families receiving better information about their options. A recent study by the RAND Corporation, supported by the Department, found that, in five out of the seven large urban LEAs in which there were sufficient numbers of students to analyze the effects, the students participating in SES showed statistically significant positive effects in both reading and mathematics achievement.[26] Moreover, for those students using SES for multiple years, the analysis suggests that the positive effects might accumulate over time. If SES can continue to improve student achievement and close the achievement gap, students, schools, and LEAs will benefit. In sum, the Department believes that the benefits students will receive, if more LEAs provide eligible students with a genuine opportunity to take advantage of the public school choice and SES options, will well exceed the small costs LEAs and SEAs would assume in implementing these regulations. Moreover, LEAs and SEAs will be able to use Federal funds provided through Title I, Part A to meet the aforementioned administrative expenses.

Other Provisions

The Department believes that the additional provisions in the final regulations will not result in significant costs for LEAs, SEAs, or other entities. These provisions include, in § 200.2, clarification of the requirement that State assessments involve multiple measures of student achievement and, in § 200.43, clarification of the actions LEAs must take when schools are in ''restructuring'' status. Similarly, § 200.22 authorizes the creation of a National Technical Advisory Council; all costs of operating the National TAC will be paid for with Department salaries and expenses funds.

Paperwork Reduction Act of 1995

The final regulations contain information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of the specific information collection requirements is provided in the following tables along with an estimate of the annual recordkeeping burden for these requirements. (Two of the requirements do not add additional burden to what has already been approved.) Included in the estimate is the time for collecting and tracking data, maintaining records, calculations, and reporting. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

The final regulations include information collection requirements associated with the following provisions that will add additional burden to already approved collections (1810–0576 and 1810–0581): § 200.7(a)(2)(ii); § 200.11(c); § 200.19(b)(1); § 200.19(b)(1)(ii)(B)(1); § 200.19(b)(6); § 200.19(b)(7); § 200.20(h); § 200.37(b)(5)(ii)(C); § 200.39(c)(1); § 200.39(c)(2); § 200.47(a)(1)(ii)(B); § 200.47(a)(3)(ii); § 200.47(a)(4)(iii); § 200.48(d)(3); and 200.48(d)(4). These information collection requirements were listed in the NPRM or represent new or modified requirements in response to public comment.

Collections of information: State Educational Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A (OMB Number 1810–0581) and Consolidated State Application (OMB Number 1810–0576).

Burden hours and cost estimates for the final regulations pertaining to ''State Educational Agency, Local Educational Agency, and School Data Collection and Reporting under ESEA, Title I, Part A (OMB Number 1810–0581)'' are presented in the following tables. The first table presents the estimated burden for SEAs and the second table presents the estimated burden for LEAs.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR SEAS

Citation	Description	Number of respondents	Average number of hours per respondent *	Total hours	Total cost (total hours × $30.00)
§ 200.11(c)	Adding NAEP data to SEA report cards and developing tool for parents to compare NAEP and State assessment data.	52	24	1,248	$37,440

[26] U.S. Department of Education. (2007). *State and Local Implementation of the No Child Left Behind Act, Volume I—Title I School Choice, Supplemental Educational Services, and Student Achievement*, Washington, DC: Author.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR SEAS—Continued

Citation	Description	Number of respondents	Average number of hours per respondent *	Total hours	Total cost (total hours × $30.00)
§ 200.19 (b)(1)	Beginning with report cards providing assessment results for SY 2010–11, calculate the four-year adjusted cohort graduation rate, and, if option is selected by the State, the extended-year adjusted cohort graduation rate.	52	286	14,880	446,400
§ 200.39(c)(2)	Post the information listed in § 200.39(c)(1) for LEAs that do not operate their own Web site.	47	5	235	7,050
§ 200.47(a)(1)(ii)(B)	Post on the SEA's Web site an amount equal to 20 percent of each LEA's Part A allocation and the per-pupil amount available for SES.	52	2	104	3,120
§ 200.47(a)(3)(ii)	Indicate on the list those providers able to serve students with disabilities or limited English proficient students.	52	2	104	3,120
§ 200.47(a)(4)(iii)	Develop, implement and publicly report on standards and techniques for monitoring LEAs' implementation of the SES requirements.	52	40	2,080	62,400
§ 200.48(d)(3)	Review of LEAs	52	33	1,728	51,840
§ 200.48(d)(4)	Review LEA request to use unexpended funds	52	28	1,440	43,200
Totals	N/A	52	N/A	21,819	654,570

* Figures in this column reflect rounding.

Information collection activities are also associated with other final revisions to § 200.47(a)(4) at the SEA level. These particular revisions, however, do not pose an additional burden to SEAs because they simply specify how SEAs are to carry out this part of the regulation and related regulations but should not require additional time beyond the hours already estimated for § 200.47(a) in the currently approved 1810–0581 collection.

TITLE I REGULATIONS (COLLECTION 1810–0581) FINAL REGULATIONS BURDEN HOURS/COST FOR LEAS

Citation	Description	Number of respondents	Average number of hours per respondent	Total hours	Total cost (total hours × $25.00)
§ 200.11(c)	Adding NAEP data to LEA report cards	13,987	24	335,688	$8,392,200
§ 200.19(b)(1)(ii)(B)(*1*)	Documentation that a student has transferred out—that the student has enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.	13,987	50	699,350	17,483,750
§ 200.37(b)(5)(ii)(C)	Providing notice to parents that their children are eligible for SES and describing the benefits of SES.	1,600	12	19,200	480,000
§ 200.39(c)(1)	Provide information on public school choice and SES.	2,400	25	60,000	1,500,000
§ 200.48(d)(3)	Maintain records that the criteria are met and meet requirements for informing SEA.	1,800	12	21,600	540,000
§ 200.48(d)(4)	Apply to SEA to use unexpended funds	120	12	1,440	36,000
Totals		13,987	N/A	1,137,278	28,431,950

Information collection activities are also associated with §§ 200.37(b)(4)(iv) and 200.37(b)(5)(ii)(B). The information collection activities associated with this change do not pose an additional burden to LEAs, however. Sufficient hours for this activity are already accounted for in the currently approved 1810–0581 collection.

Consolidated State Application (Collection 1810–0576)

SEA burden hours and cost estimates for the final regulations pertaining to ''Consolidated State Application (OMB Number 1810–0576)'' are presented in the following table.

Citation	Description	Number of respondents	Average number of hours per respondent	Total hours	Total cost (total hours × $30.00)
§ 200.7(a)(2)(ii)	Revise Accountability Workbook relating to minimum group size.	52	112	5,824	$174,720
§ 200.19(b)(6) and (b)(7)	Revise Accountability Workbook for Graduation: 1. Graduation rate definition to determine AYP based on SY 2009–2010 assessment results; 2. Progress towards deadline in § 200.19(b)(4)(ii)(A) for calculating and reporting graduation rate defined in § 200.19(b)(1)(i) through (iv); 3. Graduation rate goal and targets; 4. Explanation of graduation rate goal and how the targets demonstrate continuous and substantial improvement; 5. Graduation rate of the high school at the 10th percentile, 50th percentile, and 90th percentile ranked by graduation rate; 6. If using extended-year adjusted cohort, how it will use this rate with the four-year rate to determine AYP; 7. Request extension of deadline, if appropriate.	52	164	8,528	255,840
§ 200.20(h)	Request waiver under section 9401 of ESEA to incorporate academic growth into State's AYP definition.	52	240	12,480	374,400
Total		52	N/A	26,832	804,960

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities. The small entities that the final regulations will affect are small LEAs receiving funds under Title I. These final regulations will not have a significant economic impact because the regulations impose minimal requirements beyond those that would otherwise be required under the ESEA, with most of those requirements falling on SEAs. Further, the small LEAs should be able to meet the costs of compliance with these regulations using Federal funds provided through Title I.

Intergovernmental Review

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

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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: October 20, 2008.

Margaret Spellings,

Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends 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. Section 200.2 is amended by revising paragraph (b)(7) to read as follows:

§ 200.2 State responsibilities for assessment.

* * * * *

(b) * * *

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding of challenging content, as defined by the State. These measures may include—

(i) Single or multiple question formats that range in cognitive complexity within a single assessment; and

(ii) Multiple assessments within a subject area.

* * * * *

■ 3. Section 200.7 is amended by:

■ A. Revising paragraph (a)(2)(i).

■ B. Redesignating paragraph (a)(2)(ii) as (a)(2)(iv).

■ C. Adding new paragraphs (a)(2)(ii) and (a)(2)(iii).
■ D. Adding the OMB control number before the authority citation.

The revision and additions read as follows:

§ 200.7 Disaggregation of data.

(a) * * *

(2)(i) Based on sound statistical methodology, each State must determine the minimum number of students sufficient to—

(A) Yield statistically reliable information for each purpose for which disaggregated data are used; and

(B) Ensure that, to the maximum extent practicable, all student subgroups in § 200.13(b)(7)(ii) (economically disadvantaged students; students from major racial and ethnic groups; students with disabilities as defined in section 9101(5) of the Act; and students with limited English proficiency as defined in section 9101(25) of the Act) are included, particularly at the school level, for purposes of making accountability determinations.

(ii) Each State must revise its Consolidated State Application Accountability Workbook under section 1111 of the Act to include—

(A) An explanation of how the State's minimum group size meets the requirements of paragraph (a)(2)(i) of this section;

(B) An explanation of how other components of the State's definition of adequate yearly progress (AYP), in addition to the State's minimum group size, interact to affect the statistical reliability of the data and to ensure the maximum inclusion of all students and student subgroups in § 200.13(b)(7)(ii); and

(C) Information regarding the number and percentage of students and student subgroups in § 200.13(b)(7)(ii) excluded from school-level accountability determinations.

(iii) Each State must submit a revised Consolidated State Application Accountability Workbook in accordance with paragraph (a)(2)(ii) of this section to the Department for technical assistance and peer review under the process established by the Secretary under section 1111(e)(2) of the Act in time for any changes to be in effect for AYP determinations based on school year 2009–2010 assessment results.

* * * * *

■ 4. Section 200.11 is amended by:
■ A. Adding a new paragraph (c).
■ B. Adding the OMB control number before the authority citation.

The additions read as follows:

§ 200.11 Participation in NAEP.

* * * * *

(c) *Report cards.* Each State and LEA must report on its annual State and LEA report card, respectively, the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments under paragraph (a) of this section. The report cards must include—

(1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated for each subgroup described in § 200.13(b)(7)(ii); and

(2) The participation rates for students with disabilities and for limited English proficient students.

(Approved by the Office of Management and Budget under control number 1810–0581)

* * * * *

■ 5. Section 200.19 is amended by:
■ A. Revising paragraph (a).
■ B. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively.
■ C. Adding a new paragraph (b).
■ D. In paragraph (e)(1), removing the words ''in paragraphs (a) and (b)'', and adding in their place, the words ''in paragraphs (a) through (c)''.
■ E. Adding the OMB control number before the authority citation.

The revision and additions read as follows:

§ 200.19 Other academic indicators.

(a) *Elementary and middle schools*—(1) *Choice of indicator.* To determine AYP, consistent with § 200.14(e), each State must use at least one other academic indicator for public elementary schools and at least one other academic indicator for public middle schools, such as those in paragraph (c) of this section.

(2) *Goals.* A State may, but is not required to, increase the goals of its other academic indicators over the course of the timeline under § 200.15.

(3) *Reporting.* A State and its LEAs must report under section 1111(h) of the Act (annual report cards) performance on the academic indicators for elementary and middle schools at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(4) *Determining AYP.* A State—

(i) Must disaggregate its other academic indicators for elementary and middle schools by each subgroup described in § 200.13(b)(7)(ii) for purposes of determining AYP under § 200.20(b)(2) (''safe harbor'') and as required under section 1111(b)(2)(C)(vii) of the Act (additional academic indicators under paragraph (c) of this section); but (ii) Need not disaggregate those indicators for determining AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives).

(b) *High schools*—(1) *Graduation rate.* Consistent with paragraphs (b)(4) and (b)(5) of this section regarding reporting and determining AYP, respectively, each State must calculate a graduation rate, defined as follows, for all public high schools in the State:

(i)(A) A State must calculate a ''four-year adjusted cohort graduation rate,'' defined as the number of students who graduate in four years with a regular high school diploma divided by the number of students who form the adjusted cohort for that graduating class.

(B) For those high schools that start after grade nine, the cohort must be calculated based on the earliest high school grade.

(ii) The term ''adjusted cohort'' means the students who enter grade 9 (or the earliest high school grade) and any students who transfer into the cohort in grades 9 through 12 minus any students removed from the cohort.

(A) The term ''students who transfer into the cohort'' means the students who enroll after the beginning of the entering cohort's first year in high school, up to and including in grade 12.

(B) To remove a student from the cohort, a school or LEA must confirm in writing that the student transferred out, emigrated to another country, or is deceased.

(*1*) To confirm that a student transferred out, the school or LEA must have official written documentation that the student enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.

(*2*) A student who is retained in grade, enrolls in a General Educational Development (GED) program, or leaves school for any other reason may not be counted as having transferred out for the purpose of calculating graduation rate and must remain in the adjusted cohort.

(iii) The term ''students who graduate in four years'' means students who earn a regular high school diploma at the conclusion of their fourth year, before the conclusion of their fourth year, or during a summer session immediately following their fourth year.

(iv) The term ''regular high school diploma'' means the standard high school diploma that is awarded to students in the State and that is fully aligned with the State's academic content standards or a higher diploma and does not include a GED credential,

certificate of attendance, or any alternative award.

(v) In addition to calculating a four-year adjusted cohort graduation rate, a State may propose to the Secretary for approval an ''extended-year adjusted cohort graduation rate.''

(A) An extended-year adjusted cohort graduation rate is defined as the number of students who graduate in four years or more with a regular high school diploma divided by the number of students who form the adjusted cohort for the four-year adjusted cohort graduation rate, provided that the adjustments account for any students who transfer into the cohort by the end of the year of graduation being considered minus the number of students who transfer out, emigrate to another country, or are deceased by the end of that year.

(B) A State may calculate one or more extended-year adjusted cohort graduation rates.

(2) *Transitional graduation rate.* (i) Prior to the deadline in paragraph (b)(4)(ii)(A) of this section, a State must calculate graduation rate as defined in paragraph (b)(1) of this section or use, on a transitional basis—

(A) A graduation rate that measures the percentage of students from the beginning of high school who graduate with a regular high school diploma in the standard number of years; or

(B) Another definition, developed by the State and approved by the Secretary, that more accurately measures the rate of student graduation from high school with a regular high school diploma.

(ii) For a transitional graduation rate calculated under paragraph (b)(2)(i) of this section—

(A) ''Regular high school diploma'' has the same meaning as in paragraph (b)(1)(iv) of this section;

(B) ''Standard number of years'' means four years unless a high school begins after ninth grade, in which case the standard number of years is the number of grades in the school; and

(C) A dropout may not be counted as a transfer.

(3) *Goal and targets.* (i) A State must set—

(A) A single graduation rate goal that represents the rate the State expects all high schools in the State to meet; and

(B) Annual graduation rate targets that reflect continuous and substantial improvement from the prior year toward meeting or exceeding the graduation rate goal.

(ii) Beginning with AYP determinations under § 200.20 based on school year 2009–2010 assessment results, in order to make AYP, any high school or LEA that serves grade 12 and the State must meet or exceed—

(A) The graduation rate goal set by the State under paragraph (b)(3)(i)(A) of this section; or

(B) The State's targets for continuous and substantial improvement from the prior year, as set by the State under paragraph (b)(3)(i)(B) of this section.

(4) *Reporting.* (i) In accordance with the deadlines in paragraph (b)(4)(ii) of this section, a State and its LEAs must report under section 1111(h) of the Act (annual report cards) graduation rate at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(ii)(A) Beginning with report cards providing results of assessments administered in the 2010–2011 school year, a State and its LEAs must report the four-year adjusted cohort graduation rate calculated in accordance with paragraph (b)(1)(i) through (iv) of this section.

(B) If a State adopts an extended-year adjusted cohort graduation rate calculated in accordance with paragraph (b)(1)(v) of this section, the State and its LEAs must report, beginning with the first year for which the State calculates such a rate, the extended-year adjusted cohort graduation rate separately from the four-year adjusted cohort graduation rate.

(C) Prior to the deadline in paragraph (b)(4)(ii)(A) of this section, a State and its LEAs must report a graduation rate calculated in accordance with paragraph (b)(1) or (b)(2) of this section in the aggregate and disaggregated by the subgroups in § 200.13(b)(7)(ii).

(5) *Determining AYP.* (i) Beginning with AYP determinations under § 200.20 based on school year 2011–2012 assessment results, a State must calculate graduation rate under paragraph (b)(1) of this section at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

(ii) Prior to the AYP determinations described in paragraph (b)(5)(i) of this section, a State must calculate graduation rate in accordance with either paragraph (b)(1) or (b)(2) of this section—

(A) In the aggregate at the school, LEA, and State levels for determining AYP under § 200.20(a)(1)(ii) (meeting the State's annual measurable objectives), except as provided in paragraph (b)(7)(iii) of this section; but

(B) In the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii) for purposes of determining AYP under § 200.20(b)(2) (''safe harbor'') and as required under section 1111(b)(2)(C)(vii) of the Act (additional academic indicators under paragraph (c) of this section).

(6) *Accountability workbook.* (i) A State must revise its Consolidated State Application Accountability Workbook submitted under section 1111 of the Act to include the following:

(A) The State's graduation rate definition that the State will use to determine AYP based on school year 2009–2010 assessment results.

(B) The State's progress toward meeting the deadline in paragraph (b)(4)(ii)(A) of this section for calculating and reporting the four-year adjusted cohort graduation rate defined in paragraph (b)(1)(i) through (iv) of this section.

(C) The State's graduation rate goal and targets.

(D) An explanation of how the State's graduation rate goal represents the rate the State expects all high schools in the State to meet and how the State's targets demonstrate continuous and substantial improvement from the prior year toward meeting or exceeding the goal.

(E) The graduation rate for the most recent school year of the high school at the 10th percentile, the 50th percentile, and the 90th percentile in the State (ranked in terms of graduation rate).

(F) If a State uses an extended-year adjusted cohort graduation rate, a description of how it will use that rate with its four-year adjusted cohort graduation rate to determine whether its schools and LEAs have made AYP.

(ii) Each State must submit, consistent with the timeline in § 200.7(a)(2)(iii), its revised Consolidated State Application Accountability Workbook in accordance with paragraph (b)(6)(i) of this section to the Department for technical assistance and peer review under the process established by the Secretary under section 1111(e)(2) of the Act.

(7) *Extension.* (i) If a State cannot meet the deadline in paragraph (b)(4)(ii)(A) of this section, the State may request an extension of the deadline from the Secretary.

(ii) To receive an extension, a State must submit to the Secretary, by March 2, 2009—

(A) Evidence satisfactory to the Secretary demonstrating that the State cannot meet the deadline in paragraph (b)(4)(ii)(A) of this section; and

(B) A detailed plan and timeline addressing the steps the State will take to implement, as expeditiously as possible, a graduation rate consistent with paragraph (b)(1)(i) through (iv) of this section.

(iii) A State that receives an extension under this paragraph must, beginning with AYP determinations under § 200.20 based on school year 2011–

2012 assessment results, calculate graduation rate under paragraph (b)(2) of this section at the school, LEA, and State levels in the aggregate and disaggregated by each subgroup described in § 200.13(b)(7)(ii).

* * * * *

(Approved by the Office of Management and Budget under control numbers 1810–0581 and 1810–0576)

* * * * *

■ 6. Section 200.20 is amended by:
■ A. Adding a new paragraph (h).
■ B. Adding the OMB control number before the authority citation.
■ C. Revising the authority citation.

The additions and revision read as follows:

§ 200.20 Making adequate yearly progress.

* * * * *

(h) *Student academic growth.* (1) A State may request authority under section 9401 of the Act to incorporate student academic growth in the State's definition of AYP under this section.

(2) A State's policy for incorporating student academic growth in the State's definition of AYP must—

(i) Set annual growth targets that—

(A) Will lead to all students, by school year 2013–2014, meeting or exceeding the State's proficient level of academic achievement on the State assessments under § 200.2;

(B) Are based on meeting the State's proficient level of academic achievement on the State assessments under § 200.2 and are not based on individual student background characteristics; and

(C) Measure student achievement separately in mathematics and reading/language arts;

(ii) Ensure that all students enrolled in the grades tested under § 200.2 are included in the State's assessment and accountability systems;

(iii) Hold all schools and LEAs accountable for the performance of all students and the student subgroups described in § 200.13(b)(7)(ii);

(iv) Be based on State assessments that—

(A) Produce comparable results from grade to grade and from year to year in mathematics and reading/language arts;

(B) Have been in use by the State for more than one year; and

(C) Have received full approval from the Secretary before the State determines AYP based on student academic growth;

(v) Track student progress through the State data system;

(vi) Include, as separate factors in determining whether schools are making AYP for a particular year—

(A) The rate of student participation in assessments under § 200.2; and

(B) Other academic indicators as described in § 200.19; and

(vii) Describe how the State's annual growth targets fit into the State's accountability system in a manner that ensures that the system is coherent and that incorporating student academic growth into the State's definition of AYP does not dilute accountability.

(3) A State's proposal to incorporate student academic growth in the State's definition of AYP will be peer reviewed under the process established by the Secretary under section 1111(e)(2) of the Act.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 6311(b)(2), (b)(3)(C)(xi); 7861)

■ 7. Section 200.22 is added to read as follows:

§ 200.22 National Technical Advisory Council.

(a) To provide advice to the Department on technical issues related to the design and implementation of standards, assessments, and accountability systems, the Secretary shall establish a National Technical Advisory Council (hereafter referred to as the ''National TAC''), which shall be governed by the provisions of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463, as amended; 5 U.S.C. App.).

(b)(1) The members of the National TAC must include persons who have knowledge of and expertise in the design and implementation of educational standards, assessments, and accountability systems for all students, including students with disabilities and limited English proficient students, and experts with technical knowledge related to statistics and psychometrics.

(2) The National TAC shall be composed of 10 to 20 members who may meet as a whole or in committees, as the Secretary may determine.

(3) The Secretary shall, through a notice published in the **Federal Register**—

(i) Solicit nominations from the public for members of the National TAC; and

(ii) Publish the list of members, once selected.

(4) The Secretary shall screen nominees for membership on the National TAC for potential conflicts of interest to prevent, to the extent possible, such conflicts, or the appearance thereof, in the National TAC's performance of its responsibilities under this section.

(c) The Secretary shall use the National TAC to provide its expert opinions on matters that arise during the State Plan review process.

(d) The Secretary shall prescribe and publish the rules of procedure for the National TAC.

(Authority: 20 U.S.C. 6311(e))

■ 8. Section 200.32 is amended by:
■ A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).
■ B. Adding a new paragraph (a)(1)(ii).

The addition reads as follows:

§ 200.32 Identification for school improvement.

(a)(1)(i) * * *

(ii) In identifying schools for improvement, an LEA—

(A) May base identification on whether a school did not make AYP because it did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for two consecutive years; but

(B) May not limit identification to those schools that did not make AYP only because they did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for the same subgroup under § 200.13(b)(7)(ii) for two consecutive years.

* * * * *

■ 9. Section 200.37 is amended by:
■ A. Adding new paragraph (b)(4)(iv).
■ B. Revising paragraph (b)(5)(ii)(B).
■ C. Adding new paragraph (b)(5)(ii)(C).
■ D. Adding new paragraph (b)(5)(iii).

The revision and additions read as follows:

§ 200.37 Notice of identification for improvement, corrective action, or restructuring.

* * * * *

(b) * * *

(4) * * *

(iv) The explanation of the available school choices must be made sufficiently in advance of, but no later than 14 calendar days before, the start of the school year so that parents have adequate time to exercise their choice option before the school year begins.

(5) * * *

(ii) * * *

(B) A brief description of the services, qualifications, and demonstrated effectiveness of the providers referred to in paragraph (b)(5)(ii)(A) of this section, including an indication of those providers who are able to serve students with disabilities or limited English proficient students.

(C) An explanation of the benefits of receiving supplemental educational services.

(iii) The annual notice of the availability of supplemental educational services must be—

(A) Clear and concise; and

(B) Clearly distinguishable from the other information sent to parents under this section.

* * * * *

■ 10. Section 200.39 is amended by adding a new paragraph (c) to read as follows:

§ 200.39 Responsibilities resulting from identification for school improvement.

* * * * *

(c)(1) Except as provided in paragraph (c)(2) of this section, the LEA must prominently display on its Web site, in a timely manner to ensure that parents have current information, the following information regarding the LEA's implementation of the public school choice and supplemental educational services requirements of the Act and this part:

(i) Beginning with data from the 2007–2008 school year and for each subsequent school year, the number of students who were eligible for and the number of students who participated in public school choice.

(ii) Beginning with data from the 2007–2008 school year and for each subsequent school year, the number of students who were eligible for and the number of students who participated in supplemental educational services.

(iii) For the current school year, a list of supplemental educational services providers approved by the State to serve the LEA and the locations where services are provided.

(iv) For the current school year, a list of available schools to which students eligible to participate in public school choice may transfer.

(2) If the LEA does not have its own Web site, the SEA must include on the SEA's Web site the information required in paragraph (c)(1) of this section for the LEA.

* * * * *

■ 11. Section 200.43 is amended by:

■ A. Revising paragraph (a)(1).

■ B. In paragraph (a)(2), removing the word ''and'' at the end of the paragraph.

■ C. In paragraph (a)(3), removing the punctuation ''.'' and adding in its place the punctuation ''; '' at the end of the paragraph.

■ D. Adding new paragraphs (a)(4) and (a)(5).

■ E. Revising paragraph (b)(3)(ii).

■ F. Revising paragraph (b)(3)(v).

The additions and revisions read as follows:

§ 200.43 Restructuring.

(a) * * *

(1) Makes fundamental reforms to improve student academic achievement in the school;

* * * * *

(4) Is significantly more rigorous and comprehensive than the corrective action that the LEA implemented in the school under § 200.42, unless the school has begun to implement one of the options in paragraph (b)(3) of this section as a corrective action; and

(5) Addresses the reasons why the school was identified for restructuring in order to enable the school to exit restructuring as soon as possible.

(b) * * *

(3) * * *

(ii) Replace all or most of the school staff (which may include, but may not be limited to, replacing the principal) who are relevant to the school's failure to make AYP.

* * * * *

(v) Any other major restructuring of a school's governance arrangement that makes fundamental reforms, such as significant changes in the school's staffing and governance, in order to improve student academic achievement in the school and that has substantial promise of enabling the school to make AYP. The major restructuring of a school's governance may include replacing the principal so long as this change is part of a broader reform effort.

* * * * *

■ 12. Section 200.44 is amended by revising paragraph (a)(2) to read as follows:

§ 200.44 Public school choice.

(a) * * *

(2) The LEA must offer this option, through the notice required in § 200.37, so that students may transfer in the school year following the school year in which the LEA administered the assessments that resulted in its identification of the school for improvement, corrective action, or restructuring.

* * * * *

■ 13. Section 200.47 is amended by:

■ A. Revising paragraph (a)(1)(ii).

■ B. Redesignating paragraph (a)(3) as paragraph (a)(3)(i).

■ C. In newly redesignated paragraph (a)(3)(i), removing the punctuation ''.'' and adding in its place the words ''; and'' at the end of the paragraph.

■ D. Adding a new paragraph (a)(3)(ii).

■ E. Revising the introductory text in paragraph (a)(4).

■ F. In paragraph (a)(4)(i), removing the word ''and'' at the end of the paragraph.

■ G. In paragraph (a)(4)(ii), removing the punctuation ''.'' and adding in its place the words ''; and'' at the end of the paragraph.

■ H. Adding a new paragraph (a)(4)(iii).

■ I. Revising paragraph (b)(2)(ii)(B).

■ J. Redesignating paragraph (b)(2)(ii)(C) as paragraph (b)(2)(ii)(D).

■ K. Adding a new paragraph (b)(2)(ii)(C).

■ L. Redesignating paragraph (b)(3) as paragraph (b)(4).

■ M. Adding a new paragraph (b)(3).

■ N. Adding a new paragraph (c).

The revisions and additions read as follows:

§ 200.47 SEA responsibilities for supplemental educational services.

(a) * * *

(1)(i) * * *

(ii) This promotion must include—

(A) Annual notice to potential providers of—

(*1*) The opportunity to provide supplemental educational services; and

(*2*) Procedures for obtaining the SEA's approval to be a provider of those services; and

(B) Posting on the SEA's Web site, for each LEA—

(*1*) The amount equal to 20 percent of the LEA's Title I, Part A allocation available for choice-related transportation and supplemental educational services, as required in § 200.48(a)(2); and

(*2*) The per-child amount for supplemental educational services calculated under § 200.48(c)(1).

* * * * *

(3)(i) * * *

(ii) Indicate on the list those providers that are able to serve students with disabilities or limited English proficient students.

(4) Consistent with paragraph (c) of this section, develop, implement, and publicly report on standards and techniques for—

* * * * *

(iii) Monitoring LEAs' implementation of the supplemental educational services requirements of the Act and this part.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(B) Are aligned with State academic content and student academic achievement standards;

(C) Are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children; and

* * * * *

(3) In approving a provider, the SEA must consider, at a minimum—

(i) Information from the provider on whether the provider has been removed from any State's approved provider list;

(ii) Parent recommendations or results from parent surveys, if any, regarding the success of the provider's instructional program in increasing student achievement; and

(iii) Evaluation results, if any, demonstrating that the instructional program has improved student achievement.

* * * * *

(c) *Standards for monitoring approved providers.* To monitor the quality and effectiveness of services offered by an approved provider in order to inform the renewal or the withdrawal of approval of the provider—

(1) An SEA must examine, at a minimum, evidence that the provider's instructional program—

(i) Is consistent with the instruction provided and the content used by the LEA and the SEA;

(ii) Addresses students' individual needs as described in students' supplemental educational services plans under § 200.46(b)(2)(i);

(iii) Has contributed to increasing students' academic proficiency; and

(iv) Is aligned with the State's academic content and student academic achievement standards; and

(2) The SEA must also consider information, if any, regarding—

(i) Parent recommendations or results from parent surveys regarding the success of the provider's instructional program in increasing student achievement; and

(ii) Evaluation results demonstrating that the instructional program has improved student achievement.

* * * * *

■ 14. Section 200.48 is amended by:

■ A. In paragraph (a)(2), introductory text, adding the words ''(''20 percent obligation'')'' after the word ''part''.

■ B. In paragraph (a)(2)(iii)(A), removing the word ''and'' at the end of the paragraph.

■ C. In paragraph (a)(2)(iii)(B), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

■ D. Adding a new paragraph (a)(2)(iii)(C).

■ E. Adding a new paragraph (d).

■ F. Adding the OMB control number before the authority citation.

The additions read as follows:

§ 200.48 Funding for choice-related transportation and supplemental educational services.

(a) * * *

(2) * * *

(iii) * * *

(C) The LEA may count in the amount the LEA is required to spend under paragraph (a) of this section its costs for outreach and assistance to parents concerning their choice to transfer their child or to request supplemental educational services, up to an amount equal to 0.2 percent of its allocation under subpart 2 of part A of Title I of the Act.

* * * * *

(d) *Unexpended funds for choice-related transportation and supplemental educational services.*

(1)(i) Except as provided in paragraph (d)(2) of this section, if an LEA does not meet its 20 percent obligation in a given school year, the LEA must spend the unexpended amount in the subsequent school year on choice-related transportation costs, supplemental educational services, or parent outreach and assistance (consistent with paragraph (a)(2)(iii)(C) of this section).

(ii) The LEA must spend the unexpended amount under paragraph (d)(1)(i) of this section in addition to the amount it is required to spend to meet its 20 percent obligation in the subsequent school year.

(2) To spend less than the amount needed to meet its 20 percent obligation, an LEA must—

(i) Meet, at a minimum, the following criteria:

(A) Partner, to the extent practicable, with outside groups, such as faith-based organizations, other community-based organizations, and business groups, to help inform eligible students and their families of the opportunities to transfer or to receive supplemental educational services.

(B) Ensure that eligible students and their parents have a genuine opportunity to sign up to transfer or to obtain supplemental educational services, including by—

(*1*) Providing timely, accurate notice as required in §§ 200.36 and 200.37;

(*2*) Ensuring that sign-up forms for supplemental educational services are distributed directly to all eligible students and their parents and are made widely available and accessible through broad means of dissemination, such as the Internet, other media, and communications through public agencies serving eligible students and their families; and

(*3*) Providing a minimum of two enrollment ''windows,'' at separate points in the school year, that are of sufficient length to enable parents of eligible students to make informed decisions about requesting supplemental educational services and selecting a provider.

(C) Ensure that eligible supplemental educational services providers are given access to school facilities, using a fair, open, and objective process, on the same basis and terms as are available to other groups that seek access to school facilities;

(ii) Maintain records that demonstrate the LEA has met the criteria in paragraph (d)(2)(i) of this section; and

(iii) Notify the SEA that the LEA—

(A) Has met the criteria in paragraph (d)(2)(i) of this section; and

(B) Intends to spend the remainder of its 20 percent obligation on other allowable activities, specifying the amount of that remainder.

(3)(i) Except as provided in paragraph (d)(3)(ii) of this section, an SEA must ensure an LEA's compliance with paragraph (d)(2)(i) of this section through its regular monitoring process.

(ii)(A) In addition to its regular monitoring process, an SEA must review any LEA that—

(*1*) The SEA determines has spent a significant portion of its 20 percent obligation for other activities under paragraph (d)(2)(iii)(B) of this section; and

(*2*) Has been the subject of multiple complaints, supported by credible evidence, regarding implementation of the public school choice or supplemental educational services requirements; and

(B) The SEA must complete its review by the beginning of the next school year.

(4)(i) If an SEA determines under paragraph (d)(3) of this section that an LEA has failed to meet any of the criteria in paragraph (d)(2)(i) of this section, the LEA must—

(A) Spend an amount equal to the remainder specified in paragraph (d)(2)(iii)(B) of this section in the subsequent school year, in addition to its 20 percent obligation for that year, on choice-related transportation costs, supplemental educational services, or parent outreach and assistance; or

(B) Meet the criteria in paragraph (d)(2)(i) of this section and obtain permission from the SEA before spending less in that subsequent school year than the amount required by paragraph (d)(4)(i)(A) of this section.

(ii) The SEA may not grant permission to the LEA under paragraph (d)(4)(i)(B) of this section unless the SEA has confirmed the LEA's compliance with paragraph (d)(2)(i) of this section for that subsequent school year.

(Approved by the Office of Management and Budget under control number 1810–0581)

* * * * *

■ 15. Section 200.50 is amended by:

■ A. Redesignating paragraph (d)(1) as paragraph (d)(1)(i).

■ B. Adding a new paragraph (d)(1)(ii).

The addition reads as follows:

§ 200.50 SEA review of LEA progress.

* * * * *

(d) * * *

(1)(i) * * *

(ii) In identifying LEAs for improvement, an SEA—

(A) May base identification on whether an LEA did not make AYP because it did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for two consecutive years; but

(B) May not limit identification to those LEAs that did not make AYP only because they did not meet the annual measurable objectives for the same subject or meet the same other academic indicator for the same subgroup under § 200.13(b)(7)(ii) for two consecutive years.

* * * * *

■ 16. Section 200.56 is amended by:

■ A. Revising the introductory text.

■ B. Adding a new paragraph (d).

■ C. Revising the authority citation.

The revisions and addition read as follows:

§ 200.56 Definition of ''highly qualified teacher.''

A teacher described in § 200.55(a) and (b)(1) is a ''highly qualified teacher'' if the teacher meets the requirements in paragraph (a) and paragraph (b), (c), or (d) of this section.

* * * * *

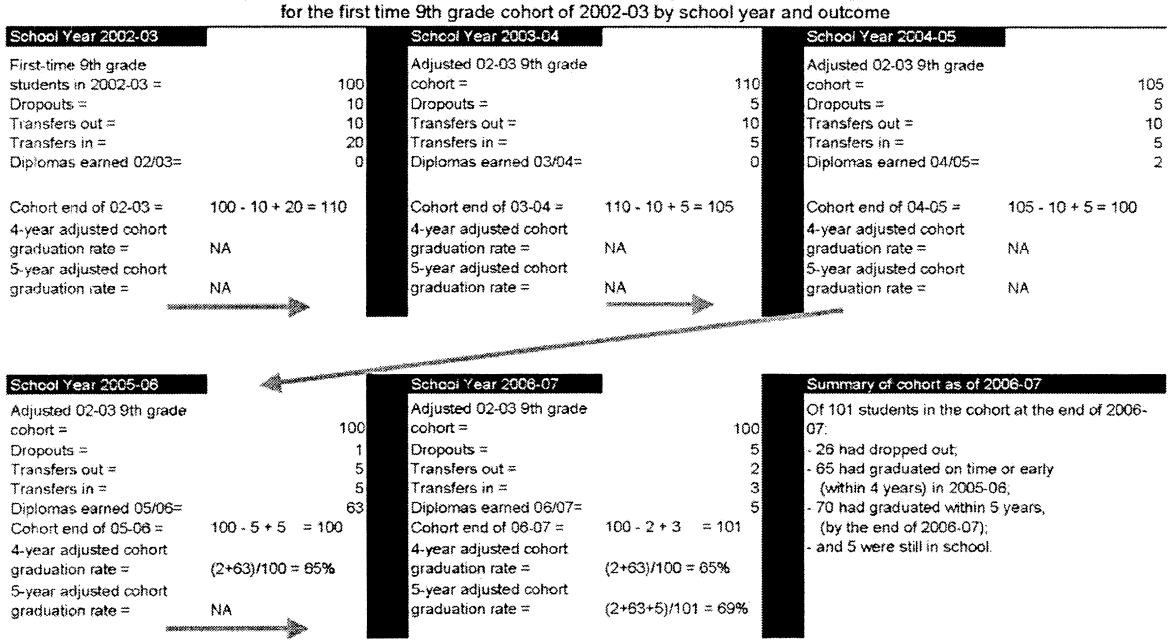
(d) A special education teacher is a ''highly qualified teacher'' under the Act if the teacher meets the requirements for a ''highly qualified special education teacher'' in 34 CFR 300.18.

(Authority: 20 U.S.C. 1401(10); 7801(23))

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

Four-year adjusted cohort graduation rate and extended-year adjusted cohort graduation rate for the first time 9th grade cohort of 2002-03 by school year and outcome



The cohort is the class of first time 9th graders of 2002-03.
The arrows show how to follow the cohort across sequential years.
The cohort size is adjusted at the end of each school year for out transfers and in transfers.
The 4-year graduation rate is the number of students in the 2002-03 adjusted cohort (denominator) who earned a regular diploma in 4 years or less.
The 5-year graduation rate is the number of students in the 2002-03 adjusted cohort (denominator) who earned a regular diploma in 5 years or less.

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