DEPARTMENT OF EDUCATION

34 CFR Parts 200 and 300

RIN 1810–AA98

Title I—Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA)—Assistance to States for the Education of Children With Disabilities

AGENCY: Office of Elementary and Secondary Education; Office of Special Education and Rehabilitative Services, U.S. Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing programs administered under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB) (referred to in these proposed regulations as the Title I program) and the regulations governing programs under Part B of the Individuals with Disabilities Education Act (IDEA) (referred to in these proposed regulations as the IDEA program). The proposed regulations would provide States with additional flexibility regarding State, local educational agency (LEA), and school accountability for the achievement of a group of students with disabilities who can make significant progress, but may not reach grade-level achievement standards within the same time frame as other students, even after receiving the best-designed instructional interventions from highly trained teachers.

DATES: We must receive your comments on or before February 28, 2006.

ADDRESSES: Address all comments about these proposed regulations to Jacquelyn C. Jackson, Ed.D., Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C156, FB–6, Washington, DC 20202–6132. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: *http://www.regulations.gov.*

Or you may send your Internet comments to us at the following address: *TitleIrulemaking@ed.gov.* You must include the term ''proposed 2% rule'' in the subject line of your electronic message.

If you want to comment on the information collection requirements, you must send your comments to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of these comments to the Department representative named in this section.

FOR FURTHER INFORMATION CONTACT: Jacquelyn C. Jackson, Ed.D, Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, Telephone: (202) 260–0826 or via Internet at jacqueline.jackson@ed.gov, or you may contact Troy R. Justesen, Ed.D, Deputy Assistant Secretary, Office of Special Education and Rehabilitative Services, Telephone: (202) 245–7468 or via Internet at *troy.justesen@ed.gov.*

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

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

SUPPLEMENTARY INFORMATION:

Invitation to Comment

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

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

During and after the comment period, you may inspect all public comments about these proposed regulations in room 3W100, FB–6, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

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

Background

These proposed regulations would amend regulations in 34 CFR part 200, implementing certain provisions of Title I, Part A of the ESEA, as amended by NCLB, which is designed to help disadvantaged children meet high academic standards. They would also amend regulations in 34 CFR part 300, implementing programs for students with disabilities under Part B of the IDEA.

These proposed regulations provide flexibility for some students with disabilities similar to that afforded by the current Title I regulations in 34 CFR part 200 regarding children with the most significant cognitive disabilities. Those Title I regulations permit a State to develop alternate academic achievement standards for students with the most significant cognitive disabilities and to include those students' proficient and advanced scores on alternate assessments based on alternate achievement standards in measuring adequate yearly progress (AYP), subject to a cap of 1.0 percent of the students assessed at the State and district levels. The purpose of those regulations was to provide flexibility for States and LEAS regarding the assessment of a very small group of students—those students with the most significant cognitive disabilities—to ensure that schools and districts receive credit for the good work they are doing with those students.

In the preamble to the December 9, 2003 notice announcing the regulations adopting the flexibility for students with the most significant cognitive disabilities, the Department indicated that, ''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'' (68 FR 68698). Since that time, information accumulated from the experiences of many States, as well as recent research, indicates that there are other students who, because of their disability, have significant difficulty achieving grade-level proficiency, even with the best instruction. This information and research indicate that there is a group of students with disabilities whose progress in response to high-quality instruction, including special education

and related services designed to address the student's individual needs, is such that the student is not likely to achieve grade-level proficiency within the school year covered by the student's individualized education program (IEP).

The proposed regulations would provide States with additional flexibility in measuring the achievement of this group of students with disabilities who do not meet State guidelines to participate in an alternate assessment based on alternate achievement standards, which is appropriate only for students with the most significant cognitive disabilities. Specifically, the proposed regulations would permit States to develop modified achievement standards (and assessments that measure achievement based on those standards) that are aligned with grade-level content standards, but are modified in such a manner that they reflect reduced breadth or depth of grade-level content. At the same time, the proposed regulations would include several safeguards to ensure that students are not inappropriately assessed based on modified achievement standards, including requirements that each State develop guidelines defining which students with disabilities are eligible to be assessed based on modified achievement standards. Similar to the current regulations, under the proposed regulations, States and LEAs would be permitted to include the proficient and advanced scores from assessments based on modified achievement standards in AYP determinations, subject to a cap at the district and State levels based on the total number of students assessed. As described elsewhere in this notice, the best available research and data indicate that 2.0 percent, or approximately 20 percent of students with disabilities, is a reasonable cap. We are also proposing other changes that would address the implementation of this cap at the State and local levels.

Additionally, to ensure a coordinated administration of the IDEA and Title I programs, § 300.160 of these proposed regulations would make changes to the proposed regulations published in the **Federal Register** on June 21, 2005 (70 FR 35839) to implement the IDEA as reauthorized by the Individuals with Disabilities Education Improvement Act of 2004, Public Law No. 108–446, enacted on December 3, 2004, regarding inclusion of children with disabilities in State and district-wide assessment systems in accordance with section 612(a)(16) of the IDEA. We are proposing regulations that will implement relevant provisions of the recently reauthorized IDEA and will include this new flexibility to assess students with disabilities based on modified achievement standards. This coordination of the regulations for the IDEA and Title I programs will avoid confusion among parents, teachers, and administrators, and reinforce IDEA's and Title I's shared goal of high expectations and accountability for all students. We will issue a final § 300.160 at the same time that we issue the final Title I regulations proposed in this notice.

Significant Proposed Regulations

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

Section 200.1 State Responsibilities for Developing Challenging Academic Standards

Statute: Section 1111(b)(1) of Title I requires each State to adopt challenging academic content standards and student academic achievement standards in mathematics, reading/language arts, and, beginning in the 2005–2006 school year, science. These standards must be the same for all public elementary and secondary schools and all public school students in the State. The State's academic content standards must specify what all students are expected to know and be able to do, contain coherent and rigorous content, and encourage the teaching of advanced skills. The State's student academic achievement standards must be aligned with the State's content standards and must describe at least three levels of achievement: advanced, proficient, and basic.

Current regulations: Section 200.1 of the Title I regulations implements the statutory requirements in section 1111(b)(1), regarding the development of standards generally. A State must apply these standards to all public elementary and secondary schools and public school students in the State. Section 200.1 also recognizes that there is a small percentage of students with disabilities—those with the most significant cognitive disabilities—who will likely never reach grade-level achievement standards, even with the very best instruction. Thus, § 200.1(d) permits a State to develop alternate achievement standards for students with the most significant cognitive disabilities, so long as those standards 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 for those students. An alternate achievement standard is an expectation of performance that differs in complexity from a grade-level achievement standard.

Proposed Regulations: Similar to the flexibility afforded to States and LEAs for students with the most significant cognitive disabilities, proposed § 200.1(e) would allow a State to use a documented and validated standards-setting process to define modified achievement standards for some students with disabilities. Proposed § 200.1(e)(1)(i) through (iii) would require that modified achievement standards provide access to grade-level curriculum; be aligned with the State's academic content standards for the grade in which the student is enrolled, although the modified achievement standards may reflect reduced breadth or depth of grade-level content; and not preclude a student from earning a regular high-school diploma.

Proposed § 200.1(e)(2) would require a State to adopt specific criteria for IEP teams to use in determining whether a student is eligible to be assessed based on modified achievement standards. Proposed § 200.1(e)(2)(i) through (iii) provides that, in order for an IEP team to determine that a student is eligible to be assessed based on modified achievement standards, the IEP team must conclude that: The student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by objective evidence; the student's progress in response to high-quality instruction, including special education and related services designed to address the student's individual needs, is such that the student is not likely to achieve grade-level proficiency within the school year covered by the IEP; and the student is receiving instruction in the grade-level curriculum for the subjects in which the student is being assessed. Proposed § 200.1(e)(3) would clarify that students eligible to take assessments based on modified achievement standards may be in any of the 13 disability categories listed in the IDEA. Proposed § 200.1(e)(4) would provide that a student may be held to modified academic achievement standards in one or more subjects for which the State administers assessments. Proposed § 200.1(e)(5) would require that IEP teams review on an annual basis their decision to assess a student based on modified achievement standards to ensure that those standards remain appropriate.

Proposed § 200.1(f), regarding the development of State guidelines and

notice to parents, would incorporate the provisions of § 200.6(a)(2)(iii)(A) and include references to assessments based on modified achievement standards. This provision would require each State to establish and ensure implementation of clear and appropriate guidelines for IEP teams to use in determining which students with disabilities may be held to either alternate or modified academic achievement standards and to ensure that parents of those students, as members of the IEP team and as participants in the IEP process, are informed that their child's achievement will be measured based on alternate or modified achievement standards.

Reasons: In proposing these amendments to § 200.1, we acknowledge that, while all children can learn challenging content, certain students, because of their disability, may not be able to achieve grade-level proficiency within the same time-frame as other students, even after receiving the best-designed instructional interventions, including special education and related services designed to address the student's individual needs, from highly trained teachers. We believe it is appropriate for these students to be assessed on grade-level content, but to measure their performance based on achievement standards that have been modified and differ in breadth or depth from grade-level achievement standards. The proposed regulations would permit States to establish modified achievement standards, so long as they meet certain requirements under proposed § 200.1(e)(1) that are designed to ensure that these students work toward mastering grade-level content. The proposed regulation therefore would require that modified achievement standards be aligned with grade-level content, but adjusted to reflect reduced breadth or depth of grade-level content so that students with disabilities participating in an assessment based on modified achievement standards would be better able to demonstrate what they know and can do.

Although proficient performance based on modified achievement standards will not indicate the same level of achievement as proficient performance based on grade-level achievement standards, modified achievement standards must be aligned to grade-level content standards. Furthermore, we anticipate that there will be significant overlap between the regular and modified achievement standards; but there would be no similar overlap between alternate achievement standards and grade-level achievement standards. Because assessing a student's performance based on modified achievement standards would not preclude a student from receiving a regular diploma, students with disabilities participating in this type of assessment would not automatically be held to a lower graduation standard.

The proposed regulations also are necessary to ensure that States have guidelines in place with certain key elements that will help IEP teams appropriately determine which students should be assessed based on modified achievement standards. We anticipate that it will be more difficult, in general, for IEP teams to determine the students with disabilities for whom modified achievement standards would be appropriate than it is for IEP teams to determine the students with the most significant cognitive disabilities for whom alternate achievement standards are appropriate. Students assessed based on modified achievement standards would not simply be students who are having difficulty with grade-level content or who are receiving instruction below grade level. Nor would they necessarily be the lowest-achieving two percent of students, who are not students with the most significant cognitive disabilities. In fact, based on recent data from the Special Education Elementary Longitudinal Study (SEELS) funded by the Office of Special Education Programs (OSEP), we anticipate that students from each of the 13 disability categories listed in the IDEA will be among those who are assessed based on modified achievement standards.

Students for whom modified achievement standards would be appropriate may require assessments that are different both in format or design due to the nature of their disability. IEP teams would determine the appropriateness of modified achievement standards based on the unique needs of each individual student with a disability. However, because it is of paramount importance to ensure that students are not held inappropriately to standards other than grade-level achievement standards, the proposed regulations would include criteria that we consider critical to support States in their implementation of modified achievement standards and to ensure that IEP teams make appropriate determinations about which students participate in assessments based on modified achievement standards. The proposed criteria are designed to help IEP teams distinguish between students whose disability has truly precluded them from achieving grade-level proficiency and those who, with appropriate services and interventions, including special education and related services designed to address the student's individual needs, can be assessed based on grade-level achievement standards. The effect of these proposed regulations and the IDEA will put into place four key safeguards regarding identification for assessment based on modified achievement standards:

1. Consistent with the IDEA and as a part of the evaluation process, a team of qualified professionals and the parent of the child would ensure that a student is not identified for special education services due to lack of instruction. That is, the team must demonstrate that the determining factor for such identification is not a lack of appropriate instruction in reading and math (20 U.S.C. 1414(b)(5)). After a child is identified, the special education and related services a child receives under the child's IEP should be of high quality and specially designed to meet the unique needs of the individual, and move a child closer to grade-level achievement, if the child is not already achieving at grade level.

2. Proposed § 200.1(e)(2)(ii)(A) would ensure that IEP teams examine a student's progress in response to high-quality instruction, including special education and related services designed to address the student's needs. The requirement to assess the student's performance using multiple measures over time in proposed § 200.1(e)(2)(ii)(B) would ensure that a student is not given an assessment based on modified achievement standards on the basis of performance on one assessment or measurement.

3. Proposed § 200.1(e)(2)(iii) would ensure that students are not assessed based on modified achievement standards if they have not had the opportunity to learn grade-level content. Implementing challenging standards, coupled with ensuring that students are receiving grade-level instruction in the subjects in which they are assessed, would provide a safeguard against leaving children behind due to lack of proper instruction.

4. As indicated in proposed 200.1(e)(5), the decision to assess a student based on modified achievement standards would not be a permanent one, and would be reviewed on a yearly basis as part of the IEP process.

Proposed § 200.1(f) emphasizes the very important responsibility of each State to establish clear and appropriate guidelines, which include the criteria for IEP teams to apply in determining whether a student with a disability may be held to modified academic

achievement standards. The guidelines required by proposed § 200.1(f) must provide sufficient guidance to ensure that IEP teams (which include parents) make appropriate decisions regarding those students for whom either alternate or modified achievement standards are appropriate. Moreover, § 200.1(f) would also safeguard students' interests because parents, as members of the IEP teams, will participate in and be informed about the decision to assess their child's achievement based on alternate or modified achievement standards.

Section 200.6 Inclusion of All Students

Statute: Section 1111(b)(3)(C) of Title I of the ESEA provides that a State's academic assessment system must be aligned with the State's challenging academic content and academic achievement standards and measure the achievement of all students in the grades assessed, including students with disabilities as defined under section 602(3) of the IDEA, students covered by Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), and students with limited English proficiency. With respect to students with disabilities in particular, the system must provide for reasonable accommodations necessary to measure their academic achievement relative to the State's content and achievement standards that all students are expected to meet.

Current regulations: Section 200.6 of the Title I regulations clarifies that a State's academic assessment system must include accommodations for students with disabilities under the IDEA and for students covered under Section 504 to allow the State to measure the academic achievement of these students relative to the State's academic content and academic achievement standards for the grades in which they are enrolled. In addition, the regulations require a State to provide one or more alternate assessments for students with disabilities who cannot participate in all or part of the State assessment, even with appropriate accommodations. These 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.

Section 200.6 also permits the use of alternate assessments to measure the achievement of students with the most significant cognitive disabilities based on the alternate academic achievement standards a State adopts under § 200.1(d). If a State permits the achievement of students with the most significant cognitive disabilities to be measured with alternate assessments that yield results based on alternate achievement standards, the State must report, to the Secretary, those results separately from students with disabilities who take the regular assessment or an alternate assessment based on grade-level achievement standards. The State must also document that students with the most significant cognitive disabilities are included, to the extent possible, in the general curriculum and in assessments aligned with that curriculum. In addition, the State must promote the use of appropriate accommodations to increase the number of students with the most significant cognitive disabilities who are tested against grade-level achievement standards. Finally, the State must ensure that teachers and other staff know how to administer assessments, including how to use appropriate accommodations, for students with the most significant cognitive disabilities.

Proposed regulations: Section 200.6 would be amended to allow a State to develop and implement modified academic achievement standards (defined by the State pursuant to proposed § 200.1(e)(1)) to assess students with disabilities who meet the criteria in proposed § 200.1(e)(2).

Proposed § 200.6(a)(3) would allow a State to use its regular assessment, with accommodations if necessary, or an alternate assessment, provided the assessment—

- Is aligned with the State's grade-level content standards;
- Yields results that measure the achievement of students separately in both reading/language arts and mathematics relative to the State's modified academic achievement standards;
- Meets the requirements under §§ 200.2 and 200.3, including validity, reliability, and high technical quality; and
- Fits coherently in the State's overall assessment system required under § 200.2.

Proposed § 200.6(a)(4)(iii) would require a State to report separately on the percentage of students with disabilities taking assessments based on modified achievement standards. Finally, the proposed regulations would move several similar existing provisions to the same location in the regulations. Current § 200.6(a)(2)(iii)(D) and (E), regarding increasing accommodations and teacher training to ensure that more students with disabilities can take a State's regular assessments, would be moved to § 200.6(a)(1)(ii). Current § 200.6(a)(2)(iii)(C), regarding documenting that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum, would be moved to § 200.6(a)(2)(iii).

Reasons: The proposed amendments to § 200.6 acknowledge the appropriateness of allowing a small percentage of students with disabilities to be assessed based on modified academic achievement standards aligned with the State's grade-level academic content standards. The proposed amendment does not limit the number or percentage of students who may take assessments based on modified achievement standards defined pursuant to § 200.1(e) as determined appropriate by their IEP teams.

The format of the assessment is less critical than the content of the modified academic achievement standards. Modified achievement standards may be expressed in various forms: for example, as scores from an assessment limited to ''core content and achievement'' expectations; or as results from an assessment that includes non-traditional items based on grade-level content. The critical characteristic is that an assessment based on modified achievement standards clearly reflects grade-level content standards even if the breadth or depth of those standards is reduced or the format or design is different.

The current Title I regulations do not prohibit the use of out-of-level assessments in all cases. They may be used to assess students with the most significant cognitive disabilities if they are aligned with a State's alternate achievement standards that meet the requirements of current § 200.1(d). However, under proposed § 200.1(e) and § 200.6, States would not be permitted to use an out-of-level test to measure the achievement of students with disabilities based on modified achievement standards. The proposed regulations require that any assessment based on modified achievement standards must meet the grade-level alignment requirements of § 200.1(e)(1), and an out-of-level assessment, by definition, cannot meet these requirements because it is not aligned with the content being taught at the grade-level in which the student is enrolled. It is not acceptable, for example, simply to assess a child who may be reading at a third-grade level using a third-grade assessment when the child is actually enrolled in the sixth grade and expected to be receiving grade-level content.

Even though modified achievement standards differ from grade-level achievement standards, the following protections in the regulation are designed to prevent students with disabilities from being left behind and to ensure that these students continue to receive challenging, grade-level instruction:

1. The modified achievement standards must be aligned to grade-level content standards. Although the breadth or depth of the standards may be reduced, it is grade-level content standards, not ''extended'' standards or instructional-level standards, that must be the basis of the assessment and the modified achievement standards. (Proposed § 200.1(e)(1)(i)). If a State's content standards include 20 different statements of what a student should know, it would not be appropriate to reduce the number of standards assessed on modified achievement standards to address only a few of those content standards. Although the Department will not set a specific numerical goal of how many standards should be addressed, we note that the modified achievement standards will be peer-reviewed and we expect States to establish meaningful academic expectations for all students.

2. The student receives instruction based on grade-level content standards. (Proposed § 200.1(e)(1)(ii) and (2)(iii)).

3. ''Proficient'' performance on modified achievement standards does not preclude a student from earning a regular high school diploma. (Proposed § 200.1(e)(1)(iii)).

A State may assess achievement based on modified achievement standards in several ways, either by designing an entirely new assessment, or by modifying an existing grade-level assessment. Modifications might include:

- Changes to content, such as coverage of a reduced number of grade-level content standards that have been identified by the State as essential for progress to the next grade.
- Changes to test format or administration, such as modified item format or response options, or use of only selected portions of the assessment.

Regardless of the method employed, a State must limit the use of modified achievement standards to the appropriate group of students. As proposed by these regulations, the State must use a documented standard-setting procedure. Results based on modified achievement standards must be valid and reliable to be used as a component in AYP determinations. Results would also need to be clearly explained to parents in terms of student competencies represented by labels such as ''basic'' or ''proficient.''

Section 200.7 Disaggregation of Data

Statute: Section 1111(b)(2)(C)(iv) of Title I requires a State's definition of AYP to measure the progress of specific subgroups of students, including students with disabilities, unless the number of students in a category is insufficient to yield statistically reliable information.

Current regulations: Section 200.7(a)(1) of the Title I regulations prohibits a State from using disaggregated data for one or more subgroups to report achievement results or to identify schools in need of improvement, corrective action, or restructuring if the number of students in those subgroups is insufficient to yield statistically reliable information. Section 200.7(a)(2) requires a State to determine, based on sound statistical methodology, the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used.

Proposed regulations: Section 200.7(a)(2) would be amended to prohibit a State from establishing a different minimum number of students for separate subgroups, regardless of whether the State chooses to implement modified achievement standards. In other words, a State would no longer be able to set a higher minimum number for the subgroup of students with disabilities, for example, than it sets for all its students or for its other subgroups. As another example, the proposed regulation would restrict States from setting a higher minimum group size for limited English proficient (LEP) students.

Reasons: Prior to the implementation of the regulations on alternate achievement standards for students with the most significant cognitive disabilities and the announcement of these proposed regulations, a State did not have much flexibility in measuring the achievement of students with disabilities for AYP purposes. Because of ongoing concerns about how accurately State assessments measure the achievement of a very heterogeneous group of students (many of whom were assessed with a range of accommodations and modifications to the regular assessment), some States requested permission to use a larger minimum number of students—group size—for their students with disabilities subgroup. In support of their request, these States argued that a larger group size for this subgroup of students would account for the challenges of measuring their achievement. States also requested to set a higher minimum group size for LEP students for similar reasons.

Setting a different group size, however, can lead to unintended consequences, such as manipulating the number of LEP or special education students in a particular school to ensure that the school will not be specifically held accountable for those students. Once these proposed regulations are implemented, we believe that States will have sufficient flexibility to measure the achievement of students with disabilities appropriately and will no longer need a different group size for this subgroup. States will be able to use different achievement standards for approximately thirty percent of students with disabilities, which is a significant change in how those students are assessed. States have also been offered flexibility in including the scores of LEP students who have recently arrived in the United States, as well as to count in the LEP subgroup for two years the scores of students who exit the LEP category. We believe that, in order to ensure that schools are held accountable for the achievement of LEP students and students with disabilities, the use of differentiated group sizes for purposes of measuring AYP must end.

Section 200.13 Adequate Yearly Progress in General

Statute: Under section 1111(b)(2)(B) of Title I of the ESEA, each State must define what constitutes AYP of the State, and of all public elementary and secondary schools and LEAs in the State, toward enabling all students to meet the State's student academic achievement standards. This definition must apply the same high standards of academic achievement to all public elementary and secondary school students in the State, be statistically valid and reliable, and measure progress based primarily on the State's academic assessments. AYP must also include measurable objectives for specific subgroups of students, including students with disabilities. To make AYP, a school must: meet or exceed the State's annual measurable objectives with respect to all students and students in each subgroup; test at least 95 percent of all students and of the students in each subgroup enrolled in the school; and make progress on the other academic indicators determined by the State.

Current Regulations: The current Title I regulations in § 200.13 require that each State demonstrate in its State plan what constitutes AYP of the State and of all public elementary and secondary schools and LEAs in the State in a

manner that applies the same high standards of achievement to all public school students; is statistically valid and reliable; results in continuous and substantial academic improvement for all students; measures the progress of all public schools, LEAs, and the State based primarily on the State's academic assessment system; measures progress separately for reading/language arts and for mathematics; is the same for all public schools and LEAs in the State; and applies the same annual measurable objectives for all students and for all identified subgroups described in § 200.13(b)(7)(ii).

Section 200.13(c) contains the rules for calculating AYP with respect to students with the most significant cognitive disabilities. It permits a State to include proficient and advanced scores of those students on assessments based on alternate achievement standards in determining AYP, subject to a 1.0 percent cap at the LEA and State levels. There is no cap at the school level. A State may request from the Secretary an exception to exceed the 1.0 percent cap if it can document that the incidence of students with the most significant disabilities exceeds 1.0 percent due to such circumstances as school, community, or health programs that have drawn large numbers of families of students with the most significant cognitive disabilities or a student population so small that it would take only a very few students to exceed the 1.0 percent cap. A State may grant an LEA's request for an exception to exceed the 1.0 percent cap under similar conditions.

Proposed Regulations: Proposed § 200.13(c) would specify acceptable uses of modified achievement standards for students with disabilities who meet the criteria in proposed § 200.1(e)(2) for the purpose of determining AYP. Specifically, proposed § 200.13(c)(2)(ii) would permit a State to include in its calculation of AYP the proficient and advanced scores of students with disabilities on assessments based on modified achievement standards, provided the number of such scores does not exceed 2.0 percent of all students in the grades assessed in reading/language arts and mathematics, separately, at the LEA and State levels. Although the 2.0 percent cap would not apply at the school level, schools should be mindful of the LEA limit, which may restrict the number of proficient scores for any one school that the LEA or State may include in its AYP calculations. Proposed § 200.13(c)(3) would permit a State's or LEA's proficient and advanced scores on assessments based on modified achievement standards to exceed 2.0 percent of all students in the grades assessed, without the need for an exception at the LEA level, if the number of proficient and advanced scores on assessments based on alternate achievement standards in § 200.1(d) is less than 1.0 percent, provided the number of proficient and advanced scores based on modified and alternate achievement standards combined does not exceed 3.0 percent of all students in the grades assessed.

Proposed § 200.13(c)(4) would provide that a State would no longer be able to request from the Secretary an exception to exceed the 1.0 percent cap on proficient and advanced scores based on alternate achievement standards, nor would the State be able to request an exception to exceed the 2.0 percent cap on proficient and advanced scores based on modified achievement standards. A State would still be able to grant an exception to an LEA to exceed the 1.0 percent cap on proficient and advanced scores based on alternate achievement standards if the LEA meets certain requirements. A State would not be able, however, to grant an exception to an LEA to exceed the 2.0 percent cap on proficient and advanced scores based on modified academic achievement standards. If a State grants an LEA an exception to exceed the 1.0 percent cap, the total number of students with disabilities in that LEA whose proficient and advanced scores may be included in calculating AYP would thus exceed 3.0 percent by the amount of the exception. However, the State would not be permitted to exceed its overall cap of 3.0 percent based on exceptions it had granted to LEAs. The proposed regulation also would provide that, for any proficient and advanced scores of students with the most significant cognitive disabilities that exceed the caps and authorized exceptions, a State would need to count those scores as non-proficient and redistribute them among schools and LEAs responsible for students with disabilities who are assessed based on alternate or modified achievement standards.

The following table provides a summary of the circumstances in which we are proposing that a State or LEA would be permitted to exceed the 1% and 2% caps.

WHEN CAN A STATE OR LEA EXCEED THE 1% AND 2% CAPS?

	Alternate achievement standards—1% Cap	Modified achievement standards—2% Cap	Alternate and modified achievement standards—3% Cap
State	Never	Only if State is below 1% cap, but cannot exceed 3% cap.	Never.
LEA	Only if granted an exception by the SEA.	Only if LEA is below 1% cap. If not below 1% cap, never.	Only if granted an exception to the 1% cap by the SEA, and only by the amount of the exception.

Reasons: To ensure that modified achievement standards are used appropriately, the proposed regulations would set a cap of 2.0 percent on proficient and advanced scores based on modified achievement standards that may be included in AYP determinations. In addition to the guidelines in proposed § 200.1(f), a numerical limit protects students from being held to lower standards. In establishing the 1.0 percent cap on proficient and advanced scores based on alternate achievement standards for students with the most significant cognitive disabilities, we primarily relied upon disability incidence rate data. Incidence rate data, however, are not as helpful in establishing a cap on the number of students who would be appropriately assessed based on modified achievement standards because students assessed based on modified achievement standards are less likely to be predominantly from a few disability categories, as is the case with students with the most significant cognitive disabilities. Therefore, in order to set an appropriate cap, we considered other sources of data from research and State experiences. This numerical limit is set at 2.0 percent because we do not believe it is necessary or appropriate for more than 3.0 percent of students to be assessed based on alternate or modified

achievement standards. For example, the Department reviewed several studies that indicate 2.0 percent is an appropriate cap when States, districts, and schools work to ensure that students receive high-quality educational services and interventions.[1] In particular, research that has recently been summarized by Reid Lyon, Jack Fletcher, Lynn Fuchs and Vinata Chabra in a literature review (currently in press) indicates that a 2.0 percent cap is appropriate, based on the percent of students who may not reach grade-level achievement standards within the same time frame as other students, even after receiving the best-designed instructional interventions from highly trained teachers.[2]

Further, we believe 2.0 percent is a reasonable cap when one takes into consideration that the cap does not need to equal the total number of students that may meet the criteria for this assessment. The cap is only a cap on the number of proficient scores that may be included in calculating AYP. In addition, we expect that over time State assessments will improve, as well as interventions and services for students with disabilities. The gains we have seen thus far when disabled students are expected to meet high standards should continue.

The proposed regulations would not permit States to request exceptions to the 1.0 or 2.0 percent caps. Under our current regulations that provide flexibility with respect to students with the most significant cognitive disabilities, we allow States to request an exception to exceed the 1.0 percent cap if they can demonstrate that there are exceptional circumstances in their State that would account for higher numbers of students with the most significant cognitive disabilities. However, with the proposed modified achievement standards and a 2.0 percent cap, we do not believe it is necessary for States to exceed the 1.0 percent cap. The vast majority of students with disabilities can, and should, be assessed based on grade-level achievement standards and, therefore, we believe it is not necessary or appropriate at the State level for the proficient and advanced scores of more than 3.0 percent of students who are assessed based on alternate or modified achievement standards to count in AYP determinations. We recognize, however, that there may still be significant local variation in the number of students with the most significant cognitive disabilities, and that is why we are proposing to allow States to continue granting LEAs exceptions to the 1.0 percent cap on proficient scores based on alternate achievement standards.

We know that it may be difficult to distinguish with absolute precision between the achievement levels of the two groups of students (students taking assessments based on modified achievement standards and students taking an alternate assessment based on alternate achievement standards). Therefore, the proposed regulations would permit States and LEAs to include proficient and advanced scores based on modified achievement standards in excess of 2.0 percent, if the State's or LEA's proficient and advanced scores on alternate assessments based on alternate achievement standards are less than 1.0 percent of the students assessed, and so long as the total number of proficient and advanced scores based on modified and alternate standards does not exceed 3.0 percent. No exception is needed in this instance.

We would like to underscore that the decision about which achievement standards to use when evaluating the achievement of a student with disabilities is an individual determination made by the IEP team, following the State guidelines. The Department expects that there will be States that will assess fewer than 1.0 percent of their students based on alternate achievement standards or fewer than 2.0 percent based on modified achievement standards.

Section 200.20 Making Adequate Yearly Progress

Statute: Under Section 1111(b)(2)(I) of Title I, a school or LEA makes AYP if each group of students described in section 1111(b)(2)(C)(v) of the statute meets or exceeds the State's annual measurable objectives in reading/language arts and mathematics, separately; not less than 95 percent of the students in each group participates in the State assessments required in section 1111(b)(3); and the school or LEA as a whole meets the other academic indicators selected by the State. If students in any group do not meet the State's annual measurable objectives, a school or LEA makes AYP if the percentage of students in that group who are not proficient decreased by 10 percent from the preceding school year and the group made progress on one or more of the State's other academic indicators. Section 1111(b)(2)(J) of Title I permits a State, in determining whether schools or LEAs are making AYP, to establish a uniform procedure for averaging data from one school year with data from one or two preceding school years, and to average data across grades in the school or LEA. If a State wishes to use a uniform averaging procedure, it is not required to include the new NCLB assessments in its annual AYP decisions until the State has acquired two or three years of data from those assessments.

Current regulations: Section 200.20 of the Title I regulations implements these statutory provisions. In addition, with respect to any student who takes the State assessment for a particular subject or grade level more than once, § 200.20(c)(3) requires a State to use the student's results from the first administration of the assessment to determine AYP.

Proposed regulations: Proposed § 200.20 would make several significant changes. First, current § 200.20(c)(3), which requires a State to use the student's results from the first administration of the State assessment to determine AYP, would be removed. With this removal, a State could administer its State assessments to a student more than once and include the student's best score in determining AYP. This practice, however, could not result in delaying the State's ability to make timely AYP determinations.

Second, proposed § 200.20(c)(3) would make clear that, to count a student who is assessed based on alternate or modified achievement standards as a participant for purposes of meeting the 95 percent participation requirement, a State must have guidelines for IEP teams to use to determine appropriately which students should participate in assessments based on alternate or modified achievement standards in accordance with proposed § 200.1(f). If a State does not have guidelines or those guidelines do not meet the requirements in § 200.1(f), students inappropriately assessed based on alternate or modified achievement standards would be considered non-participants for purposes of calculating participation rates.

Third, proposed § 200.20(f) would be added to provide additional flexibility in calculating AYP for the students with disabilities subgroup. Under this proposed section, a State would be able to include, for a period of up to two

[1] For example, see: McMaster, K.L., Fuchs, D., Fuchs, L.S., & Compton, D.L. (2005). Responding to nonresponders: An experimental field trial of identification and intervention methods. *Exceptional Children,* 71, 445–463; Torgensen, J.K., Alexander, A.W., Wagner, R.K., Rashotte, C.A., Voeller, K.K.S., & Conway, T. (2001). Intensive remedial instruction for children with severe reading disabilities; Immediate and long-term outcomes from two instructional approaches. *Journal of Learning Disabilities,* 34, 33–58.

[2] Lyon, G.R., Fletcher, J. M., Fuchs, L.S., & Chhabra, V. (in press). Learning Disabilities. In E. Mash & R. Barkley (Eds.), *Treatment of Childhood Disorder* (2nd ed.). New York: Guilford Press.

years, the scores of students who were previously identified with a disability under section 602(3) of the IDEA, but who have exited from special education services. In addition, if a State includes the scores of these students in AYP, the State would not be required to include those students in the students with disabilities subgroup in determining if the number of students with disabilities is sufficient to yield statistically reliable information under § 200.7(a). As indicated in proposed § 200.20(f)(3), for the purpose of reporting information on report cards under section 1111(h) of the ESEA, a State and its LEAs would be able to include the scores of former students with disabilities as part of the students with disabilities subgroup for the purpose of reporting AYP, but would not be able to include the scores of former students with disabilities as part of the students with disabilities subgroup in reporting any other information under section 1111(h) of the ESEA.

Reasons: The Secretary proposes to remove current § 200.20(c)(3), which requires a State to use a student's results from the first administration of the State assessment to determine AYP, because the Secretary believes that it is possible to grant flexibility to States to determine which score to count in AYP determinations without compromising the integrity of the State accountability system or the timing of AYP decisions. Since the publication of this regulation on December 2, 2002, the Secretary has learned from several States that they wish to administer their assessments to students more than once during the school year for differing reasons. For example, one State is required by law to offer multiple opportunities to students to take and pass the State-mandated graduation exam. In taking advantage of this flexibility, we emphasize that States should take care not to establish an administrative schedule in which students are repeatedly taking the State assessment in order to improve their scores.

Proposed § 200.20(c)(3) clarifies that, to consider a student as a participant for AYP purposes under the State accountability system, the student must be assessed with assessments that meet the requirements of section 1111 of Title I of the ESEA and the Title I regulations. That is, the student must be assessed based on grade-level achievement standards unless the student qualifies under § 200.1(d) or proposed § 200.1(e)(2) to be assessed based on alternate or modified achievement standards, respectively. To determine which students qualify to be assessed based on alternate or modified standards, each State must have guidelines that meet the requirements of § 200.1(f)(1) to instruct its IEP teams. The current Title I regulations permit only students with the most significant cognitive disabilities to be assessed based on alternate achievement standards. These regulations propose to permit a second group of students with disabilities to be assessed using modified achievement standards. However, both current and proposed regulations make clear that only certain students may be appropriately assessed based on either standard. Therefore, if a State has IEP team guidelines in place that permit the use of alternate achievement standards for students without the most significant cognitive disabilities, or if the guidelines are used to determine that modified achievement standards are appropriate for students who do not meet the requirements of proposed § 200.1(e)(2), those students would not be considered participants when determining whether the 95 percent participation requirement has been met. For example, if a State decides to measure the performance of a population of students based on modified achievement standards that is broader than the group of students described in proposed § 200.1(e)(2), only those students who meet the criteria under proposed § 200.1(e)(2) would be considered participants for AYP purposes.

The proposed amendments to § 200.20(f) would allow a State, in determining AYP for the students with disabilities subgroup, to include in that subgroup any student tested in the current year who had exited special education within the prior two-year period. Students are identified as a student with a disability based on two factors: first, that they have a disability, as defined under the IDEA; and second, that they need special education and related services. Educators and parents consider it a success when students succeed to such an extent that special education services are no longer needed. Because students with disabilities exit this subgroup once special education services are no longer needed, school assessment results for that subgroup do not reflect the gains that these students with disabilities have made in academic achievement or the work that schools and teachers have done to achieve this success. Recognizing this, the proposed regulations would allow a State, for purposes of making AYP determinations, to include the scores of students previously identified as students with disabilities within the subgroup for up to two years after they no longer receive IDEA services. States may not include the scores of these students for reporting purposes under Section 1111(h) apart from AYP, because it is very important to have information about the achievement of students with disabilities who are currently receiving services under the IDEA.

Finally, to further ensure a coordinated administration of Title I and IDEA, we proposed to define in § 200.103 *student with a disability* to mean child with a disability as defined in section 602(3) of the IDEA.

Part 300

Section 300.160 Participation in Assessments

Statute: Under section 612(a)(16) of the IDEA, a State must ensure that all children with disabilities are included in all general State and district-wide assessments with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs. The State (or LEA, for district-wide assessments) must develop guidelines for the provision of appropriate accommodations and must develop and implement guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in the regular assessments, even with accommodations, as indicated in their IEPs. A State's alternate assessment guidelines must provide for alternate assessments that are aligned with the State's challenging academic content and achievement standards and, if the State has adopted alternate academic achievement standards permitted under the Title I regulations, measure the achievement of children with disabilities against those standards.

The State (or LEA, for a district-wide assessment) must make available to the public data on the participation of children with disabilities and report to the public, with the same frequency and detail as it reports on the assessment of nondisabled children,

- The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations to participate in the regular assessment,
- The number of children with disabilities participating in alternate assessments based on grade-level academic achievement standards, and
- The number of children with disabilities participating in alternate assessments based on alternate academic achievement standards.

A State must also report on the performance of children with disabilities on regular assessments and on alternate assessments, compared to the achievement of all children.

Reporting on performance is not required if the number of children with disabilities is not sufficient to yield statistically reliable information or if reporting that information would reveal personally identifiable information. The State (or LEA, in the case of a district-wide assessment) must, to the extent feasible, use universal design principles in developing and administering any State or district-wide assessments.

Current regulations: On June 21, 2005, we issued a notice of proposed rulemaking (NPRM) to implement section 612 and other provisions of the IDEA, as recently amended and authorized by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446. The IDEA NPRM included proposed language in § 300.160, that would implement the provisions of section 612(a)(16) of the IDEA regarding assessments, and we indicated in the preamble to the IDEA NPRM that proposed § 300.160 would replace §§ 300.138 and 300.139 of the current regulations. The language we propose in this notice would supercede the language we proposed in the IDEA NPRM.

Proposed regulations: Proposed § 300.160(a) and (b)(1) would incorporate the statutory requirements regarding the participation of children with disabilities in State and district-wide assessments and the development of guidelines for the provision of appropriate accommodations. Proposed § 300.160(b)(2) would require that State (or, in the case of a district-wide assessment, LEA) guidelines require that each child be validly assessed and identify any accommodations that would result in an invalid score. Consistent with the changes to the Title I regulations regarding modified achievement standards, proposed § 300.160(c) would require that States that have adopted modified academic achievement standards as permitted under the Title I regulations have guidelines for the participation of children with disabilities in assessments based on those modified achievement standards. Proposed § 300.160(d) would incorporate the statutory requirements regarding alternate assessment guidelines and requirements for conducting alternate assessments. It also would clarify that the requirements for alternate assessments aligned to challenging academic content standards and academic achievement standards and alternate assessments based on alternate academic achievement standards apply only to assessments of student academic progress under Title I of the ESEA.

Proposed § 300.160(e) would incorporate the statutory requirements regarding reporting on assessments, would clarify in proposed § 300.160(e)(1) that reports must include only the number of children provided accommodations that did not invalidate the score, and would add a requirement, in proposed § 300.160(e)(4), that States (or LEAs, in the case of district-wide assessments) also must report on the number of children with disabilities who are assessed based on modified academic achievement standards. Proposed § 300.160(f) would adopt the statutory requirement regarding use of universal design principles in developing and administering assessments. We are also proposing to revise the authority citation for part 300 to be consistent with the proposed regulations in the IDEA NPRM.

Reasons: Under IDEA, States have a duty to ensure that children with disabilities are validly assessed. The House Committee Report on the reauthorization of the IDEA emphasizes the importance of ensuring that accommodation guidelines identify accommodations that do not affect test validity:

> The bill also makes clear that States have an affirmative obligation to determine what types of accommodations can be made to assessments while maintaining their reliability and validity * * *. The Committee is intent on ensuring that each child with a disability receives appropriate accommodations, but is equally intent that these accommodations not invalidate the particular assessment. In developing the guidance on accommodations, the Committee encourages States to work with test publishers, assessment experts, special education teachers, and other experts to maximize the opportunities for children with disabilities to participate in regular assessments.[3]

Similarly, the Senate Committee Report acknowledges that appropriate accommodations to a test will not affect the test's validity.[4]

Tests administered with accommodations that do not maintain test validity are not measuring academic achievement under the State's assessment system. Under the reauthorized IDEA, each IEP now must indicate ''appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments.''[5] State and LEA guidelines thus need to identify, for IEP teams, those accommodations that will maintain test validity. Similarly, under Title I, the concept of ''appropriate accommodations'' in the context of assessments must be thought of as accommodations that are needed by the individual child and that maintain test validity. The Title I regulations would only consider a student to be a participant for AYP purposes if his or her assessment results in a valid score.

If a State adopts modified academic achievement standards under Title I, it also must have guidelines for the participation of children with disabilities in assessments based on those modified academic achievement standards. State guidelines will ensure that IEP teams in that State have information about the range of methods of assessment under the State assessment system when making assessment decisions for individual children. Consistency in the assessment and reporting requirements of children with disabilities under Title I and IDEA will reinforce NCLB's and IDEA's shared goal of high expectations and accountability for all students and will avoid confusion among parents, teachers and administrators.

Executive Order 12866

1. Potential Costs and Benefits

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

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering the Title I and IDEA programs effectively and efficiently. Elsewhere in this **SUPPLEMENTARY INFORMATION** section under the heading Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

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

[3] H. Rep. No. 108–77, at 97 (2003).

[4] S. Rep. No. 108–185, at 30 (2003).

[5] 20 U.S.C. 1414(d)(1)(A)(VI)(aa).

Executive Order 12866

1. Potential Costs and Benefits

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

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering the Title I and IDEA programs effectively and efficiently. Elsewhere in this **SUPPLEMENTARY INFORMATION** section under the heading Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

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

Summary of Potential Costs and Benefits

These proposed regulations would not add significantly to the costs of implementing either the Title I or IDEA programs or alter the benefits that the Secretary believes will be obtained through successful implementation.

As noted elsewhere in this notice, the proposed regulations would provide States with additional flexibility regarding State, LEA, and school accountability for the achievement of students with disabilities who qualify to be assessed based on modified achievement standards and with respect to students with disabilities who no longer receive special education services. The major benefit of this approach is that it will permit States to develop and implement modified achievement standards and aligned assessments for the group of students with disabilities, for whom, according to recent research, assessments aligned with modified achievement standards are appropriate, and then to use the results from those assessments in making AYP determinations. Implementation of these assessments and standards would be an element of State and local efforts to improve educational outcomes for this group of students, consistent with the principles and objectives of NCLB. The benefits of higher educational achievement and better outcomes for the students in question are the same as those that are obtained for students in general.

Economists and other social scientists have found repeatedly that better education results in major benefits, both economic and non-economic, not only for the individuals who receive it but for society as a whole. Nations that invest successfully in better education enjoy higher levels of growth and productivity, and a high-quality education is an indispensable element of a strong economy and a successful civil society. Census Bureau data demonstrate that individual income increases with the level of educational attainment. More educated individuals also tend to have higher lifetime earnings and higher savings rates, and to lead healthier lives.

As the proposed regulations make clear, a State could elect to develop new modified achievement standards and new assessments to measure achievement based on those standards, but no State would ever be required to do so. Thus, the proposed regulations would impose no direct costs on States, LEAs, or other entities or individuals.

Most implementation costs will stem from the underlying statute, which requires each State to have academic content and academic achievement standards and aligned assessments that measure the achievement of all students, including students with disabilities. States that decide to adopt modified achievement standards and implement assessments aligned with those standards will be able to use funds from Title I, Title VI State Assessment Grants, and IDEA to finance those activities. The costs of developing and implementing assessments vary considerably but are modest when compared to the amounts available under Federal programs that States can draw on for test development and implementation. In a 2003 report titled, ''Title I: Characteristics of Tests Will Influence Expenses: Information Sharing May Help States Realize Efficiencies,'' the Government Accountability Office found that the State of Massachusetts had spent approximately $200,000 to develop each of its assessments, while Texas had spent $60,000 and Maine had spent $22,000 for their assessments.[6] By comparison, the fiscal year 2005 appropriation for Title I Grants to Local Educational Agencies was approximately $12.7 billion, and States could reserve approximately 1 percent of this amount for administrative expenses, including paying the costs of developing assessments. The appropriation for IDEA Grants to States was $11.4 billion, and States could reserve more than $900 million for such activities as the development and provision of appropriate accommodations and assessments of children with disabilities under Title I. For State Assessment Grants, the appropriation was $412 million. The Department believes that the regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal sources.

For purposes of the Unfunded Mandates Reform Act of 1995, these regulations do not include a Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

2. Clarity of the Regulations

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

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

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

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

Regulatory Flexibility Act Certification

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

These provisions require States and LEAs to take certain actions to improve

[6] U.S. Government Accountability Office, Report 03–389, pg. 17.

student academic achievement. The Department believes that these activities will be financed through the appropriations for Title I and IDEA 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

Sections 200.6 and 300.160 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

Collection of Information: Improving the Academic Achievement of the Disadvantaged and Assistance to States for the Education of Children With Disabilities

The proposed regulations make changes in reporting requirements already required under both Title I, Part A, of the ESEA and the IDEA for States that voluntarily take advantage of the new flexibility. States already report the number of students with disabilities participating in assessments and the type of assessments these students take. The proposed regulations would add one additional category for students with disabilities who are assessed based on modified academic achievement standards. States would be required annually to report separately the number and percentage of students with disabilities taking assessments based on the modified achievement standards under § 200.1 and § 300.160(e). Each of the 50 SEAs, Puerto Rico and the District of Columbia would report this data a single time each year. However, there is no appreciable burden associated with the collection as States already report on the number and percentage of students with disabilities participating in State assessments under 1810–0614 and 1880–0541. The total number of students with disabilities being reported does not change as a result of this collection. The cost for this collection also is minimal as it is simply a matter of coding on the test document, something the SEA is already doing to report the data under 1810–0614 and 1880–0541. We estimate annual reporting and recordkeeping burden for this collection of information to average 1 hour for 52 respondents.

If you want to comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education. You may also send a copy of these comments to the Department's representative named in the **ADDRESSES** section of this preamble.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of this proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

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 Numbers: 84.010 Improving Programs Operated by Local Educational Agencies; 84.027 Assistance to States for the Education of Children with Disabilities)

List of Subjects

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, Institutions of higher learning, Local educational agencies, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies.

34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs—education, Privacy, Private Schools, Reporting and recordkeeping requirements.

Dated: December 12, 2005.

Margaret Spellings,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 200 and 300 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 200.1 is amended by:

A. Revising paragraphs (a)(1), (a)(2), and (b)(1)(i).

B. Redesignating paragraphs (e) and (f) as paragraphs (g) and (h), respectively.

C. Adding new paragraphs (e) and (f).

The revisions and additions 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 paragraphs (d) and (e) of this section;

(2) Include the same knowledge, skills, and levels of achievement expected of all students, except as provided in paragraphs (d) and (e) of this section; and

* * * * *

(b) * * *

(1) * * *

(i) Specify what all students are expected to know and be able to do, except as provided in paragraphs (d) and (e) of this section;

* * * * *

(e) *Modified academic achievement standards.* (1) For students with disabilities under section 602(3) of the Individuals with Disabilities Education Act (IDEA) who meet the State's criteria under paragraph (e)(2) of this section, a State may, through a documented and validated standards-setting process, define modified academic achievement standards, provided those standards—

(i) Are aligned with the State's academic content standards for the grade in which the student is enrolled, although the modified academic achievement standards may reflect reduced breadth or depth of grade-level content;

(ii) Provide access to grade-level curriculum; and

(iii) Do not preclude a student from earning a regular high-school diploma.

(2) A State must include the following criteria in the guidelines for defining which students with disabilities are eligible to be assessed based on modified academic achievement standards that the State establishes under paragraph (f) of this section:

(i) The student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by such objective evidence as—

(A) The State's assessments described in § 200.2; or

(B) Other assessment data that can validly document academic achievement.

(ii)(A) The student's progress in response to high-quality instruction, including special education and related services designed to address the student's individual needs, is such that the student is not likely to achieve grade-level proficiency within the year covered by the student's individualized education program (IEP).

(B) The determination of the student's progress must be based on multiple measurements, over a period of time, that are valid for the subjects being assessed.

(iii) The student is receiving instruction in the grade-level curriculum for the subjects in which the student is being assessed.

(3) A student eligible to be assessed based on modified academic achievement standards may be in any of the 13 disability categories listed in the IDEA.

(4) A student may be assessed based on modified academic achievement standards in one or more subjects for which assessments are administered under § 200.2.

(5) The decision to assess a student based on modified academic achievement standards must be reviewed annually by the student's IEP team to ensure that those standards remain appropriate.

(f) *State guidelines.* If a State defines alternate or modified academic achievement standards under paragraph (d) or (e) of this section, the State must—

(1) Establish and ensure implementation of clear and appropriate guidelines for IEP teams to apply in determining—

(i) Students with the most significant cognitive disabilities who will be assessed based on alternate academic achievement standards; and

(ii) Students with disabilities who meet the criteria in § 200.1(e)(2) who will be assessed based on modified academic achievement standards; and

(2) Ensure that parents of students selected for assessment based on alternate or modified academic achievement standards under the guidelines in this paragraph (f) are informed that their child's achievement will be measured based on alternate or modified academic achievement standards.

* * * * *

3. Section 200.6 is amended by:

A. Revising paragraph (a)(1) and (a)(2)(iii).

B. Adding paragraphs (a)(3) and (a)(4).

The revisions and additions read as follows:

§ 200.6 Inclusion of all students.

* * * * *

(a) *Students eligible under IDEA and Section 504.* (1) *Appropriate accommodations.* (i) A State's academic assessment system must provide—

(A) For each student with a disability, as defined under section 602(3) of the IDEA, appropriate accommodations that the student's IEP team determines are necessary to measure the academic achievement of the student relative to the State's academic content and academic achievement standards for the grade in which the student is enrolled, consistent with § 200.1(b)(2), (b)(3), and (c); and

(B) For each student covered under section 504 of the Rehabilitation Act of 1973, as amended (Section 504), appropriate accommodations that the student's placement team determines are necessary to measure the academic achievement of the student relative to the State's academic content and academic achievement standards for the grade in which the student is enrolled, consistent with § 200.1(b)(2), (b)(3), and (c).

(ii) A State must—

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

(B) 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 disabilities and students covered under Section 504.

(2) * * *

(iii) If a State permits the use of alternate assessments that yield results based on alternate academic achievement standards, the State must document that students with the most significant cognitive disabilities are, to the maximum extent possible, included in the general curriculum.

(3) *Assessments that measure modified academic achievement standards.* A State may use the assessments described in paragraph (a)(1) or (2) of this section to assess students with disabilities based on modified academic achievement standards pursuant to § 200.1(e)(1), provided the assessments—

(i) Are aligned with the State's grade-level academic content standards;

(ii) Yield results that measure the achievement of those students separately in reading/language arts and mathematics relative to the modified academic achievement standards;

(iii) Meet the requirements in §§ 200.2 and 200.3, including the requirements relating to validity, reliability, and high technical quality; and

(iv) Fit coherently in the State's overall assessment system under § 200.2.

(4) *Reporting.* A State must report separately, under section 1111(h)(4) of the Act, the number and percentage of students with disabilities taking—

(i) Regular assessments described in § 200.2;

(ii) Regular assessments with accommodations;

(iii) Assessments based on the modified academic achievement standards described in § 200.1(e).

(iv) Alternate assessments based on the grade-level academic achievement standards described in § 200.1(c); and

(v) Alternate assessments based on the alternate academic achievement standards described in § 200.1(d).

* * * * *

4. In § 200.7, redesignate paragraph (a)(2) as (a)(2)(i) and add a new paragraph (a)(2)(ii) to read as follows:

§ 200.7 Disaggregation of data.

(a) * * *

(2) * * *

(ii) A State may not establish a different minimum number of students under paragraph (a)(2)(i) of this section for separate subgroups under § 200.13(b)(7)(ii).

* * * * *

5. Section 200.13 is amended by:

A. Revising paragraph (c).

B. Adding an appendix at the end of the section.

The revisions and addition read as follows:

§ 200.13 Adequate yearly progress in general.

* * * * *

(c)(1) In calculating AYP for schools, LEAs, and the State, a State must, consistent with § 200.7(a), include the scores of all students with disabilities.

(2) With respect to scores based on alternate or modified academic achievement standards, a State may include—

(i) The proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards described in § 200.1(d), provided that the number of those scores 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; and

(ii) The proficient and advanced scores of students with disabilities based on the modified academic achievement standards described in § 200.1(e)(1), provided that the number of those scores at the LEA and at the State levels, separately, does not exceed 2.0 percent of all students in the grades assessed in reading/language arts and in mathematics.

(3) A State's or LEA's number of proficient and advanced scores on the modified academic achievement standards described in § 200.1(e)(1) may exceed 2.0 percent of all students in the grades assessed if the number of proficient and advanced scores on the alternate academic achievement standards described in § 200.1(d) is less than 1.0 percent, provided the number of proficient and advanced scores based on modified and alternate academic achievement standards combined does not exceed 3.0 percent of all students in the grades assessed.

(4) A State may not request from the Secretary an exception permitting it to exceed the caps on proficient and advanced scores based on alternate or modified academic achievement standards under paragraph (c)(2) and (3) of this section.

(5)(i) A State may grant an exception to an LEA permitting it to exceed the 1.0 percent cap on proficient and advanced scores based on the alternate academic achievement standards described in paragraph (c)(2)(i) of this section only if—

(A) The LEA demonstrates that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the combined grades assessed;

(B) The LEA 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 LEA that have drawn large numbers of families of students with the most significant cognitive disabilities, or that the LEA has such a small overall student population that it would take only a few students with such disabilities to exceed the 1.0 percent cap; and

(C) The LEA documents that it is implementing the State's guidelines under § 200.1(f).

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

(6) A State may not grant an exception to an LEA to exceed the 2.0 percent cap on proficient and advanced scores based on modified academic achievement standards under paragraph (c)(2)(ii) of this section.

(7) In calculating AYP, if the percentage of proficient and advanced scores based on alternate or modified academic achievement standards under § 200.1(d) or (e) exceeds the caps in paragraph (c) of this section at the State or LEA level, the State must do the following:

(i) Consistent with § 200.7(a), include all scores based on alternate and modified academic achievement standards.

(ii) Count as non-proficient the proficient and advanced scores that exceed the caps in paragraph (c) of this section.

(iii) Determine which proficient and advanced scores to count as non-proficient in schools and LEAs responsible for students who are assessed based on alternate or modified academic achievement standards.

(iv) Include non-proficient scores that exceed the caps in paragraph (c) of this section in each applicable subgroup at the school, LEA, and State level.

(v) Ensure that parents of a child who is assessed based on alternate or modified academic achievement standards are informed of the actual academic achievement levels of their child.

* * * * *

Appendix to § 200.13—When Can a State or LEA Exceed the 1% and 2% Caps?

The following table provides a summary of the circumstances in which a State or LEA may exceed the 1% and 2% caps described in § 200.13.

WHEN CAN A STATE OR LEA EXCEED THE 1% AND 2% CAPS?

	Alternate achievement Standards—1% Cap	Modified Achievement Standards—2% Cap	Alternate and Modified Achievement standards—3% Cap
1. State	Never	Only if State is below 1% cap, but cannot exceed 3% cap.	Never.
2. LEA	Only if granted an exeception by the SEA.	Only if LEA is below 1% cap. If not below 1% cap, never.	Only if granted an exception to the 1% cap by the SEA, and only by the amount of the exception.

6. Section 200.20 is amended by:

A. Revising the introductory text of paragraph (a)(1).

B. Revising the introductory text of paragraph (b).

C. Revising the introductory text of paragraph (c)(1).

D. Revising paragraph (c)(3).

E. Adding a new paragraph (f).

The revisions and addition read as follows:

§ 200.20 Making adequate yearly progress.

* * * * *

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

* * * * *

(b) If students in any group under § 200.13(b)(7) in a school or LEA do not meet the State's annual measurable objectives under § 200.18, the school or LEA makes AYP if, consistent with paragraph (f) of this section—

* * * * *

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

* * * * *

(3) To count a student who is assessed based on alternate or modified academic achievement standards described in § 200.1(d) or (e) as a participant for purposes of meeting the requirements of this paragraph, the State must have, and ensure that its LEAs adhere to, guidelines that meet the requirements of § 200.1(f).

* * * * *

(f)(1) In determining AYP for the subgroup of students with disabilities, a State may include, for a period of up to two years, the scores of students who were previously identified under section 602(3) of the IDEA but who have exited from special education services.

(2) If a State, in determining AYP for the subgroup of students with disabilities, includes the scores of the students described in paragraph (f)(1) of this section, the State is not required to include those students in the students with disabilities subgroup in determining if the number of students with disabilities is sufficient to yield statistically reliable information under § 200.7(a).

(3) For the purpose of reporting information on report cards under section 1111(h) of the Act—

(i) A State may include the scores of the former students with disabilities described in paragraph (f)(1) of this section as part of the students with disabilities subgroup for the purpose of reporting AYP at the State level under section 1111(h)(1)(C)(ii) of the Act;

(ii) An LEA may include the scores of the former students with disabilities described in paragraph (f)(1) of this section as part of the students with disabilities subgroup for the purpose of reporting AYP at the LEA and school levels under section 1111(h)(2)(B) of the Act; but

(iii) A State or LEA may not include the scores of former students with disabilities as part of the students with disabilities subgroup in reporting any other information under section 1111(h) of the Act.

7. Section 200.103 is amended by adding a new paragraph (c). The addition reads as follows:

§ 200.103 Definitions.

* * * * *

(c) *Student with a disability* means child with a disability, as defined in section 602(3) of the IDEA.

PART 300—ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

8. The authority citation for part 300 is revised to read as follows:

Authority: 20 U.S.C. 1221e–3, 1406, 1411–1419, unless otherwise noted.

9. Add a new § 300.160 to read as follows:

§ 300.160 Participation in assessments.

(a) *General.* A State must ensure that all children with disabilities are included in all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA, 20 U.S.C. 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs.

(b) *Accommodation guidelines.* (1) A State (or, in the case of a district-wide assessment, an LEA) must develop guidelines for the provision of appropriate accommodations.

(2) The State's (or, in the case of a district-wide assessment, the LEA's) guidelines must —

(i) Require that each child be validly assessed; and

(ii) Identify valid accommodations.

(c) *Assessments based on modified academic achievement standards.* If a State has adopted modified academic achievement standards permitted in 34 CFR 200.1(e), the State must have guidelines for the participation of children with disabilities in assessments based on those modified academic achievement standards.

(d) *Alternate assessments.* (1) A State (or, in the case of a district-wide assessment, an LEA) must develop and implement alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments, even with accommodations as indicated in their respective IEPs, as provided in paragraph (a) of this section.

(2) The alternate assessments and guidelines in paragraph (d)(1) of this section must provide for alternate assessments that, in the case of assessments of student academic progress under Title I of the ESEA—

(i) Are aligned with the State's challenging academic content standards and challenging student academic achievement standards; and

(ii) If the State has adopted alternate academic achievement standards permitted in 34 CFR § 200.1(d), measure the achievement of children with disabilities against those standards.

(e) *Reports.* An SEA (or, in the case of a district-wide assessment, an LEA) must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(1) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations (that did not result in an invalid score) in order to participate in those assessments.

(2) The number of children with disabilities participating in alternate assessments described in paragraph (d)(2)(i) of this section.

(3) The number of children with disabilities participating in alternate assessments described in paragraph (d)(2)(ii) of this section.

(4) The number of children with disabilities who are assessed based on modified academic achievement standards described in paragraph (c) of this section.

(5) The performance results of children with disabilities on regular assessments and on alternate assessments if—

(i) The number of children participating in those assessments is sufficient to yield statistically reliable information; and

(ii) Reporting that information will not reveal personally identifiable information about an individual student on those assessments.

(f) *Universal design.* An SEA (or, in the case of a district-wide assessment, an LEA) must, to the extent possible, use universal design principles in developing and administering any assessments under this section.

(Authority: 20 U.S.C. 1412(a)(16))

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