DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AA95

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 the programs administered under title I, part A, of the Elementary and Secondary Education Act of 1965 (ESEA). These regulations are needed to implement statutory provisions regarding State, local educational agency (LEA), and school accountability for the academic achievement of students with the most significant cognitive disabilities and are needed to implement changes to title I of the ESEA made by the No Child Left Behind Act of 2001 (NCLB Act).

DATES: These regulations are effective January 8, 2004.

FOR FURTHER INFORMATION CONTACT: Jacquelyn C. Jackson, Ed.D. Acting Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W202, FB–6, Washington, DC 20202–6132. Telephone: (202) 260–0826.

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SUPPLEMENTARY INFORMATION: These regulations implement statutory provisions of title I of the ESEA, as amended by the NCLB Act (Pub. L. 107–110), enacted January 8, 2002. On March 20, 2003, the Secretary published a notice of proposed rulemaking (NPRM) for title I programs in the **Federal Register** (68 FR 13796). The NPRM proposed allowing States to adopt alternate achievement standards for children with the most significant cognitive disabilities and include assessment scores based on those standards in title I adequate yearly progress (AYP) calculations.

Background

Including Children With Disabilities in State Assessment Programs

The Individuals with Disabilities Education Act (IDEA), section 504 of the Rehabilitation Act of 1973, and title I require inclusion of all students with disabilities in the State assessment system. Title I further requires that the assessment results for all students (and all students with disabilities, among other groups) who have been enrolled in a school for a full academic year be used in calculating AYP for the school, and that the assessment results of students who have been in a district for a full academic year be used in calculating AYP for the district and the State. System accountability should be just that—accountability for everyone in the system. Students with disabilities are a part of the student body. Most of these students spend the majority of their time in general education classrooms, and receive instruction from regular classroom teachers. Regardless of where students receive instruction, all students with disabilities should have access to, participate in, and make progress in, the general curriculum. Thus, all students with disabilities must be included in the measurement of AYP toward meeting the State's standards.

Several critical elements in title I as amended by the NCLB Act ensure that schools are held accountable for educational results, so that the best education possible is provided to each and every student. Three critical elements—academic content standards, academic achievement standards, and assessments aligned to those standards—provide the foundation for an accountability system ensuring that students with disabilities reach high standards. State assessments are the mechanism for determining whether schools have been successful in teaching students the knowledge and skills defined by the content standards. States are required to hold all students to the same standards except that these regulations permit States to measure the achievement of students with the most significant cognitive disabilities based on alternate achievement standards.

Only by including all students in accountability measures will certain unintended negative consequences be avoided. For example, we know from research that when students with disabilities are allowed to be excluded from school accountability measures, the rates of referral of students for special education increase dramatically. (*See* National Center for Educational Outcomes Synthesis 26: *http://education.umn.edu/nceo/OnlinePubs/Synthesis26.html.*) In addition, students with disabilities accrue positive benefits when they are included in school accountability systems. Educators realize that these students also count, just like all other students; they understand that they need to make sure that these students learn to high levels, just like other students. When students with disabilities are part of the accountability system, educators' expectations for these students are more likely to increase.

One State explains the instructional benefits of including students with the most significant cognitive disabilities in its assessment: ''Some students with disabilities have never been taught academic skills and concepts, for example, reading, mathematics, science, and social studies, even at very basic levels. Yet all students are capable of learning at a level that engages and challenges them. Teachers who have incorporated learning standards into their instruction cite unanticipated gains in students' performance and understanding. Furthermore, some individualized social, communication, motor, and self-help skills can be practiced during activities based on the learning standards.'' (*Concerns and Questions about Alternate Assessment. http://www.doe.mass.edu/mcas/atl/QabdC.doc.* September 22, 2003).

Too often in the past, students with disabilities were excluded from assessments and accountability systems, and the consequence was that they did not receive the academic attention they deserved. Access and exposure to the general curriculum for students with disabilities often did not occur, and there was no systemwide measure to indicate whether or what they were learning. These regulations are designed to ensure that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as schools are held accountable for the educational results of all other students with disabilities and students without disabilities.

Regulatory Development

In a notice of proposed rule making (NPRM) published in the **Federal Register** (67 FR 50986) on August 6, 2002, the Secretary proposed a regulation to allow States to develop and use alternate achievement standards for students with the most significant cognitive disabilities for the purpose of determining the AYP of States, LEAs, and schools, provided that the number of proficient scores based on the alternate achievement standards included in AYP calculations, at the

State and LEA levels separately, did not exceed 0.5 percent of all students in the grades assessed. However, because the comments indicated significant misunderstanding of the proposed rule, § 200.13 of title 34 of the Code of Federal Regulations, as adopted in the final regulations published in the **Federal Register** (67 FR 71710) on December 2, 2002, did not allow any use of alternate achievement standards for students with the most significant cognitive disabilities.

In an NPRM printed in the **Federal Register** on March 20, 2003, the Secretary again proposed to amend the title I regulations to allow States to develop and use alternate achievement standards for students with the most significant cognitive disabilities for the purpose of determining the AYP of States, LEAs, and schools. In the new NPRM, the Secretary proposed that the number of proficient and advanced scores based on alternate achievement standards included in AYP calculations at the State and LEA levels, separately, could not exceed 1.0 percent of all students in the grades assessed at the State and the LEA levels, respectively. One percent of all students is approximately 9.0 percent of students with disabilities.

The March 20, 2003, NPRM included additional explanatory information on the purpose and intent of the proposed regulations. However, the comments on this NPRM, like those received on the August 6, 2002, NPRM, indicated that there continued to be misunderstandings about alternate assessments, alternate achievement standards, and the intent and purpose of the proposed regulations. Many commenters continued to think that the number of students with disabilities who could take an alternate assessment was being limited. The NPRM did not propose limiting the number or percentage of students who take an alternate assessment; rather, it proposed to limit the number of proficient and advanced scores based on alternate achievement standards that may be counted in the calculation of AYP.

Being mindful of timing issues related to these proposed regulations, the submission of State accountability plans, and State efforts to develop assessments that better measure the progress of students with disabilities toward meeting State standards, as well as the fact that some States already had administered out-of-level assessments (instructional level assessments) in the 2002–2003 school year, the Secretary used his transitional authority to afford States flexibility in making AYP determinations, based on data from assessments administered during the 2002–2003 school year. Under that transition policy, a State, in calculating AYP for schools and districts, could use alternate achievement standards for students with the most significant cognitive disabilities (subject to a 1.0 percent cap) and also could use results from out-of-level assessments (instructional level assessments). The Department communicated this transition policy to States through the State accountability system approval process as well as in a letter to each State. (*See http://www.ed.gov/policy/speced/guid/secletter/030627.html.*)

Key Concepts

The following paragraphs clarify the Department's understanding of several critical issues related to these regulations. They are: (1) Alternate assessments: (2) out-of-level assessments; and (3) and the 1.0 percent cap.

Alternate Assessments

An alternate assessment is an assessment designed for the small number of students with disabilities who are unable to participate in the regular State assessment, even with appropriate accommodations. An alternate assessment may include materials collected under several circumstances, including (1) teacher observation of the student, (2) samples of student work produced during regular classroom instruction that demonstrate mastery of specific instructional strategies in place of performance on a computer-scored multiple-choice test covering the same content and skills, or (3) standardized performance tasks produced in an ''on-demand'' setting, such as completion of an assigned task on test day. To serve the purposes of assessment under title I, an alternate assessment must be aligned with the State's content standards, must yield results separately in both reading/language arts and mathematics, and must be designed and implemented in a manner that supports use of the results as an indicator of AYP.

As part of the State assessment program, alternate assessments should have a clearly defined structure, guidelines for which students may participate, clearly defined scoring criteria and procedures, and a report format that clearly communicates student performance in terms of the academic achievement standards defined by the State. The requirements for high technical quality set forth in §§ 200.2(b) and 200.3(a)(1), including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards, apply to alternate assessments as well as to regular State assessments.

Alternate assessments may be needed for students who have a broad variety of disabling conditions; consequently, a State may employ more than one alternate assessment. An alternate assessment may be scored against grade-level standards, or, in the case of students with the most significant cognitive disabilities, against alternate achievement standards. Therefore, all students taking an alternate assessment are included in calculations of AYP as either proficient (and above) or non-proficient.

An alternate achievement standard is an expectation of performance that differs in complexity from a grade-level achievement standard. These regulations clarify that a State is permitted to use alternate achievement standards to evaluate the performance of students with the most significant cognitive disabilities and to give equal weight to proficient and advanced performance based on the alternate standards in calculating school, district, and State AYP, provided that the number of proficient and advanced scores based on the alternate achievement standards does not exceed 1.0 percent of all students in the grades tested at the State or LEA level. The Secretary may approve an exception for a specified period of time for a State (or a State may approve a higher limit for an LEA.)

If a State chooses to create alternate achievement standards, the State is not limited to setting a single alternate achievement standard. If, however, the State chooses to define multiple alternate achievement standards, it must employ commonly accepted professional practices to define the standards; it must document the relationship among the alternate achievement standards as part of its coherent assessment plan; and it must include in the 1.0 percent cap proficient scores resulting from all assessments based on alternate achievement standards.

Although the 1.0 percent cap is applied to the number of proficient and advanced scores that may be included in AYP determinations, rather than the number of students taking an assessment against alternate achievement standards, this regulation clarifies the Department's position that alternate achievement standards are acceptable only for the small number of students with the most significant cognitive disabilities. In consideration of schools that, for example, are small

schools or provide special services to students with the most significant cognitive disabilities, the numerical cap of 1.0 percent does not apply at the school level. This does not mean, however, that the use of alternate assessments aligned with alternate standards is unlimited at the school level. For most schools, only a small portion of students with disabilities—those with the most significant cognitive disabilities—should appropriately participate in an assessment based on alternate achievement standards, and all other students with disabilities should be assessed against grade-level standards. In general, the Department expects that no more than 9.0 percent of students with disabilities will participate in an assessment based on alternate achievement standards.

The Department expects most students with disabilities to participate in the regular statewide assessment either without accommodations or with appropriate accommodations that are consistent with the accommodations provided during regular instruction. Current § 200.6 requires that the IEP team determine the accommodations necessary to measure the academic achievement of students with disabilities relative to the State's academic content and achievement standards for the grade in which the student is enrolled. Through the IEP process, parents should be informed of the potential consequences, if any, for their child if he or she participates in a regular assessment with particular accommodations, an alternate assessment based on grade-level achievement standards, or an alternate assessment based on alternate achievement standards. (For example, a parent should be informed if a State will not allow a student to graduate with a regular diploma if he or she takes an alternate assessment based on alternate achievement standards.)

Out-of-Level Assessments

In order to improve instruction and achievement for all students with disabilities, the Department expects States to assess as many students as possible with academic assessments aligned to regular achievement standards. To achieve that goal and reduce use of out-of-level assessments, States should work to implement fully the IDEA Amendments of 1997, provide students access to the general curriculum, develop universally designed assessments that measure whether students with disabilities are meeting the State's challenging academic standards, and ensure that both special and regular education teachers set high expectations for students with disabilities and understand the State's academic content standards. The alternate achievement standards associated with an out-of-level assessment used for calculating AYP must meet the requirements of § 200.1(d) and students taking such assessments must be included in AYP calculations. The achievement standards associated with out-of-level assessments may meet the alternate achievement standards under § 200.1(d), only if they are aligned with the State's academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible. The results from those tests must be included within the 1.0 percent cap for the purposes of calculating AYP, because the achievement standards associated with the content and skills measured by out-of-level assessments are clearly different from the achievement standards in the target grade.

Previous guidance from the Department's Office of Special Education Programs indicated that out-of-level assessments were not alternate assessments. This new guidance, however, recognizes that out-of-level assessments that are administered to students with the most significant cognitive disabilities and that meet the requirements of § 200.1(d) may be considered to be alternate assessments aligned with alternate achievement standards for the purposes of calculating AYP.

1.0 Percent Cap

Alternate achievement standards are appropriate only for students with the most significant cognitive disabilities. The intent of the March 20, 2003, NPRM was not to create a separate category of disability and these regulations do not do so; rather, the intent was to provide for a narrow population of children with disabilities whose proficient and advanced scores based on alternate achievement standards may be included in AYP calculations. Although some commenters argued that no limit should be imposed on the use of scores based on alternate achievement standards in calculating AYP, the Secretary has determined that a cap is warranted both to protect the interests of individual students (by providing an incentive for schools to provide maximum learning opportunities to each student) and to protect the meaningful interpretation and use of State assessment results for determining school, district, and State AYP. This will ensure that States, LEAs, and schools are held accountable for the academic progress of these students and that students with the most significant cognitive disabilities are assigned to a curriculum that is appropriately challenging.

The Secretary welcomes comments and data from States and others about how the regulations are working over time and may consider revising them in the future should the comments indicate a need to do so. In addition, the Department intends to issue a report on the implementation of this regulation after two years of implementation. As data and research on assessing students with disabilities improve, the Department may decide to issue regulations or guidance on other related issues in the future.

Significant Changes From the March 20, 2003, NPRM

Section 200.1 of NPRM proposed defining ''students with the most significant cognitive disabilities'' as students with disabilities under the IDEA whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean. The regulations remove this definition, thereby giving States greater flexibility in applying the provisions for including a limited number of proficient and advanced scores based on alternate achievement standards in calculating AYP.

At the same time, as described in the discussion of comments related to § 200.6, the regulations require States to implement a number of important safeguards to ensure that this flexibility will be used in an appropriate manner.

Section 200.6 of the NPRM proposed allowing States to measure the achievement of students with the most significant cognitive disabilities against alternate achievement standards. In doing so, it proposed requiring States to establish guidelines ensuring that only students with the most significant cognitive disabilities are tested against alternate standards including establishing clear policies for determining when alternate achievement standards may be used. The regulations retain these provisions while clarifying that a State is not required to use alternate achievement standards. If it does, the regulations establish these additional conditions associated with their use: The State must ensure that parents are informed their children will be assessed based on alternate achievement standards, and the State must report on the number and percentage of students with disabilities taking regular assessments (with or without accommodations), alternate assessments based on grade-level

achievement standards, and alternate assessments based on alternate achievement standards. These regulations also require the State to promote the use of appropriate accommodations, provide appropriate guidance to IEP teams, and provide training for teachers and other staff in the administration of assessments to children with the most significant cognitive disabilities. These requirements will encourage States to decrease or eliminate out-of-level testing and other changes in the test that invalidate test results.

Whereas the NPRM proposed requiring reporting on the number and percentage of students with disabilities taking various types of assessments at the school and district levels, these regulations only require reports about the types of assessments used for students with disabilities at the State level. States also must document that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum and participating in assessments aligned with content standards. The Department's Office of Special Education Programs, in its regular monitoring, may examine this documentation and the Office of Elementary and Secondary Education may review data during its peer review process for standards and assessments.

In addition, States using alternate achievement standards must promote the use of appropriate accommodations in order to increase the numbers of students with disabilities who can be tested against grade-level academic achievement standards. These regulations promote the use of appropriate testing practices through the dissemination of information about accommodations for regular assessments and ensure that relevant staff know how to administer assessments to students with disabilities.

Section 200.13 of the NPRM proposed providing that the Secretary could permit a State—and a State could permit an LEA—to exceed the 1.0 percent cap on the number of proficient and advanced scores based on alternative achievement standards that can be included in AYP calculations if the State or LEA, as applicable, establishes that the incidence of students with the most significant cognitive disabilities exceeds the limit and if the agency documents circumstances that explain the higher percentage. These regulations retain these provisions but add further requirements to ensure (1) that students who should be assessed against grade-level standards with appropriate accommodations are not being assessed against alternate achievement standards, and (2) that the alternate achievement standards embody challenging academic expectations appropriate for those students who are assessed against them.

Section 200.13(c)(3) of the NPRM proposed requiring a State, in calculating AYP for the State and each LEA, to apply grade-level academic content and achievement standards to assessment results of any students taking alternate assessments that exceeded the percentage limitations. To make the intent of this provision clearer, we are revising § 200.13(c)(4) of these regulations. First, § 200.13(c)(4)(i) clarifies that a State must include the scores of all students with the most significant cognitive disabilities who have been in the LEA or State for a full academic year in calculating AYP. It may not exclude the scores of students who exceed the percentage limitations in § 200.13(c)(1) through (3). Second, § 200.13(c)(4)(ii) requires the State to count as non-proficient, the scores of any such students who exceed the percentage limitations in calculating AYP. In other words, the State must count the scores of these students as not proficient, even if some or all of the students achieved proficiency on the alternate achievement standards. Non-proficient scores are any scores below proficient, as determined by the State accountability plan.

Because the scores of all students must be included, if an LEA or State educational agency (SEA) exceeds their cap, § 200.13(c)(4)(iii) requires the State to determine which proficient scores are counted as non-proficient in the LEAs and schools responsible for students who took alternate assessments aligned to alternate achievement standards. The State has flexibility in determining how to do this.

Section 200.13(c)(4)(iv) through (v) has been added. Section 200.13(c)(4)(iv) clarifies that, in calculating AYP, a State must be consistent in its use of the scores of students with the most significant cognitive disabilities. For example, if there are such students in an LEA who score at the proficient level on the State's alternate assessment but who exceed the 1.0 percent cap, and the State has not granted the LEA an exception, the State may not count those students as proficient in determining AYP at the school, LEA, or State level. Moreover, the State must also count their scores as not proficient in the other subgroups to which they belong. Section 200.13(c)(4)(v), however, emphasizes that the State must ensure that parents are informed of the actual achievement level that a student with the most significant cognitive disabilities attains, even if that student's score is determined to be in the group above the 1.0 percent cap and counted as non-proficient for purposes of calculating AYP.

Multiple Test Administration

The March 20, 2003, NPRM also requested additional comments on § 200.20(c)(3) of the title I regulations published in the **Federal Register** on December 2, 2002. Section 200.20(c)(3) provides that, if a student takes a State assessment for a particular subject or grade level more than once, the State must use the student's results from the first administration to determine AYP. We are not changing § 200.20(c)(3). Through the approval of State accountability systems this year, we have been able to work with States to clarify the intent of these regulations and to implement these requirements in a manner consistent with their test administration policies. We believe these regulations offer more flexibility than commenters understood at the time of the March 20, 2003, NPRM, and that it is not necessary to change § 200.20(c)(3).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, approximately 100 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these regulations.

Executive Order 12866

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

The potential costs associated with these regulations are those we have determined to be necessary for administering the requirements of the statute effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, we have determined that the benefits of the regulations justify the costs.

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

Regulatory Flexibility Act

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

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

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid Office of Management and Budget (OMB) control number.

Section 200.6 of the proposed regulation contained an information collection requirement. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education submitted a copy of this section to the Office of Management and Budget (OMB) for its review as part of the paperwork collection titled ''State educational agency, local educational agency, and school data collection and reporting under ESEA, Title I, Part A''.

These regulations remove the requirement that LEAS and schools report data and replace them with a requirement that States report data as part of their report to the Secretary required under section 1111(h)(4) of title I. The Department is currently working on a separate paperwork package (1820–0624), covering the 2002–2003 school year, which includes the requirement in these regulations that States report data on the number of students with disabilities taking regular and alternate assessments. This data collection will not require States to report data on the percentage of students with disabilities taking regular and alternate assessments for the 2002–2003 school year. However, the Department can calculate the percentages based on the data that is included in 1820–0624. States will report on the percent of students with disabilities taking regular and alternate assessments will take place for school year 2003–2004. It will be included as part of an existing paperwork package submitted at that time.

Executive Order 12372

These regulations are not subject to the requirements of 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, Indian education, Institutions of higher education, Local educational agencies, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies.

Dated: November 26, 2003.

Rod Paige,

Secretary of Education.

■ 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. In § 200.1, revise paragraph (a)(1), redesignate paragraphs (d) and (e) as (e) and (f), and add new paragraph (d) to read as follows:

§ 200.1 State responsibilities for developing challenging academic standards.

(a) * * *

(1) Be the same academic standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part, except as provided in paragraph (d) of this section;

* * * * *

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's academic content standards;

(2) Promote access to the general curriculum; and

(3) Reflect professional judgment of the highest achievement standards possible.

* * * * *

■ 3. In § 200.6, revise paragraph (a)(2)(ii) and add new paragraph (a)(2)(iii) to read as follows:

§ 200.6 Inclusion of all students.

* * * * *

(a) * * *

(2) * * *

(ii)(A) Alternate assessments must yield results for the grade in which the student is enrolled in at least reading/language arts, mathematics, and, beginning in the 2007–2008 school year, science, except as provided in the following paragraph.

(B) For students with the most significant cognitive disabilities, alternate assessments may yield results that measure the achievement of those students relative to the alternate academic achievement standards the State has defined under § 200.1(d).

(iii) If a State permits the use of alternate assessments that yield results based on alternate academic achievement standards, the State must—

(A)(*1*) Establish and ensure implementation of clear and appropriate guidelines for Individualized Educational Program (IEP) teams to apply in determining when a child's significant cognitive disability justifies assessment based on alternate academic achievement standards; and

(*2*) Ensure that parents of those students are informed that their child's achievement will be based on alternate achievement standards; and

(B) Report separately, under section 1111(h)(4) of the ESEA, the number and percentage of students with disabilities taking—

(*1*) Alternate assessments based on the alternate academic achievement standards defined under § 200.1(d);

(*2*) Alternate assessments based on the academic achievement standards defined under § 200.1(c); and

(*3*) Regular assessments, including those administered with appropriate accommodations.

(C) Document that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum and in assessments aligned with that curriculum;

(D) Develop, disseminate information on, and promote use of appropriate accommodations to increase the number of students with the most significant cognitive disabilities who are tested against grade-level academic achievement standards; and

(E) Ensure that regular and special education teachers and other appropriate staff know how to administer assessments, including making appropriate use of accommodations, for students with the most significant cognitive disabilities.

* * * * *

■ 4. In § 200.13, revise the introductory text of paragraph (b) and paragraph (b)(1), redesignate paragraph (c) as paragraph (d), and add new paragraph (c) to read as follows:

200.13 Adequate yearly progress in general.

* * * * *

(b) A State must define adequate yearly progress, in accordance with §§ 200.14 through 200.20, in a manner that—

(1) Applies the same high standards of academic achievement to all public school students in the State, except as provided in paragraph (c) of this section;

* * * * *

(c)(1) In calculating adequate yearly progress for schools, LEAs, and the State, a State—

(i) Must, consistent with § 200.7(a), include the scores of all students with disabilities, even those with the most significant cognitive disabilities; but

(ii) May include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics.

(2) An SEA may request from the Secretary an exception permitting it to exceed the 1.0 percent cap. The Secretary will consider granting, for a specified period of time, an exception to a State if the following conditions are met:

(i) The SEA documents that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the grades assessed.

(ii) The SEA explains why the incidence of such students exceeds 1.0 percent of all students in the combined grades assessed, such as school, community, or health programs in the State that have drawn large numbers of families of students with the most significant cognitive disabilities, or such a small overall student population that it would take only a very few students with such disabilities to exceed the 1.0 percent cap.

(iii) The SEA documents that it is fully and effectively addressing the requirements of § 200.6(a)(2)(iii).

(3)(i) A State may grant an exception to an LEA permitting it to exceed the 1.0 percent cap in paragraph (c)(1) of this section only if the State evaluates the LEA's request using conditions consistent with paragraph (c)(2) of this section.

(ii) The State must review regularly whether an LEA's exception to the 1.0 percent cap is still warranted.

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

(i) Consistent with § 200.7(a), include all scores of students with the most significant cognitive disabilities.

(ii) Count as non-proficient the proficient and advanced scores above the caps in paragraph (c)(1) through (3) of this section.

(iii) Determine which proficient scores to count as non-proficient in schools and LEAs responsible for students who take an alternate assessment based on alternate achievement standards.

(iv) Include those non-proficient scores in each applicable subgroup at the school, LEA and State level.

(v) Ensure that parents are informed of the actual academic achievement levels of their students with the most significant cognitive disabilities.

Appendix—Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Section 200.1 State Responsibilities for Developing Challenging Academic Standards

Comment: Several commenters noted that proposed language requiring ''a documented and validated standards-setting process [to] define achievement standards that * * * reflect professional judgment of the highest learning standards possible for those students'' seems to be more rigorous than the process required for general assessments.

Discussion: Title I, as amended by the NCLB Act, requires that, for the general assessment, States establish challenging academic content standards that contain rigorous content and encourage the teaching of advanced skills, and challenging student achievement standards that determine how well students are mastering this content. States must create the achievement standards with all students in mind, so that they are realistic for a wide variety of individuals. The standards should represent a consensus among experienced teachers, parents, and other appropriate individuals regarding the performance expected after appropriate student effort in a challenging instructional program. In addition, the law calls for all schools and districts to attain the long-range goal of all students becoming proficient by 2013–14, thereby eliminating existing achievement gaps. For a school, the challenge is to enable all students to meet this achievement standard.

Students with the most significant cognitive disabilities who participate in an alternate assessment are entitled to the same deliberate approach to defining achievement standards that represent a rigorous but realistic challenge for this heterogeneous group of students and a challenging long-range goal for their school and district. The use of ''highest learning standards possible'' is intended to reflect that the alternate achievement standards should be no less challenging for students with the most significant cognitive disabilities than the standards set for all other students.

Change: None, except that we have deleted the phrase, ''for those students,'' as it was redundant.

Comment: Some commenters expressed confusion regarding the need for achievement standards that are aligned with the State's academic content standards. They questioned what it means for alternate achievement standards to be aligned with the content standards when children with the most significant cognitive disabilities are not working on the same content as their peers.

Discussion: Alternate achievement standards must be aligned with the State's academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest learning standards possible for the group of students with the most significant cognitive disabilities. In practice, alignment with the State's academic content standards means that the State has defined clearly the connection between the instructional content appropriate for non-disabled students and the related knowledge and skills that may serve as the basis for a definition of proficient achievement for students with the most significant cognitive disabilities. One State,

for example, has developed a curriculum framework for students with the most significant cognitive disabilities that moves from grade-level expectations to progressively less complex versions of the standard. This continuum of ''entry points'' provides a range of options at which a student with disabilities can access the content at an appropriately challenging level. It lists, for example, the following skills for grade 3 through 4 content standards under Mathematics Operations: ''Select, use and explain various meanings and models of multiplication and the division of whole numbers. Understand and use the inverse relationship between the two operations.'' The State's standards document also identifies the essence of the standard in several brief statements, *e.g.*, understand the meaning of multiplication and division; and represent multiplication and division problems concretely. The State then provides several illustrations of the knowledge and skills appropriate for use in the alternate assessment. These range from less complex, ''Illustrate the concept of multiplication using groups of objects,'' to more complex knowledge that approaches grade-level expectations such as ''Identify the commutative property of addition and multiplication using number sentences ($3 \times 5 = 5 \times 3$).'' *See http://www.doe.mass.edu/mcas/alt/rg/math.doc.*

The alternate achievement standards may include prerequisite or enabling skills that are part of a continuum of skills that culminate in grade-level proficiency. The use of alternate achievement standards, however, must not result in inappropriate placements or assignment of students to a curriculum that does not include academic content.

Change: None.

Comment: One commenter recommended that § 200.1 be revised to require States to develop alternate achievement standards rather than making this authority permissive

Discussion: Section 1111(b)(1) of title I requires a State to adopt challenging student achievement standards and to apply the same standards ''to all schools and children in the State.'' The Secretary acknowledges, however, that, while *all* children can learn challenging content, evaluating that learning through alternate achievement standards is appropriate for a small, limited percentage of students who are within one or more of the existing categories of disability, and whose cognitive impairments may prevent them from attaining grade-level achievement standards. Therefore, these regulations permit States to measure the achievement of a limited percentage of students—those with the most significant cognitive disabilities—against challenging but alternate achievement standards. Based on the statutory language, the Secretary does not have the authority to *require* a State to adopt alternate achievement standards. The Secretary's interest, however, is in ensuring that if a State adopts such standards, they are rigorous and used only for those students for whom they are appropriate.

Change: None.

Comment: Two commenters indicated a desire for flexibility that would permit individual students to show progress based on IEP goals rather than performance against an additional set of standards.

Discussion: IEP goals address a broad range of individualized instructional needs as well as behavioral and developmental goals. Title I, as amended by the NCLB Act requires that schools be accountable for student achievement only in the content areas of reading/language arts and mathematics and requires assessment of all students in these essential skill areas. To the maximum extent possible, the IEP should provide for student access to, and participation and progress in, the general curriculum. Students with the most significant cognitive disabilities can address many of their IEP goals using materials and activities that are related to the State's reading/language arts and mathematics standards. To ensure that schools are accountable for this group of students, they must be included in the assessment and accountability systems. In order to make confident accountability determinations for schools based on student achievement, including the achievement of students with the most significant cognitive disabilities, alternate achievement standards must ensure consistency in the judgments made about the schools rather than relying on measures that do not permit consistent judgments using comparable measures of achievement across all students. In addition to reporting student successes relative to the achievement standard, well-designed assessments will also show student progress over time.

Change: None.

Comment: Many commenters objected to proposed § 200.1(d)(2) that would define ''students with the most significant cognitive disabilities'' as those ''who have been identified as students with disabilities under IDEA and whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean.'' Some commenters objected to the definition's implicit reliance on IQ test scores. Others expressed concern that the definition is inconsistent with the 1.0 percent cap.

Discussion: The Secretary agrees with the commenters on both issues. He is concerned that the proposed definition would have placed unwarranted reliance on an IQ test to determine three standard deviations below the mean. Moreover, he acknowledges that it was inconsistent to set a 1.0 percent cap while defining students with the most significant cognitive disabilities as those three standards deviations below the mean. A student may be appropriately assessed on the basis of alternate achievement standards even if the child's intellectual functioning and adaptive behavior are fewer than three standard deviations from the mean. The definition in the NPRM thus restricted the use of alternate achievement standards to a more narrowly defined group of students than many educators feel appropriate based on their professional experience. As a result, the Secretary is removing the proposed definition. Removing the definition while maintaining the 1.0 percent cap gives States and LEAs more latitude in identifying the population that should appropriately be evaluated against alternate achievement standards, while ensuring that alternate achievement standards are not used as a loophole to evade accountability for unwarrantedly large numbers of students with disabilities. At the same time, the Secretary believes there are other safeguards that States adopting alternate achievement standards should establish to ensure that the flexibility to use alternate achievement standards for a small population of students with disabilities is exercised appropriately and is not abused.

Change: The definition in proposed § 200.1(d)(2) is removed from the final regulations. New provisions have been added in § 200.6(a)(2)(iii) (C), (D), and (E) requiring States that are using alternate achievement standards to: (1) Document that students with the most significant cognitive disabilities are included in the general curriculum to the extent possible and are participating in assessments aligned with that curriculum; (2) develop, disseminate information on, and promote the use of appropriate accommodations; (3) ensure that regular and special education teachers and other appropriate staff know how to administer assessments to students with the most significant cognitive disabilities; and (4) ensure that parents are informed that their child is going to be measured against alternate achievement standards.

Comment: Several commenters indicated concern that, because the term ''students with the most significant cognitive disabilities'' introduces new terminology, it suggests a new category of disability.

Discussion: The intent of the March 20, 2003, NPRM was not to create a new category of disability. Rather, the Secretary intended the term ''students with the most significant cognitive disabilities'' to include that small number of students, who are (1) within one or more of the 13 existing categories of disability (*e.g.* autism, multiple disabilities, traumatic brain injury, *etc.*), and (2) whose cognitive impairments may prevent them from attaining grade-level achievement standards, even with the very best instruction.

Change: None.

Comment: Several commenters expressed concern that the 1.0 percent cap would unnecessarily limit access of some students with disabilities to alternate assessments.

Discussion: The intent of the NPRM was not to restrict students with disabilities from taking alternate assessments when that is appropriate. The NPRM and this regulation only address the inclusion of scores for AYP calculations. The intent was to provide for a narrow population of children with disabilities whose achievement on alternate assessments is more appropriately measured by alternate achievement standards. The regulations permit the proficient and advanced scores of those students (limited to 1.0 percent of the total population of students in the grades assessed for States and LEAs) to be included in the calculation of AYP, even though their proficient and advanced scores are based on alternate standards. The Secretary developed this policy to ensure that States, LEAs, and schools are held accountable for the progress of *all* students and that students with disabilities—particularly students with the most

significant cognitive disabilities—are not inappropriately assigned to a curriculum that is not appropriately challenging in order to avoid accountability consequences.

Change: None.

Comment: Some commenters indicated that the proposed regulations would require new recordkeeping for students with the most significant cognitive disabilities.

Discussion: By eliminating the proposed definition of students with the most significant cognitive disabilities, these regulations should alleviate the concerns of commenters who were worried about the need for additional documentation of individual students' disabling characteristics. The regulations, however, will require States to report separately on the number and percentage of students taking an alternate assessment based on either grade-level achievement standards, or on alternate achievement standards as well as taking regular assessments (including with accommodations). States are already collecting and reporting on the numbers of students with disabilities taking regular assessments and alternate assessments as a part of performance reporting under the IDEA as well as reporting the results under title I and IDEA. Requiring States to report separately on the number of students taking alternate assessments measured against alternate and regular achievement standards is necessary to ensure that alternate achievement standards are being used consistent with the limitation imposed by these regulations.

Change: The regulations have been amended to require that States report on the number (in addition to percentage) of students with disabilities taking alternate assessments measured against regular and alternate achievement standards, and the number and percentage of students with disabilities taking regular assessments.

Comment: One commenter suggested that some students should be assessed using an alternate assessment based on the same standards as all other students.

Discussion: An important purpose for alternate assessments in State assessment systems is to increase the capacity of large-scale accountability systems to create information about how a school, district, or State is doing in terms of overall student performance. As States have gained experience in developing assessment strategies for students with disabilities, it has become apparent that there can be several kinds of alternate assessments. These may include different strategies for gathering information about what students know and can do; for example, (1) teacher observation of the student, (2) collecting and scoring samples of student work produced during regular classroom instruction that demonstrates mastery of specific instructional strategies, in place of performance on a computer scored multiple choice test covering the same content and skills, or (3) student work produced in an ''on-demand'' setting such as completion of an assigned task on test day. Such variations are permissible under title I as long as the State can to document that the results provide evidence of student knowledge and skills that is comparable to the evidence provided by results from the regular standards-based State assessment.

For a very small group of students with the most significant cognitive disabilities, alternate achievement standards are appropriate. These alternate achievement standards must reflect a set of expectations for students with the most significant cognitive disabilities consistent with the State content standards in reading/language arts and mathematics.

Change: None.

Section 200.6 Inclusion of All Students

Comment: Several commenters suggested that the proposed regulation conflicted with the role of the IEP team in determining how students with disabilities are assessed. Specifically, commenters indicated that it is the responsibility of the IEP team to decide which assessment students with disabilities take and whether students with disabilities take an assessment based on alternate achievement standards. Another commenter recommended that the IEP team develop the alternate assessments.

Discussion: Under the IDEA, a student's IEP team is responsible for determining how that student participates in a State assessment of student achievement. The IEP team is charged with determining whether accommodations for the assessments required under title I are needed by each individual student to enable the student to participate in the assessment. If the IEP team determines that a student will not participate in the regular assessment (or part thereof), the team is required to identify why the assessment is not appropriate for the child and how the child will be assessed, such as through an alternate assessment. IEP teams, however, do not have complete discretion regarding the assessment of students with disabilities. The team decides how a student participates, not whether the student participates in the assessment at all.

For State assessment programs under title I, the State is responsible for establishing the State academic content and achievement standards against which all children in the State will be assessed, including all students with disabilities. In addition, under title I the State is responsible for implementing a system of high-quality, yearly student academic assessments that are aligned with the State's academic content standards, are valid and reliable for the purposes for which they are used, and are consistent with relevant, nationally recognized professional and technical standards. Under the IDEA, the State also is responsible for developing guidelines for the participation of students with disabilities in alternate assessments for those students who cannot participate in the regular State assessments. Thus, for assessments under title I, the IEP team operates in an environment in which the academic content and achievement standards and assessments are set by the State, the technical qualities of the State assessments are well established, (including whether accommodations are valid and do not invalidate test results on all or part of the assessment), and the State has guidelines regarding eligibility for alternate assessments.

Change: None.

Comment: One commenter suggested that the alternate assessment requirement be delayed until 2007–08 to give States time to develop alternate assessments.

Discussion: States have received ample notification of this requirement and should now have alternate assessments in place. Under IDEA, States were required to implement an alternate assessment as of July 1, 2000. The Office of Elementary and Secondary Education notified States in spring 2000 that title I requires that all students with disabilities be included in State assessments, either with accommodations or in an alternate assessment as determined by their IEP team. Further, whatever assessment approach is taken, the scores of students with disabilities must be included in the assessment system for purposes of public reporting and school and district accountability.

Change: None.

Comment: One commenter proposed that alternate assessments include functional life skills in addition to academic content.

Discussion: The purpose of alternate assessments under title I is to measure the progress of schools in increasing the percentage of students who reach or exceed the proficient level on State academic performance standards. While States and LEAs have the authority to develop assessments that measure the acquisition of functional life skills, such assessments are not required by title I and are beyond the scope of these regulations.

Change: None.

Comment: Several commenters requested that the regulation permit the use of out-of-level assessments, although they disagreed about whether out-of-level assessments should be considered as an assessment based on alternate achievement standards or as another form of assessment for which additional flexibility should be permitted.

Discussion: The NCLB Act is based on the premise that holding States, LEAs and schools to high expectations for the learning of all students can significantly improve the educational attainment of all students. Although these regulations recognize that there is a small population of students with disabilities who may not achieve grade-level proficiency, we expect, and State experience indicates, that other students with disabilities can achieve when they are held to high expectations, provided full access to the general curriculum, and taught by teachers highly qualified in the core academic subjects that they teach. Under these regulations, out-of-level assessments are considered to be alternate assessments based on alternate achievement standards to which the cap in § 200.13(c) applies if they are based on alternate achievement standards that meet the requirements of § 200.1(d). If the out-of-level assessment does not meet those requirements, it is not an alternate assessment measuring alternate achievement standards.

Change: None.

Section 200.13 Adequate Yearly Progress in General

Comment: Numerous comments were received on the proposed cap on the

percentage of proficient assessment scores based on alternate achievement standards that may be included in the calculation of AYP. Some commenters said the cap was too high; others said the cap was too low; some said the 1.0 percent cap was appropriate; and still others said there should be no cap at all.

Discussion: The 1.0 percent cap does not restrict the number of students who may participate in an alternate assessment. It does limit the number of proficient and advanced scores based on alternate achievement standards that may be used in the calculation of AYP. A limit is required in order to ensure a thoughtful application of alternate achievement standards and to protect IEP teams from pressure to assign low-performing students to assessments and curricula that are inappropriately restricted in scope, thus limiting educational opportunity for these students.

These regulations maintain the 1.0 percent cap that was included in the proposed regulation. Specifically, § 200.13(c)(1) permits States to use results from assessments aligned to alternate achievement standards for students with the most significant cognitive disabilities in calculating AYP. A State may include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed. Nationally, 1.0 percent of students in the grades assessed represent approximately 9 percent of students with disabilities, but the actual percent varies across States. Section 200.13(c)(2) permits States to request a slightly higher cap if the State is able to meet the criteria and documentation requirements set forth in this section.

In the discussion of the March 20, 2003, proposed rule, we noted that the 1.0 percent cap was based on current prevalence rates of students with the most significant cognitive disabilities, allowing for reasonable local variation in prevalence. In addition, we cited converging scientific evidence from multiple sources that indicated that the prevalence rates of students with the most significant cognitive disabilities were somewhat less than 1.0 percent. We also noted that these numbers are generally seen as reflecting national rates, and, as a number of commenters on the August 6, 2002, NPRM pointed out, may not account for more localized differences, caused by a number of factors. Factors beyond the control of a school, school district, or even a State may cause the number of students with the most significant cognitive disabilities to exceed a national average percentage of the total student population at the grades assessed. For example, in small schools, a single student may be more than that limit would allow. Moreover, certain schools, districts, or States may have disproportionate numbers of students with the most significant cognitive disabilities because of proximity to special facilities or services.

State data reported to the Department under IDEA also support the 1.0 percent cap. Of the 38 States for which sufficient data are available, 21 States reported 5.0 percent or less of students with disabilities who participated in the State assessment program took an alternate assessment. (Five percent of students with disabilities is roughly equivalent to 0.5 percent of all students.) In 14 other States, between 5.0 and 10.0 percent of students with disabilities participated in State assessment programs through an alternate assessment (Analysis of 2000–2001 Biennial Performance Reports, National Center for Educational Outcomes). In these States, students with disabilities comprise approximately 8.0 to 12.0 percent of the total student population (IDEA Annual Report to Congress, 2001).

The 1.0 percent cap is the limit on the number of proficient or advanced scores based on alternate achievement standards that may count as proficient or advanced for accountability purposes at the LEA and SEA levels. Consequently, in cases where the number of students taking an alternate assessment based on alternate achievement standards exceeds 1.0 percent, it may not be necessary to apply for a higher cap. For example, if 1.0 percent equals 200 students and 400 students are assessed with an alternate assessment based on alternate achievement standards, but only half of the students assessed are ''proficient,'' the LEA would not exceed the cap.

In summary, the Secretary believes that the 1.0 percent cap is consistent with disability incidence rates and the States' use of alternate assessments. It provides sufficient flexibility for States to measure the achievement of students with the most significant cognitive disabilities for accountability purposes, while meeting the spirit and intent of the law that all students be held to high standards.

Change: None.

Comment: None.

Discussion: If a State chooses not to use alternate achievement standards, it must still incorporate the assessment scores of all students with disabilities in AYP determinations, including those with the most significant cognitive disabilities.

Change: Section 200.13(c)(1)(i) has been added to clarify this requirement.

Comment: A number of commenters raised questions about how the 1.0 percent cap would work in practice and how it would be applied at the LEA and State levels. In particular, there were questions about what effect this limitation would have on schools and their AYP calculations.

Discussion: The cap applies at the State and LEA levels, but not at individual schools, and is based on the number of students enrolled in the grade(s) tested. Some districts may deliver special services for students with the most significant cognitive disabilities in one or a few schools. Additionally, the enrollment patterns of students across districts may not result in an even distribution of students with the most significant cognitive disabilities among schools, even if there are not special centers for these students. In these cases, a limitation on the number of students who may score proficient on alternate assessments based on alternate achievement standards may prove unworkable at a school level and not be in the best interests of those students.

The actual enrollment of students who are appropriately assessed with the alternate assessment based on alternate achievement standards may not be evenly distributed across a district. One school may have 2.0 percent of its students score proficient or better on an alternate assessment based on alternate achievement standards, while another school may not have even a single student assessed using alternate achievement standards. The flexibility offered by the Secretary in these regulations is meant to accommodate such distributions. Working through the IEP development process, the district should determine how best to ensure that students with the most significant cognitive disabilities participate in the general curriculum, are assessed appropriately, and, quite importantly, are provided with an education in the least restrictive environment.

All scores based on alternate achievement standards must be included in school, LEA, and State AYP calculations. An individual student's results from such assessments are counted in all appropriate subgroups. Consequently, in those circumstances when a district has more than 1.0 percent of its students score proficient or advanced on an alternate assessment based on alternate achievement standards, the State must determine which proficient scores are counted as non-proficient at schools in the district responsible for students who took an alternate assessment based on alternate achievement standards. This ensures that schools do not have an incentive to inappropriately increase the number of students assessed with an assessment based on alternate achievement standards. To implement this process, each student's score used for calculating AYP must remain the same at each level of the educational system—school, district, and State, and for each group and subgroup of which the student is a member for which AYP is calculated. However, regardless of how an individual student's score is treated in AYP calculations, the parent must be informed of the actual academic achievement level earned by the student.

The LEA is responsible for managing this process at the local level in three ways. First, the LEA must provide information to school personnel and IEP teams about the state assessment, the use of accommodations, and assessment against alternate achievement standards. State guidelines for use of alternate achievement standards should be communicated to local schools early in the school year to ensure consistency between instruction and assessment and to prevent confusion at the time of test administration. A reasonable expectation is that, in most cases, about 9 percent of the students receiving special education services would be tested against alternate achievement standards, unless a school provides special services to students with the most significant disabilities or is particularly small. An LEA may choose to provide individual schools with preliminary estimates of the number of

students to be tested against alternate achievement standards based on the characteristics of the school's student population and existing State guidelines for participation. Second, the LEA should ensure appropriate staff receive training to support sound IEP decisions about which students participate in an alternate assessment based on alternate achievement standards. These decisions should always be made on a case-by-case basis and should support access to the most challenging curriculum possible for the individual student. Finally, the LEA should monitor implementation of assessments based on alternate achievement standards in schools throughout the district to ensure that alternate achievement standards are being used in a manner consistent with the best instructional practices known for students with the most significant cognitive disabilities.

These regulations provide new flexibility to LEAs and schools and will increase the number of schools and LEAs that can make AYP. If an LEA manages the process well, AYP determinations should withstand appeal under the State's accountability system. If an LEA does not manage the cap well, however, and permits schools to assess an inappropriately large number of students with an alternate assessment aligned to alternate achievement standards, the LEA may significantly exceed the cap and, thus, a large number of non-proficient scores would have to be allocated among the schools that administered the alternate assessment aligned with alternate achievement standards. This would potentially create negative consequences for schools that administer the alternate assessment. States should ensure that these regulations are implemented appropriately throughout the State to ensure schools benefit from this new flexibility.

The following example illustrates how the policy works in practice. As determined by its cap, a district may count for AYP purposes no more than 100 students scoring at proficient or advanced on an alternate assessment based on alternate achievement scores. If this district has 150 students scoring at proficient or advanced on an alternate assessment based on alternate achievement scores, and has not received an exception from the State to exceed the 1.0 percent cap, it must (1) count the excess 50 scores as non-proficient, and (2) determine which proficient and advanced scores will be considered not proficient because they exceed the district's 1.0 percent cap when determining AYP for schools responsible for students who took the alternate assessment aligned with alternate achievement standards. To illustrate further, in this particular district there are four schools responsible for students who take alternate assessments aligned to alternate achievement standards.

- In school A, there are 50 proficient scores
- In school B, there are 50 proficient scores
- In school C, there are 25 proficient scores
- In school D, there are 25 proficient scores

The LEA needs to determine which 50 of the 150 ''proficient'' scores will be counted as ''non-proficient'' at schools A, B, C and/or D. This district would follow the State's procedures for allocating the scores among its schools. One State might identify a particular method that all districts would use. Another State might permit districts to select among several methods approved by the State.

If a State requests an exception to the 1.0 percent cap, the Secretary believes that the State should be able to document that it is fully and effectively implementing the procedural safeguards set out in § 200.6(a)(2)(iii), as a means of showing that it is appropriately including students with disabilities in its assessment system. Because of these safeguards, the Secretary expects that it will be necessary to grant exceptions only for small increments above the 1.0 percent cap.

Change: Section 200.13(c)(2)(iii) has been added, requiring a State requesting an exception to the cap to document that it is fully and effectively addressing the procedural safeguards of § 200.6(a)(2)(iii). Section 200.13(c)(4)(iv) now includes a provision that requires States to apply the academic achievement level (*e.g.*, advanced, proficient, basic) of students with the most significant cognitive disabilities consistently in calculating AYP for the State, LEA, and school. A new § 200.13(c)(4)(i)–(iii) has been added to explain that States must determine which proficient scores that exceed the cap must count as non-proficient in calculating AYP in LEAs and schools responsible for students who take an alternate assessment based on alternate achievement standards.

Comment: Several commenters expressed concern that a school with the capacity to provide effective services for students with the most significant cognitive disabilities may suffer negative consequences as a result of exceeding the 1.0 percent cap.

Discussion: The 1.0 percent cap on proficient and advanced scores based on alternate achievement standards applies specifically at the State and district levels, although scores must be treated the same for AYP purposes at the State, district and school levels. An extraordinarily effective school that draws students from across the district, or from outside the district may exceed the limit so long as the total number of proficient and advanced scores based on alternate achievement standards does not exceed the 1.0 percent cap within the district. The LEA has considerable discretion to accommodate such schools in determining how to meet the 1.0 percent cap at the LEA level. The responsibility for establishing guidelines to inform local practice and for monitoring the use of alternate achievement standards for AYP rests with the State and LEA. This responsibility is consistent with the typical organization of special education programs at the State and district levels.

Change: None.

Comment: None.

Discussion: The Secretary was concerned that these regulations may lead to confusion between the use of scores based on alternate achievement standards in AYP calculations, and reporting results to parents.

Change: The regulation clarifies in § 200.13(c)(4)(v) that regardless of how a score is used for AYP, the actual score of a child must be reported to parents.

General Comments

Comment: One commenter said that the proposed rule should be subject to negotiated rulemaking.

Discussion: The statutory requirements for negotiated rulemaking apply to regulations initially implementing the NCLB Act, not to subsequent regulatory amendments such as those contained in these regulations. The Secretary previously issued regulations for standards and assessments through a negotiated rulemaking process. (*See* 34 CFR part 200).

Change: None.

Comment: Several commenters recommended that the Department closely monitor the cap to ensure it is being used appropriately.

Discussion: The Secretary agrees with the importance of monitoring State and LEA implementation of these requirements as they relate to students with disabilities. The Department's Office of Special Education Programs and the Student Achievement and School Accountability Programs office in the Office of Elementary and Secondary Education will coordinate their efforts in monitoring States for these requirements, and will establish internal mechanisms to share student achievement data and other pertinent information necessary to assess States' progress in this area. In addition, the Secretary believes that it is crucial that SEAs closely monitor how districts are using the 1.0 percent cap both generally and specifically in the case of an LEA that receives an exception to the 1.0 percent cap.

Change: A new provision is added in § 200.13(c)(3)(ii) that requires States to review annually whether an LEA's exception to the 1.0 percent cap is still warranted.

Section 200.20(c)(3)

Comment: Several commenters suggested that States be able to determine which administration of an assessment counts for AYP purposes, and in cases where a particular assessment is given more than once, the best result from students should be used for determining AYP.

Discussion: States have the authority and responsibility to design assessments that measure what students should know and be able to do at a given point in their schooling. States have an expectation, as evident in the assessments, for when students should learn the content standards. Accordingly, for AYP purposes States must count the assessment results that reflect when they expect all students to have learned the content standards. In other words, the ''first administration'' is the first time an assessment is officially administered to measure a student's achievement of the State's content standards in the grade or subject for which the State expects the student to have achieved proficiency of those standards. Scores from this first official administration must be used for calculating AYP. Students who have scored at proficient or higher on assessments taken earlier than the first official administration, however, may ''bank'' those scores, and would not have to retake the test at a later date. Consider the following example: A State administers a third-grade reading test in the

fall and spring, while expecting all students to have learned the material by the spring administration. In this case, the State may use the scores from students who were proficient on the fall administration for calculating AYP and these students would not be required to take the assessment a second time.

Through the accountability review process, we were able to work with States and clarify the intent of the regulation. Consequently we do not believe a change to these regulations is necessary to address the concerns that were submitted earlier this year.

Change: None.

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