

## DEPARTMENT OF EDUCATION

## 34 CFR Part 200

RIN 1810-AB32

[Docket ID ED-2016-OESE-0053]

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

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

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing academic assessment requirements under title I, part A of the Elementary and Secondary Education Act of 1965 (ESEA) to implement changes to the ESEA by the Every Student Succeeds Act (ESSA) enacted on December 10, 2015.

**DATES:** These regulations are effective January 9, 2017.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****Executive Summary**

*Purpose of This Regulatory Action:* On December 10, 2015, President Barack Obama signed the ESSA into law. The ESSA reauthorizes the ESEA, which provides Federal funds to improve elementary and secondary education in the Nation's public schools. The ESSA builds on the ESEA's legacy as a civil rights law and seeks to ensure every child, regardless of race, socioeconomic status, disability, English proficiency, background, or residence, has an equal opportunity to obtain a high-quality education. Though the reauthorization made significant changes to the ESEA for the first time since the ESEA was reauthorized through the No Child Left Behind Act of 2001 (NCLB), including significant changes to title I, it made limited changes to the academic assessment provisions of part A of title I. Many of these changes were aligned with President Obama's Testing Action Plan released in October 2015, which was designed to make assessments fewer, better and fairer.<sup>1</sup> In particular,

the ESSA added new exceptions to allow a State to approve its local educational agencies (LEAs) to administer a locally selected, nationally recognized high school academic assessment in lieu of the statewide high school assessment and, to reduce the burden of unnecessary testing, to allow a State to avoid double-testing eighth graders taking advanced mathematics coursework. In the spirit of making assessments as fair as possible and inclusive of all students, the ESSA also imposed a cap to limit, to 1.0 percent of the total number of students who are assessed in a State in each assessed subject, the number of students with the most significant cognitive disabilities whose performance may be assessed with an alternate assessment aligned with alternate academic achievement standards (AA-AAAS), if the State has adopted alternate academic achievement standards. With the goal of making tests better, the ESSA also included special considerations for computer-adaptive assessments. Finally, also with the goal of making assessments fair, the ESSA amended the provisions of the ESEA related to assessing English learners in their native language. Unless otherwise noted, references in this document to the ESEA refer to the ESEA, as amended by the ESSA.

We amend §§ 200.2–200.6 and §§ 200.8–200.9 of title 34 of the Code of Federal Regulations (CFR) in order to implement these statutory changes, as well as other key statutory provisions, including those related to the assessment of English learners and students in Native American language schools and programs. We are changing these regulations to provide clarity and support to State educational agencies (SEAs), LEAs, and schools as they implement the ESEA requirements regarding statewide assessment systems, and to ensure that key requirements in title I of the ESEA are implemented in a manner consistent with the purposes of the law—“to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”

Section 1601(b) of the ESEA required the Secretary, before publishing proposed regulations on the assessment requirements under title I, part A of the ESEA, to establish a negotiated rulemaking process. Consistent with this section, the Department subjected the proposed assessment regulations to

a negotiated rulemaking process, through which the Department convened a diverse committee of stakeholders representing Federal, State, and local administrators, tribal leaders, teachers and paraprofessionals, principals and other school leaders, parents, the civil rights community, and the business community that met in three sessions during March and April 2016. The negotiating committee's protocols provided that it would operate by consensus, which meant unanimous agreement—that is, with no dissent by any voting member. Under the protocols, if the negotiating committee reached final consensus on regulatory language for assessments, the Department would use the consensus language in the proposed regulations. The negotiating committee reached consensus on all of the proposed regulations related to assessments. Accordingly, the Department published the consensus language to which the negotiated rulemaking committee agreed as a notice of proposed rulemaking (NPRM) and took public comment from July 11 through September 9, 2016.

*Summary of the Major Provisions of This Regulatory Action:* The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NPRM. The rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section elsewhere in this preamble.

- Section 200.2(b)(7) has been revised to provide a number of examples to describe higher-order thinking skills.
- Section 200.3(b)(1)(v) has been revised to clarify that comparability between a locally selected, nationally recognized high school academic assessment and the statewide assessment is expected at each academic achievement level.
- Section 200.3(b)(3) has been revised to explicitly permit an SEA to disapprove or revoke approval of, for good cause, an LEA's request to administer a locally selected, nationally recognized high school academic assessment.
- Section 200.5(a)(2) has been revised to clarify that a State must administer its English language proficiency (ELP) assessments annually to all English learners in schools served by the State, kindergarten through grade 12.
- Section 200.6(b)(2)(i) has been revised to clarify that a State must develop appropriate accommodations for students with disabilities; disseminate information and resources about such accommodations to, at a minimum, LEAs, schools, and parents; and promote the use of those

<sup>1</sup> For more information regarding President Obama's Testing Action Plan, please see: <http://www2.ed.gov/admins/lead/account/saa.html>; see also: [www.ed.gov/news/press-releases/fact-sheet-testing-action-plan](http://www.ed.gov/news/press-releases/fact-sheet-testing-action-plan).

accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments.

- Section 200.6(b)(2)(ii) has been revised to include teachers of English learners among those who should receive necessary training regarding administering assessments, including training on how to administer appropriate accommodations and alternate assessments.

- Section 200.6(c)(4) has been revised by making a number of changes to the list of criteria a State would need to meet in seeking a waiver to exceed the State-level cap on the number of students with the most significant cognitive disabilities taking an AA-AAAS in each subject area:

- Section 200.6(c)(4)(i) has been revised to clarify that a State must submit a waiver request 90 days prior to the start of the testing window for the relevant subject.

- Section 200.6(c)(4)(iii) has been revised to require that a State only verify that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a subject using an AA-AAAS followed the State's guidelines and will address disproportionality in use of the AA-AAAS.

- Proposed § 200.6(c)(4)(iii)(B) has been removed to no longer require a State to verify that an LEA that the State anticipates will exceed the State cap on using an AA-AAAS will not significantly increase that use from the prior year.

- Section 200.6(c)(4)(iv)(B) has been revised to require that a State only include a plan and timeline to support and provide appropriate oversight to each LEA that the State anticipates will exceed the State cap using an AA-AAAS.

- Section 200.6(d)(1)(i) has been clarified so that a student's status as an English learner may not determine whether the student is a "student with the most significant cognitive disabilities," as defined by each State.

- Proposed § 200.6(f)-(h) has been renumbered and reorganized as § 200.6(f)-(k) to contain all the requirements regarding English learners and students in Native American language schools and programs. Proposed § 200.6(i) regarding highly mobile student populations has also been moved to new § 200.2(b)(1)(ii)(A)-(D). Revisions to the renumbered paragraphs are described below.

- Section 200.6(f)(1)(i) has been added to require a State to develop appropriate accommodations for English learners; disseminate information and

resources about such accommodations to, at a minimum, LEAs, schools, and parents; and promote the use of those appropriate accommodations to ensure that all English learners are able to participate in academic instruction and assessments.

- Section 200.6(h)(4)(ii) (proposed § 200.6(f)(3)(iv)) has been revised to clarify that where a determination has been made, on an individualized basis by the student's IEP team, 504 team, or for students covered under title II of the ADA, by the team or individual designated by the LEA to make those decisions, as set forth in § 200.6(b)(1), that an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency (ELP) assessment such that there are no appropriate accommodations for the affected domain(s), a State must assess the student's English proficiency based on the remaining domains in which it is possible to assess the student.

- Section 200.6(j) (proposed § 200.6(g)) permits students in Native American language schools and programs to be assessed in their Native American language in any subject area, including reading/language arts, mathematics, and science, with evidence pertaining to these assessments required to be submitted for assessment peer review and approval, consistent with § 200.2(d).

- Section 200.6(j)(2) (proposed § 200.6(g)) requires assessment of students in Native American language schools and programs in reading/language arts in English in at least high school, instead of beginning in eighth grade.

Please refer to the *Analysis of Comments and Changes* section of this preamble for a detailed discussion of the comments received and changes made in the final regulations.

*Costs and Benefits:* The Department believes that the benefits of this regulatory action outweigh any associated costs to States and LEAs, which would be financed with Federal education funds. These benefits include the administration of assessments that produce valid and reliable information on the achievement of all students, including English learners and students with disabilities. States can use this information to effectively measure school performance and identify underperforming schools; LEAs and schools can use it to inform and improve classroom instruction and student supports; and parents and other stakeholders can use it to hold schools accountable for progress, ultimately leading to improved academic outcomes

and the closing of achievement gaps, consistent with the purpose of title I of the ESEA. In addition, the regulations address statutory provisions intended to limit assessment burden, including by avoiding the double testing of eighth-grade students taking advanced mathematics coursework in certain circumstances. Please refer to the *Regulatory Impact Analysis* section of this document for a more detailed discussion of costs and benefits. Consistent with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this action is significant and, thus, is subject to review by OMB under the Executive order.

*Public Comment:* In response to our invitation to comment in the NPRM, 232 parties submitted comments on the proposed regulations (including Tribal Consultation, further described below, as a comment).

We discuss substantive issues under the sections of the regulations to which they pertain, with the exception of a number of cross-cutting issues, which are discussed together under the heading "Cross-Cutting Issues." Generally, we do not address technical and other minor changes, or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed regulations or that were otherwise outside the scope of the regulations, including comments that raised concerns pertaining to particular sets of academic standards or assessments or the Department's authority to require a State to adopt a particular set of academic standards or assessments, as well as comments pertaining to the Department's regulations on statewide accountability systems.

*Tribal Consultation:* The Department held four tribal consultation sessions on April 24, April 28, May 12, and June 27, 2016, pursuant to Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). The purpose of these tribal consultation sessions was to solicit tribal input on the ESEA, including input on several changes that the ESSA made to the ESEA that directly affect Indian students and tribal communities. The Department specifically sought input on: The new grant program for Native language immersion schools and projects; the report on Native American language medium education; and the report on responses to Indian student suicides. The Department announced the tribal consultation sessions via

listserv emails and Web site postings on [www.edtribalconsultations.org/](http://www.edtribalconsultations.org/). The Department considered the input provided during the consultation sessions in developing the proposed regulations.

*Analysis of Comments and Changes:* An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

#### *Cross-Cutting Issues*

##### Parental Rights

*Comments:* One commenter noted the importance of parental involvement in issues pertaining to required State assessments, including test design, reporting, and use, and voiced support for a parent's right to make decisions regarding a child's participation in State assessments. However, the commenter did not provide any suggested changes to the proposed regulations in this area.

*Discussion:* We agree that seeking and considering input from parents when designing and implementing State assessment systems and policies is important in ensuring tests are fair and worth-taking. In fact, because a State assessment system is part of the State plan, section 1111(a)(1)(A) of the ESEA requires a State to consult with a wide variety of stakeholders, including parents, in designing and implementing its system. Moreover, section 1111(b)(2)(B)(x) requires a State assessment system to produce and provide individual student interpretive, descriptive, and diagnostic reports to parents so that they understand their child's specific academic needs. In addition, the new authority for an LEA to request to administer a locally selected, nationally recognized high school academic assessment in place of the statewide high school assessment requires the LEA to notify parents of its decision to administer such an assessment. See section 1111(b)(2)(H)(vi) of the ESEA and § 200.3(c). Accordingly, we believe no further clarification is needed in the regulations. We also note that, under section 1111(b)(2)(K) of the ESEA, the requirements for State assessment systems do not pre-empt a State or local law regarding parental decisions related to their child's participation in those assessments.

*Changes:* None.

##### Overtesting

*Comments:* One commenter noted that the ESEA expands opportunities to reduce testing, including allowing States to exempt eighth graders taking advanced mathematics coursework from double testing and allowing LEAs to

administer a locally selected, nationally recognized assessment instead of the statewide assessment, so long as the State approves use of such an assessment. This commenter encouraged SEAs to consider the Administration's recommendation to reduce the overuse and misuse of tests, and recommended the Department continue to promote this message as it enforces the assessment regulations. Other commenters articulated concerns about the total time students spend taking assessments required by Federal, State, and local entities, including some commenters who expressed these concerns regarding particular grade levels or subject areas. One commenter proposed replacing standardized testing with testing related to the Response to Intervention framework. Other commenters advocated that States, and not the Federal government, be the ones selecting academic standards and assessments, or that there be no Federal testing requirements at all. One commenter requested reductions in testing to allow for instructional time in social studies.

*Discussion:* We strongly agree with the commenter who expressed that, while the ESEA presents States with opportunities to streamline testing, each State and LEA should continue to consider additional action it may take to reduce burdensome or unnecessary testing. Annual assessments, as required by the ESEA, are tools for learning and promoting equity when they are done well and thoughtfully. When assessments are done poorly, in excess, or without a clear purpose, they take time away from teaching and learning. As discussed previously, President Obama's Testing Action Plan provides a set of principles and actions that can help protect the vital role that good assessment plays in guiding progress for students and evaluating schools, while providing help in reducing practices that have burdened classroom time or not served students or educators well (see footnote 1).

We do wish to clarify, however, that the ESEA does include Federal testing requirements under section 1111(b)(2)(B)(v)(I)–(II), to assess all students in a State annually in reading/language arts and mathematics in grades 3–8 and once in grades 9–12 and to assess all students in the State in science at least once in each grade span (*i.e.*, grades 3–5, 6–9, and 10–12). It would be inconsistent with the statute for the Department to use its regulatory authority to relieve States of these requirements, which provide important information to support teaching and learning, increase transparency, and

protect civil rights benefits when used appropriately. The Department does not now, and never has, required any specific set of standards or assessments under title I, part A. Similarly, nothing in these regulations promotes any particular set of standards or assessments; rather, the regulations define requirements, based in the statute that a State-determined assessment must meet.

*Changes:* None.

##### Plain Language

*Comments:* One commenter requested that the Department simplify the language of the regulation, indicating concern that the average teacher or parent may not understand the text. Specifically, the commenter requested that the regulation be written at a sixth grade reading level.

*Discussion:* While we appreciate that this regulation is specific and, at times, technical, we note that the language is intended to be both accessible and clear. We further note that, in negotiated rulemaking, representatives of both teachers and parents participated on the negotiated rulemaking committee and actively engaged in drafting and developing the language of the proposed regulation on which this final rule is based.

*Changes:* None.

#### *Section 200.2 State Responsibilities for Assessment*

##### Accessibility

*Comments:* Multiple commenters wrote in support of provisions in § 200.2(b)(2) related to developing assessments, to the extent practicable, consistent with the principles of universal design for learning (UDL) as a way to promote greater test accessibility for students with disabilities.

*Discussion:* Section 1111(b)(2)(B)(xiii) of the ESEA requires a State to develop its assessment system, to the extent practicable, using the principles of UDL. Using principles of UDL can help ensure that all students, including students with disabilities and English learners, are able to access high-quality State assessment systems, and we appreciate the commenters' support.

*Changes:* None.

*Comments:* One commenter requested a change in § 200.2(b)(2)(ii) regarding the meaning of UDL. Specifically, the commenter asked that we add language regarding UDL to require that assessments designed in accordance with the principles of UDL maintain high standards, validity, and reliability.

*Discussion:* The Department declines to make the requested change for three

reasons. First, all assessments under this subpart must be valid and reliable, as set forth in § 200.2(b)(4)(i). Therefore, it is unnecessary to restate such a requirement with regard to use of the principles of UDL in assessment development. Second, section 8101(51) of the ESEA states that the term “universal design for learning” as used in the ESEA has the meaning given it in section 103 of the Higher Education Act of 1965, the definition of which we incorporated directly into § 200.2(b)(2)(ii). Since the statute defines this term, we decline to make any edits to that definition. Finally, while we agree with the commenter that it is critical to hold all students to high standards, we believe this is clear throughout the regulation, particularly as required in §§ 200.2 and 200.6.

*Changes:* None.

#### Alignment With State Academic Standards

*Comments:* Numerous commenters expressed support for the requirements in § 200.2(b)(3)(i)(B), (b)(3)(ii)(A)(2), and (c)(1)(i) that require a State’s assessments, including computer-adaptive assessments, to provide information about student attainment of the full depth and breadth of the State’s academic content standards and how students are performing against the State’s academic achievement standards for the grade in which they are enrolled. Several commenters, as described in response to comments on § 200.6, believed these provisions were particularly important for students with disabilities, for whom expectations were in the past lower than for their peers. A few commenters noted that these provisions will help build consistency with the statutory requirement to use a measure of grade-level proficiency for school accountability and reporting, without limiting a State’s ability to consider measures of growth or the achievement of students who are above or below grade-level proficiency. One commenter expressed specific concern about whether the instructional standards were aligned to the assessment used in the commenter’s State, particularly at the high school level. An additional commenter expressed a preference for more consistency across State standards in order to better support highly mobile students whose parents are in the military. Another commenter, however, felt the focus on grade-level proficiency was inappropriate and would prefer for assessments to match a student’s level of instruction, rather than the grade in which the student is enrolled.

*Discussion:* We agree with the commenters that it is critically important for all students, including children with disabilities, to have access to the same challenging, grade-level academic content standards and be assessed against the same high standards for their academic achievement, except as noted below. Further, we believe that requiring State assessment systems to measure the depth and breadth of the academic content standards is one way to ensure that these goals of equitable access to challenging content and high achievement standards are met. We note that although students with the most significant cognitive disabilities must be assessed against the State’s academic content standards for the grade in which a student is enrolled, the performance of these students may be assessed with an AA-AAAS if a State has adopted such alternate academic achievement standards. We strongly disagree with the commenter who felt it would be more appropriate for assessments to match a student’s instructional level, as this could stifle educational opportunity and access to grade-level content for student populations, such as students from minority backgrounds, students from low-income families, English learners, and students with disabilities, who have been historically underserved and not given instruction aligned with academic content standards for the grade in which they are enrolled. Further, allowing out-of-level assessments would be inconsistent with section 1111(b)(2)(B)(ii) of the ESEA, which provides that the assessment system must be aligned with the State’s challenging academic standards and provide information about whether a student has attained such standards and whether the student is performing “at the student’s grade level.” We are unable to comment on whether the academic standards and assessments in a particular State are aligned. Instead, the assessment peer review process offers an opportunity for the Department to provide feedback on technical evidence regarding State assessment systems, including alignment, based on outside experts’ review of State-submitted evidence. While we acknowledge the commenter’s point regarding the utility of consistent standards and assessments across States for military families, we reaffirm that each State has the sole discretion to develop and adopt its own challenging State academic standards, provided they meet the relevant statutory and regulatory requirements.

*Changes:* None.

*Comments:* One commenter recommended adding to § 200.2(b)(3)(ii)(A) a requirement that each State document continued alignment with its State academic content standards over time, indicating that such an addition is necessary to ensure the Department receives appropriate evidence that a State’s assessment system is aligned to the full depth and breadth of the State’s academic content standards.

*Discussion:* We agree with the commenter that a State is continuously responsible for ensuring that its assessments are aligned with its challenging State academic content standards. We believe that these issues are sufficiently addressed in the technical requirements for assessments in § 200.2. Moreover, section 1111(a)(6)(B)(i) of the ESEA, clearly requires a State to submit its assessment system for assessment peer review if the State makes significant changes such as the adoption of new challenging State academic standards or new academic assessments, which is reflected in the Department’s Peer Review of State Assessment Systems Non-regulatory Guidance for States (see <http://www2.ed.gov/policy/elsec/guid/assessguid15.pdf>). The Department anticipates updating this non-regulatory assessment peer review guidance in the future to fully incorporate changes to the ESEA made by the ESSA and to align with these regulations.

*Changes:* None.

*Comments:* Some commenters strongly supported § 200.2(b)(3)(ii)(B), which requires assessment systems to be based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the State’s system of public higher education and relevant career and technical education standards, asserting that setting standards and aligning assessments to meet expectations for student readiness in postsecondary coursework is appropriate and necessary for States to ensure students acquire the knowledge and skills they will need to be successful beyond high school. However, one commenter stated that the provision severely narrows the goals of schooling and overlooks many important skills that students need to be successful.

*Discussion:* We appreciate the support for this provision, and agree that it is appropriate for State assessment systems to be aligned to standards that measure students’ college and career readiness. In response to the commenter’s concern that this provision narrows certain goals and overlooks

important skills, we note that section 1111(b)(1)(D)(i) of the ESEA requires a State to demonstrate that its challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards. Furthermore, because a State assessment system must be aligned to the State's challenging academic standards under section 1111(b)(2)(B)(ii) of the ESEA, § 200.2(b)(3)(ii)(B) is fully consistent with the law.

*Changes:* None.

*Comments:* Several commenters strongly supported § 200.2(b)(3)(ii)(B)(2), which specifies that a State's AA-AAAS for students with the most significant cognitive disabilities measure performance in such a way that a student who meets those standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (WIOA). They contended such a requirement will greatly benefit students with the most significant cognitive disabilities who have often been held to lower standards and given few opportunities beyond "sheltered workshops."

However, a few commenters objected to the proposed regulation, contending it would narrow the focus of education for these students to employability and would ignore important outcomes other than competitive integrated employment that they felt were more fair and attainable for some students with the most significant cognitive disabilities. One commenter also noted that the statute requires alignment of academic achievement standards to the purposes of the Rehabilitation Act and that competitive integrated employment is but one of those purposes. These commenters recommended that the final regulations only include the statutory language and reference the purposes, generally, of WIOA.

*Discussion:* Section 200.2(b)(3)(ii)(B)(2) requires that an AA-AAAS for students with the most significant cognitive disabilities measure student performance based on alternate academic achievement standards defined by the State that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the purposes of the

Rehabilitation Act of 1973, as amended by WIOA. The Department believes it is critical to maintain a focus on the highest expectations for all students in order to ensure that students have the greatest possible opportunities. Higher expectations have been shown to lead to better results for students.<sup>2</sup> The focus on competitive integrated employment is critical to emphasize that standards for students with the most significant cognitive disabilities must be rigorous and structured such that the students are prepared to earn competitive wages alongside their peers without disabilities. Such language is intended to clarify the connection between alternate academic achievement standards and preparation for competitive integrated employment, recognizing there was significance to this heightened expectation as expressed throughout the Rehabilitation Act, as amended by WIOA, and the importance of maintaining high expectations for students with the most significant cognitive disabilities in the ESEA.

*Changes:* None.

*Comments:* One commenter recommended that the final regulations include greater specificity regarding the comparability and quality of academic achievement standards across States, noting considerable differences between State determinations of student proficiency and proficiency as measured by the National Assessment of Educational Progress (NAEP) that indicate low and uneven expectations for students, particularly across State lines. Another commenter, however, recommended leaving all decisions regarding standards for student proficiency to the discretion of States.

*Discussion:* The ESEA leaves discretion for setting academic achievement standards to the States, so long as they meet all applicable

<sup>2</sup> U.S. Department of Education (2015). Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children with Disabilities. 80 FR 50774–50775 and 50777. Available at <https://www.federalregister.gov/documents/2015/08/21/2015-20736/improving-the-academic-achievement-of-the-disadvantaged-assistance-to-states-for-the-education-of>.

Rubie-Davies, C.M., Peterson, E.R., Sibley, C.G., & Rosenthal, R. (2015). A teacher expectation intervention: Modelling the practices of high expectation teachers. *Contemporary Educational Psychology, 40*, 72–85.

Klehm, M. (2014). The effects of teacher beliefs on teaching practices and achievement of students with disabilities. *Teacher Education and Special Education, 37*(3), 216–240.

Courtade, G, Spooner, F., Browder, D., & Jimenez, B. (2012). Seven reasons to promote standards-based instruction for students with severe disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011). *Education and Training in Autism and Developmental Disabilities, 47*(1), 3–13.

statutory and regulatory requirements under section 1111(b)(1) of the ESEA. For this reason, we decline to make any further changes to the final regulations to provide greater specificity as to how a State must set its standards. Under section 1111(b)(1)(D), each State must demonstrate alignment between its challenging academic standards and its statewide assessments through assessment peer review under section 1111(a)(4). In this manner, a State will also demonstrate that the academic achievement standards it adopts reflect college- and career-ready expectations for all students.

*Changes:* None.

*Comments:* One commenter suggested that, in order to facilitate meaningful use of assessment results by local administrators and educators, the Department clarify in § 200.2(b)(3)(i)(B) that providing timely information on student attainment of the State's challenging academic standards means that LEAs will receive results of State assessments at least 30 days prior to the beginning of each school year.

*Discussion:* We agree with the commenter that timely access to information from student assessments is critical to ensure the results are meaningful and actionable for stakeholders, but believe such a requirement is best addressed in requirements for reporting results of assessments on State and LEA report cards under section 1111(h) of the ESEA.

*Changes:* None.

#### Characteristics of High-Quality Assessments

*Comments:* Several commenters supported the addition of fairness in § 200.2(b)(4)(i), along with validity and reliability, as a criterion for State assessments required by the ESEA, particularly to ensure all students have equal access to rigorous instruction, curricula, and assessments.

One commenter, however, recommended deleting § 200.2(b)(4)(i), stating that separate requirements for validity, reliability, and fairness were unnecessary as § 200.2(b)(4)(ii) (which requires State assessments to be consistent with relevant, nationally recognized professional and technical testing standards) adequately covers topics of validity, reliability, and fairness. Other commenters recommended deleting "fair" from § 200.2(b)(4)(i), contending that it has no basis in the statute and adds confusion. One of these commenters also argued that the addition of "fair" was in conflict with the prohibition in section 1111(e)(2) of the ESEA, related to the

Secretary's authority to define terms that are inconsistent with or outside the scope of the law.

*Discussion:* The Department agrees with the commenters who pointed out that relevant, nationally recognized professional and technical testing standards—such as the *Standards for Educational and Psychological Testing* developed jointly by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education—address the topics of validity, reliability, and fairness.<sup>3</sup> The Department disagrees that it is unnecessary to include those factors explicitly in the regulations. Validity, reliability, and fairness are the cornerstones of effective and appropriate educational assessment, so we think it is worthwhile to specifically emphasize these attributes. As to the contention that adding “fair” is confusing, the *Standards for Educational and Psychological Testing* make clear that “fairness” has a technical definition—specifically that, “the validity of test score interpretations for intended use(s) for individuals from all relevant subgroups. A test that is fair minimizes the construct-irrelevant variance associated with individual characteristics and testing contexts that otherwise would compromise the validity of scores for some individuals”<sup>4</sup>—that is well accepted in the professional assessment community and does not create confusion. Moreover, because fairness is part of the *Standards for Educational and Psychological Testing*, it is within the scope of section 1111(b)(2)(B)(iii) of the ESEA, which requires consistency with relevant nationally recognized professional and technical testing standards.

We also disagree with the contention that requiring that assessments be “fair” is in conflict with the prohibition in section 1111(e)(2) of the ESEA on defining terms that are inconsistent with or outside the scope of the law. Rather, the law itself affirms the importance of fair assessment, for example, by requiring the use of principles of UDL (section 1111(b)(2)(B)(xiii) of the ESEA), prohibiting assessments that would evaluate personal or family beliefs (section 1111(b)(2)(B)(iii) of the ESEA), and requiring that the State provide for the participation of all students (section 1111(b)(2)(B)(vii) of the ESEA).

<sup>3</sup> American Educational Research Association, American Psychological Association, National Council on Measurement in Education (2014). *Standards for Educational and Psychological Testing*.

<sup>4</sup> *Ibid.*, p. 219.

Moreover, the regulations do not, in fact, propose a definition of “fair.” For these reasons, we believe highlighting the importance that assessments be “fair” in addition to valid and reliable is consistent with the requirements in section 1111(b)(2) of the ESEA and not outside the scope of title I, part A.

*Changes:* None.

*Comments:* A few commenters wrote in general support of § 200.2(b)(5)(i), which requires State assessment systems to be supported with evidence that the assessments are of adequate technical quality.

*Discussion:* We appreciate the commenters' support for § 200.2(b)(5)(i) and agree that providing evidence of a State assessment system's technical quality is a critical requirement to maintain in the final regulations.

*Changes:* None.

#### Public Posting of Technical Information

*Comments:* A commenter requested that the Department require a State's technical review process regarding locally selected, nationally recognized high school academic assessments under § 200.3 be made public on the State's Web site, including by requiring the State to post the technical criteria against which an LEA's requested assessment would be evaluated. The same commenter and another commenter requested that the results of any technical reviews a State completes be made publicly available.

*Discussion:* We agree that it is important that a State post information about technical quality related to assessments under § 200.3. Transparency fosters collaboration and productive civic engagement. However, since § 200.3(b)(1)(iv) specifies that all requirements of § 200.2(b) (except for § 200.2(b)(1)) apply to locally selected, nationally recognized high school academic assessments, if a State chooses to allow such assessments, the requirement under § 200.2(b)(5)(ii) that technical information be posted on the State's Web site already applies. Therefore, a State will need to make at least as much information available regarding assessments under § 200.3 as it would provide regarding other assessments the State uses to meet the requirements of this subpart.

*Changes:* We have revised § 200.2(b)(5)(ii) to make clear that the requirement to post technical information applies to each assessment administered under this subpart.

#### Multiple Measures of Student Achievement

*Comments:* A few commenters recommended further specifying

“higher-order thinking skills” under § 200.2(b)(7) by providing examples of these skills, such as critical thinking, complex problem-solving applied to authentic problems, communication, and academic mindsets. Commenters stated this would help support students' college and career readiness, as these skills are valuable for long-term success after high school.

*Discussion:* We agree that providing examples of higher-order thinking skills will clarify the meaning of this phrase in the regulations and have added critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content to § 200.2(b)(7) to help illustrate what is meant by higher-order thinking skills.

*Changes:* We have revised § 200.2(b)(7) to include illustrative examples of higher-order thinking skills.

*Comments:* A number of commenters supported provisions that offer flexibility to States to develop assessment systems that measure student growth, in addition to achievement, and encouraged the broad use of growth measures. Further, some of these commenters suggested modifying § 200.2(b)(7)(i) and (b)(10)(ii) to require States' assessment systems to measure student growth. Commenters wrote that such a requirement would be consistent with statutory and proposed regulatory requirements for accountability systems under the ESEA, and would help ensure assessments provide results that can be used to inform instruction and meet the learning needs of all students. Another commenter suggested that if a State uses its assessment system to measure both student growth and achievement, the State should be required to report publicly both measures to give parents and the public a more comprehensive picture of students' learning.

*Discussion:* We agree with commenters that measures of student growth can provide valuable insight into how well students are progressing against the State's challenging academic standards to inform instruction. However, section 1111(b)(2)(B)(vi) of the ESEA makes clear that measuring student academic growth is a State's decision. Moreover, contrary to the commenters' assertion, measures of student growth are not required to be used in the statewide accountability system under section 1111(c) of the ESEA; also, section 1111(e)(1)(B)(iii)(III) prohibits the Secretary from requiring States to measure student growth for accountability purposes as a condition of approval of a State plan, or revisions or amendments to such plan, or

approval of a waiver request.

Accordingly, we agree with commenters that a State's discretion to measure student growth based on its assessment systems is valuable, but decline to make any revisions to § 200.2(b)(7)(i) or (b)(10)(ii). Further, any change in reporting requirements for States that elect to measure student academic growth is outside the scope of these regulations, as such requirements are specified in section 1111(h) of the ESEA, for which the Department has recently issued final regulations. We note that if a State were to elect to measure student academic growth as an accountability indicator, section 1111(h)(1)(C)(iii)(I) of the ESEA requires that performance on those indicators be included on State and LEA report cards.

*Changes:* None.

*Comments:* Several commenters wrote in support of assessment systems that include forms of assessments, such as portfolios and performance-based tasks as described in § 200.2(b)(7)(ii), as opposed to a single, summative, standardized assessment and encouraged the Department to find ways to incentivize and promote their widespread use. A few commenters noted that these forms of assessments are particularly helpful for assessing students with disabilities who may struggle to demonstrate what they know using traditional standardized tests.

One commenter, however, urged caution about the use of portfolios, projects, or extended performance tasks in State assessment systems and recommended the Department revise § 200.2(b)(7)(ii) to require States seeking to use these forms of assessment to develop and submit a plan to the Department for approval that would describe the efficacy, reliability, and comparability of these assessments and how the State will monitor their implementation.

*Discussion:* Section 1111(b)(2)(B)(vi) of the ESEA, specifies that State assessments may be partially delivered in the form of projects, portfolios, or extended performance tasks, and we appreciate the commenters' support for reiterating this provision in the regulations. Because projects, portfolios, and extended performance tasks would be part of a State's assessment system, evidence about these items would need to be included in a State's submission for assessment peer review, as described in § 200.2(d), to determine whether the assessment system as a whole meets all applicable regulatory requirements (including those related to validity, reliability, and technical quality). Therefore, we disagree with the commenter that additional language is

needed in the final regulations to require each State that uses portfolios, projects, or extended performance tasks in its assessments to submit a separate plan describing their quality and use.

*Changes:* None.

*Comments:* One commenter suggested requiring that all State assessment systems include a performance-based component in mathematics in order to ensure all parts of mathematical knowledge, such as reasoning and procedural skills, are assessed. Another commenter suggested that State assessments be able to be fully delivered in the form of portfolios or projects, believing that this type of format may be most appropriate for certain students, such as those with very low levels of English proficiency. Other commenters suggested that further clarity would be helpful to ensure that assessments including portfolios, projects, or performance tasks could be used by States while still meeting the requirement in § 200.2(b)(1)(i) to administer the same assessment to all students; one commenter recommended that so long as these assessments measure the same standards, the various items, prompts, or tasks, as well as scoring rubrics and training for evaluators, need not be the same.

*Discussion:* Section 1111(b)(2)(B)(vi) of the ESEA, specifies that State assessments may be partially delivered in the form of projects, portfolios, or extended performance tasks. As the statute leaves the decision about whether to use any of these formats up to each State and qualifies their inclusion with "partially," we decline to require a State to use them when developing its assessment system or to modify the regulations so that assessments may be fully delivered in these formats. Further, we are declining to make revisions to the final regulations to address the commenter's concern that § 200.2(b)(7)(ii) may be perceived as inconsistent with the statutory and regulatory requirements for the State to use the same assessment to measure the achievement of all public school students, as we believe such clarification is better suited for non-regulatory assessment peer review guidance. States may use assessments that include portfolios, projects, or performance tasks in a manner that is consistent with the statutory and regulatory requirements, examples of which we think would be best suited to such non-regulatory guidance.

*Changes:* None.

*Comments:* Two commenters recommended clarifying that State assessments partially delivered in the form of portfolios, projects, or extended

performance tasks be excluded from any calculations of time students spend taking assessments, as required to be reported, when available, under the "parents right-to-know" provisions under section 1112(e)(2)(B)(iv)(I) of the ESEA, and as part of any assessment audit under section 1202 of the ESEA—noting that these assessments are often administered over the course of a semester or year, and not in a single, discrete test-taking period.

*Discussion:* Although we appreciate the commenters' suggestions regarding the use of portfolios, projects, and extended performance tasks, which are permitted in State assessments under these regulations, the regulations pertain to requirements for State assessment systems in general under section 1111(b)(2) of the ESEA. Thus, comments on how the Department should implement the "parents right-to-know" and assessment audit requirements in sections 1112(e)(2) and 1202 of the ESEA, respectively, are outside the scope of these regulations.

*Changes:* None.

State Flexibility for Assessment Format

*Comments:* Multiple commenters supported the proposed regulations regarding State flexibility to administer a single summative assessment or multiple interim assessments throughout the year that result in a single summative score, noting that greater discretion in the time and format of assessments may help reduce the time students spend taking required assessments, could promote innovative assessment formats among States rather than traditional large-scale summative assessments taken at the end of the year, and may support particular student groups, like students with disabilities, who may be better able to demonstrate their knowledge when assessments occur throughout the year as students master academic material. One commenter supported this flexibility for States, but felt that a single summative score for each student was unnecessary. Another commenter expressed that it should not be necessary for all students to take the same test across schools in the State due to variations in instructional methods.

Another commenter, however, urged caution about the use of multiple, interim assessments throughout the year that result in a summative score. This commenter suggested the Department revise § 200.2(b)(10) to require States seeking to use these forms of assessment to develop and submit a plan to the Department for approval that would describe the efficacy, reliability, and comparability of these assessments and

how the State will monitor their implementation.

*Discussion:* Section 1111(b)(2)(B)(viii) of the ESEA, specifies that State assessments may be administered through a single summative assessment or multiple statewide interim assessments during the course of the year that result in a single summative score, and we appreciate the commenters' support of reiterating this provision in the proposed regulations. Given that the requirement for multiple interim assessments to produce a single summative score is statutory, we decline to strike this requirement in the final regulations. Moreover, because multiple statewide interim assessments administered throughout the school year would be part of a State's assessment system, they would be included in a State's submission for assessment peer review, as described in § 200.2(d), to determine whether the assessments meet all applicable regulatory requirements (including those related to validity, reliability, and technical quality), we disagree with the commenter that additional language is needed in the final regulations to require each State that uses multiple interim statewide assessments to submit a separate plan describing their quality and use. Rather, validity, reliability, and technical quality will be considered as part of the assessment peer review process for each State, regardless of a particular State's test design.

We reaffirm the statutory and regulatory requirements to assess all students in the State using the same assessments, except in specific circumstances outlined in § 200.2(b)(1)(i). This is essential to promote ongoing transparency, meaningful and fair school accountability, and equity.

*Changes:* None.

#### Disaggregated Data

*Comments:* Several commenters recommended requiring more detailed disaggregated data for various subgroups of students specified under § 200.2(b)(11). One commenter recommended requiring further disaggregation of assessment data by gender, to better identify and support students of different sexes or gender identities. Another commenter suggested that the children with disabilities subgroup be disaggregated by each category of disability specified under section 602(3) of the Individuals with Disabilities Education Act (IDEA), given the broad range of cognitive and functional abilities among students in the subgroup. An additional commenter

objected to the use of the term "subgroups" with regard to students.

*Discussion:* The statute uses the term "subgroup" to identify students based on certain characteristics. Accordingly, the regulations use the same language. The individual subgroups of students for which State assessments are required to be able to be disaggregated in the regulations are consistent with those required under section 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA. While we understand that requiring further disaggregation of assessment data for additional subgroups of students may help focus needed attention on underserved students with unique academic and non-academic needs, we believe States should have discretion over the disaggregation of any additional subgroups.

*Changes:* None.

*Comments:* Two commenters recommended allowing States and districts flexibility regarding when assessment data must be available in a disaggregated fashion for certain new subgroups, such as students who are homeless, are in foster care, or have military-connected families in proposed § 200.2(b)(11)(vii)–(ix).

*Discussion:* Given that the requirement to report assessment results disaggregated for students who are homeless, are in foster care, or have military-connected families is found in section 1111(h)(1)(C)(ii) of the ESEA, which specifies requirements for State and LEA report cards, we are declining to make the suggested changes as the comments are outside the scope of the regulations on State assessments under title I, part A.

*Changes:* None.

*Comments:* None.

*Discussion:* In reviewing the final regulations, the Department realized that § 200.2(b)(11) did not include language from section 1111(b)(2)(B)(xi) of the ESEA which states that disaggregation is not required if the number of students in a subgroup in a State, LEA, or school is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student. The statute and, accordingly, the regulations stipulate disaggregation of student data by many student subgroups, including subgroups that cause students to be highly mobile. While transparent information about students in specific circumstances is important for promoting equity and access for all students, student data privacy is also critical. Incorporating this statutory language will help ensure that States and LEAs appropriately balance public reporting and privacy by

not showing results for a particular subgroup if doing so would reveal personally identifiable student information.

*Changes:* We have added § 200.2(b)(11)(ii) to incorporate statutory language stating that disaggregation by subgroups is not required if the number of students in a subgroup in a State, LEA, or school is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

#### Computer-Adaptive Assessments

*Comments:* Multiple commenters strongly supported the proposed requirements for computer-adaptive assessments in § 200.2(c), noting that these forms of assessments may help reduce the time students spend taking required assessments and support States in more accurately measuring student learning and growth over time, particularly for students with disabilities who may be behind grade level or gifted students who are well above the proficient level for their enrolled grade. Several of these commenters also supported the fact that the regulations require States, when using computer-adaptive assessments, to provide a determination of a student's achievement against the academic content standards for the grade in which the student is enrolled to ensure all students are held to high expectations for their learning. One of these commenters supported the flexibility for States to use computer-adaptive tests, but did not think that a single summative score from a computer-adaptive assessment for each student was necessary.

However, a couple of commenters were concerned that the proposed requirements for computer-adaptive assessments to produce a grade-level determination would mean such assessments would not also produce a valid result for a student's performance above or below grade level and advocated for allowing computer-adaptive tests that primarily assess performance above or below grade level, potentially with reduced focus on grade level content.

*Discussion:* We appreciate the commenters' support and agree that computer-adaptive assessments could promote positive change in the design and delivery of State assessment systems. Section 1111(b)(2)(J) of the ESEA gives each State the discretion to adopt a computer-adaptive assessment so long as it measures, at a minimum, each student's academic proficiency based on challenging State academic

standards for the student's grade level and growth toward such standards; in addition, the adaptive assessment may measure a student's level of proficiency and growth using items above or below the student's grade level. As this statutory language, which emphasizes the importance of a determination of grade-level proficiency for each student against the State's challenging academic standards, is included nearly verbatim in the proposed regulations, we believe the commenters' suggested changes would be inconsistent with the statute.

*Changes:* None.

*Comments:* A commenter expressed concern that the requirements for computer-adaptive assessments in § 200.2(c)(1) do not require such assessments to measure the depth and breadth of the State's academic content standards, contending this will undermine full alignment of the assessments with the State's grade-level expectations and their accuracy in measuring student performance against those expectations.

*Discussion:* Section 1111(b)(2)(f) of the ESEA requires that, if a State chooses to use computer-adaptive assessments, those assessments meet all requirements of "this paragraph"—*i.e.*, section 1111(b)(2)—which include requirements related to addressing the depth and breadth of State academic content standards. We have incorporated this expectation into § 200.2(c)(1)(i). Therefore, we disagree that the regulations will undermine full alignment with grade-level expectations or accuracy, and believe that no change is warranted.

*Changes:* None.

*Comments:* One commenter recommended that the Department revise the regulations to make clear that a State may assess students against academic content standards above and below their enrolled grade level on all forms of assessments, not only if the State administers computer-adaptive tests. The commenter believed this flexibility is needed to promote competency-based approaches to education.

*Discussion:* A State must, at a minimum, assess students in a valid and reliable manner against grade-level content standards consistent with the Federal assessment requirements under title I, part A. Generally, a State may also assess a student against academic content standards above and below the grade in which the student is enrolled provided the State meets all applicable requirements for assessment relative to the grade in which the student is enrolled, regardless of whether the assessment is computer-adaptive. The

Federal assessment requirements under title I, part A include: Producing a summative score that measures a student's academic achievement against the State's academic achievement standards; reporting that score and the corresponding achievement level to parents and educators, in the aggregate and disaggregated by subgroups; reporting student academic achievement information based on the enrolled grade on State and local report cards; and using that score in the Academic Achievement indicator and long-term goals in the State's school accountability determinations. While we urge a State to use assessment time judiciously, in keeping with President Obama's Testing Action Plan (see footnote 1), a State does not need specific authority to offer a student assessment items in addition to those items that produce the student's annual summative score based on grade-level achievement standards. Since any assessment, including any computer-adaptive assessment, must provide a measure of student academic achievement against the challenging State academic standards for the grade in which a student is enrolled, items above or below a student's grade level would be administered in addition to items needed to meet the requirements of this subpart. While students with the most significant cognitive disabilities may be assessed with an AA-AAAS, if the State has adopted such standards, such an assessment must also be aligned with the challenging State academic content standards for the grade in which the student is enrolled. In any circumstance, a State must ensure that it demonstrates that all of its assessments meet all technical quality requirements regarding measurement of a student's grade-level academic achievement. We therefore decline to make any additional changes.

*Changes:* None.

#### Assessment Peer Review

*Comments:* One commenter supported § 200.2(d) that requires each State to submit evidence for assessment peer review that its English language proficiency (ELP) assessment meets all applicable requirements, which will help ensure that these assessments (used for both school accountability and to help determine whether students are ready to exit English learner services) are of the highest technical quality.

*Discussion:* We appreciate the commenter's support and agree that peer review of a State's ELP assessment will be critically important to ensuring that assessment is fair, valid, reliable, and high quality.

*Changes:* None.

*Comments:* One commenter recommended revising § 200.2(d) so that the peer review of assessments would allow for States to use innovative assessments that depart from traditional forms of standardized testing, believing such assessments to be preferable to traditional large-scale assessment systems.

*Discussion:* States have broad discretion to design and implement assessment systems that effectively measure student academic achievement related to a State's challenging academic content and academic achievement standards. Neither the statute nor the regulations apply any specific limits on test design; rather, the statute and regulations focus on the technical quality of assessments, including validity, reliability, and fairness for all students and high technical quality. In fact, section 1111(b)(2)(B)(vi) of the ESEA specifically directs States to "involve multiple up-to-date measures of student academic achievement, including measures that address higher-order thinking skills and understanding, which may include measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks," and the regulations incorporate this authority. A State may apply innovative principles to academic assessments without any additional specific authority.

As previously discussed, annual assessments, as required by the ESEA, are tools for learning and promoting equity when they are done well and thoughtfully. When assessments are done poorly, in excess, or without a clear purpose, they take time away from teaching and learning. President Obama's Testing Action Plan (see footnote 1), released in October 2015, provides a set of principles and actions that the Department put forward to help protect the vital role that good assessment plays in guiding progress for students and evaluating schools, while providing help in reducing practices that have burdened classroom time or not served students or educators well.

Further, section 1204 of the ESEA allows States granted Innovative Assessment Demonstration Authority to begin administering them in some schools or LEAs and then take such assessments to scale statewide over several years. The Department wishes to emphasize, however, that a State does not need to be granted such authority in order to innovate or improve its assessments, provided it annually assesses all students in each required grade level and subject area using the

same assessment, in keeping with all applicable statutes and regulations.

Finally, the Department offers competitive grant funds to State applicants to support specific kinds of assessment development. Under the ESEA, as amended by the NCLB, these grants were called the Enhanced Assessment Grants; in the ESEA, as amended by the ESSA, similar authority exists in section 1203. The most recent competition included a competitive preference priority for applicants proposing projects that develop innovative assessment items, which a State would incorporate into its statewide assessment system (for more information, see [www.ed.gov/programs/eag](http://www.ed.gov/programs/eag)).

*Changes:* None.

*Comments:* One commenter suggested revising § 200.2(d) to include requirements related to the background and expertise of individuals who serve as assessment peer reviewers to ensure that the reviewers are well positioned to determine whether a State has met all applicable requirements. Another commenter suggested, in particular, that stakeholders from diverse backgrounds be included in the assessment peer review process, to the extent practicable.

*Discussion:* We recognize the commenters' intent to ensure that the individuals who serve as assessment peer reviewers of State assessments possess the necessary skills and background to make informed determinations, but we believe such specificity is unnecessary in the final regulations. The individuals best suited to evaluate State assessments may vary depending on the type of assessment under review (*i.e.*, AA-AAAS versus ELP assessments), and further regulation in this area could unintentionally inhibit the Department from selecting the most knowledgeable and appropriate peer review teams based on the context of the State assessments under review.

*Changes:* None.

*Comments:* A few commenters contended that assessment peer review is too burdensome for States and advocated reducing or eliminating it.

*Discussion:* Assessment peer review, as required under section 1111(a)(4) of the ESEA, is the Department's primary mechanism for ensuring that States implement high-quality academic assessments that meet the requirements of the law. Since these assessments are a factor in school accountability systems and provide a critical window into student educational opportunity and progress in closing achievement gaps, a key purpose of title I of the ESEA, we

think it is important to administer the process in a thorough manner. That said, as the Department considers future non-regulatory assessment peer review guidance aligned with the ESEA and these regulations, we welcome stakeholder input into how to support States in meeting all requirements under the law and in these regulations.

*Changes:* None.

#### Information to Parents

*Comments:* Multiple commenters wrote in support of § 200.2(e), which requires information provided to parents to be (1) in an understandable and uniform format, (2) written, to the extent practicable, in a language and format that parents can understand or, if it is not practicable for a written translation, orally translated, and (3) available in alternate formats accessible to parents with disabilities upon request. These commenters cited the importance of ensuring parents receive information about assessments that is clear, transparent, and in formats and languages they can access and understand in order to facilitate meaningful parental engagement and involvement in their child's education and improve student outcomes. One commenter specifically recommended we revise the final regulations to require States to make available a written translation of notices to parents in at least the most populous language in the State. This commenter argued that such a requirement is consistent with provisions related to assessments in languages other than English under proposed § 200.6(f) and would not be overly burdensome. Another commenter recommended that the Department develop guidance to offer additional clarity and best practices in this area, including examples of model notices, to help support States in making information to parents fully accessible. Some commenters also recommended requiring that all written notices include information on how a parent can request free language assistance from a school or district if a written translation is not available. Another commenter requested that the regulations explicitly note that the requirements apply to making information available in Native American languages.

However, a few commenters argued the opposite—that compliance with § 200.2(e) would be overly burdensome and costly for local districts, particularly those requirements related to providing information in a language that parents can understand. One commenter noted that these provisions could be particularly challenging to implement in States with Native

American populations, and sought additional guidance from the Department on circumstances in which a language is more common at a local level, yet rare nationally, and where some languages are primarily oral and not written. In addition, another commenter recommended only including the statutory language, thereby removing requirements related to written and oral translations and alternate formats.

*Discussion:* We appreciate the strong support of many commenters for § 200.2(e) and the suggestions for future non-regulatory guidance on providing accessible information to parents. Section 1111(b)(2)(B)(x) of the ESEA requires each State to produce individual student interpretive, descriptive, and diagnostic reports on achievement on assessments that allow parents, teachers, principals, and other school leaders to understand and address students' specific academic needs. In order to ensure that a parent receives needed information about a child's academic progress, section 1111(b)(2)(B)(x) further requires a State to provide this information in an understandable and uniform format, and to the extent practicable, in a language that parents can understand. We believe these requirements for meaningful access to assessment information—and the clarifications provided by § 200.2(e)—are critical in order to help parents meaningfully engage in supporting their children's education and provide consistency between these regulations and applicable civil rights laws, as explained below.

Given that such information is essential for meaningful parent engagement and involvement in decision-making related to their child's education, we disagree with the contention that compliance with § 200.2(e) would be overly burdensome and costly. Likewise, we note that if this information is provided through an LEA Web site, the information is required to be accessible for individuals with a disability not only by the ESEA, but also based on the Federal civil rights requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (section 504), title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* (title II of the ADA), as amended, and their implementing regulations, all of which are enforced by the Department's Office for Civil Rights.

We disagree with commenters that we should require only written translations and not allow for oral translations, or require oral translations and alternate formats only to the extent practicable. Parents with disabilities or limited

English proficiency have the right to request information in accessible formats. Whenever practicable, written translations of printed information must be provided to parents with limited English proficiency in a language they understand, and the term “language” includes all languages, including Native American languages. However, if written translations are not practicable for a State to provide, it is permissible to provide information to limited English proficient parents orally in a language that they understand. This requirement is not only consistent with the Department’s longstanding interpretation of the phrase “to the extent practicable,” it is also consistent with Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and its implementing regulations. Under Title VI, recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency. It is also consistent with Department policy under Title VI and Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency).

We decline to further define the term “to the extent practicable” under these regulations, but remind States and LEAs of their Title VI obligation to take reasonable steps to communicate the information required by the ESEA, as amended by the ESSA, to parents with limited English proficiency in a meaningful way.<sup>5</sup> We also remind States and LEAs of their concurrent obligations under Section 504 and title II of the ADA, which require covered entities to provide persons with disabilities with effective communication and reasonable accommodations necessary to avoid discrimination unless it would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. Nothing in ESSA or these regulations modifies those independent and separate obligations. Compliance with the ESEA, as amended by the ESSA, does not ensure compliance with Title VI, Section 504, or title II of the ADA.

*Changes:* None.

#### Other Comments Related to State Responsibilities for Assessment

*Comments:* One commenter wrote in general support of the requirement to assess all students under § 200.2(b)(1), noting that this provision is particularly

critical for historically underserved populations of students like children with disabilities.

*Discussion:* We appreciate the commenter’s support for the proposed regulations, which were intended to ensure equity and educational opportunities for all students, including children with disabilities.

*Changes:* None.

*Comments:* One commenter suggested the regulations replace the slash (/) in reading/language arts with “or” to make the language consistent with the statutory requirements to assess students in reading or language arts.

*Discussion:* We recognize the commenter’s point that the ESEA uses “reading or language arts” to describe the academic content standards in these subjects, but note that the prior authorizations of the ESEA, the NCLB and the Improving America’s Schools Act of 1994, also used the term “reading or language arts” to describe standards in these subjects, while the corresponding regulations used the term “reading/language arts.” As this is consistent with policy and practice for over two decades and we are unaware of significant confusion in this area, we believe it is unnecessary to change “reading/language arts” in § 200.2 and other sections of the final regulations.

*Changes:* None.

*Comments:* One commenter suggested adding a requirement to § 200.2 highlighting improved test security measures as a potential use of formula funds provided for State assessments under section 1201 of the ESEA, noting instances of testing irregularities that could be prevented with additional resources to support enhanced security measures.

*Discussion:* In general, effective test security practices are needed in order for a State to demonstrate strong technical quality, validity, and reliability, which the statute and regulations already require. We believe that specific expectations related to test security are best reflected in non-regulatory guidance. Existing non-regulatory assessment peer review guidance (available at <http://www2.ed.gov/admins/lead/account/peerreview/assesspeerrevst102615.doc>) for State assessments details the types of evidence States might submit to demonstrate strong test security procedures and practices. We therefore believe additional emphasis on test security in § 200.2 is unnecessary. Further, comments on funding for State assessment systems under section 1201 of the ESEA are outside the scope of these regulations. However, we note that

using funds under 1201 to improve test security would be permissible.

*Changes:* None.

*Comments:* One commenter expressed concern about the risk of technical failure on a computer-based test and about the computing skills needed for a student to demonstrate knowledge and skills on such a test. Another commenter articulated similar concerns specifically with regard to English learners.

*Discussion:* The Department shares the commenters’ concern about the risk of technical failure and encourages States to prepare thoroughly for technology-based assessments, including through building in needed back-up systems to ensure continuity of operations. As students grow up in an increasingly technology-based world, many are digital natives. However, we agree with the commenters’ concerns about opportunity to access technology, and continue to support schools and districts in creating innovative means of providing equitable access to technology for all students, including English learners. Nothing in these regulations either requires or restricts the use of technology-based assessments, provided such assessments are accessible to all students, including students with disabilities, and we believe these topics are better suited to non-regulatory guidance and should be subject to a State’s discretion.

*Changes:* None.

*Comments:* Several commenters suggested adding requirements that States must engage educators in developing (1) guidance on creating a positive testing environment in schools leading toward data-driven decisions; (2) tools for using tests to measure student growth and progress over time; and (3) ongoing professional development for teachers in using assessment data.

*Discussion:* While the Department appreciates the intent of these commenters to improve the assessment experience for educators, we decline to require these activities. We believe these efforts are most likely to be successful and meaningful if they are undertaken in response to community demand and buy-in from classroom teachers, school leaders, and local administrators—not in response to a Federal requirement. The Department anticipates updating non-regulatory guidance related to using Federal funds to support assessment literacy and implementing President Obama’s Testing Action Plan.

*Changes:* None.

*Comments:* Multiple commenters recommended that the final regulations specifically allow States to adopt

<sup>5</sup> For more information on agencies’ civil rights obligations to Limited English Proficient parents, see the Joint Dear Colleague Letter of Jan. 7, 2015, at Section J. (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>).

innovative assessments statewide or in a subset of LEAs without seeking approval or any flexibility from the Department, so long as the State or LEA continues to administer its annual statewide assessments as described in § 200.2 and related regulations.

*Discussion:* We agree with the commenters that nothing in these regulations precludes an LEA or State from adopting and implementing innovative assessments in addition to the statewide assessments it uses to meet the requirements of section 1111(b)(2) of the ESEA. A State also does not need special flexibility if it uses an innovative approach statewide to meet the requirements of section 1111(b)(2) of the ESEA and these regulations. A State only requires special flexibility from the Department if it is seeking to use an innovative assessment in a subset of LEAs and permit these LEAs to forego administration of the statewide assessment while it scales the innovative assessments to operate statewide. In those cases, a State requires Innovative Assessment Demonstration Authority under section 1204 of the ESEA. Because the Department intends to issue separate regulations on this new authority, we believe additional clarification in these final regulations on assessments under part A of title I is unnecessary.

*Changes:* None.

### *Section 200.3 Locally Selected, Nationally Recognized High School Academic Assessments*

#### Definition of “Nationally Recognized High School Academic Assessment”

*Comments:* Some commenters supported the proposed definition of a “nationally recognized high school academic assessment.” Other commenters opposed it for various reasons, including the desire to include an individualized State higher education entrance or placement examination (*i.e.*, one that may be in use in a given State’s system of higher education, but not across multiple States), a request for a particular assessment to meet the definition, and a concern that the proposed definition would preclude assessments used by career and technical education programs.

*Discussion:* The negotiated rulemaking committee discussed the definition of “nationally recognized high school academic assessment” at length and came to consensus on the proposed definition. Specifically, the committee agreed that, in order to be nationally recognized, an assessment

must be in use in multiple States and recognized by institutions of higher education in those or other States for the purposes of entry or placement in those institutions. Since the statute specifically limits this exception to nationally recognized assessments, we do not think it is consistent with the statute to allow for assessments used only in a single State to meet the definition. The definition does not identify any specific academic assessment as allowable; neither does it preclude the use of any specific assessment that meets the definition. Any assessment given by a State or an LEA to meet the requirements of this subpart must be aligned with the challenging State academic standards, in keeping with §§ 200.2(b)(3) and 200.3(b)(1)(i)–(ii). Finally, since a State’s high school assessment must assess the high school standards broadly, and since those standards are required by section 1111(b)(1)(D) to be aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards, we believe the definition is sufficiently broad to include assessments recognized by both postsecondary education and career training programs. We, therefore, disagree with commenters who worry that the use of this definition will adversely affect career and technical training programs. An LEA could request to use an assessment honored by career and technical training programs provided it fully meets the definition, including alignment with challenging State academic standards and use for entrance or placement in postsecondary education programs in multiple States.

*Changes:* None.

#### State Authority Over Locally Selected, Nationally Recognized High School Academic Assessments

*Comments:* Some commenters supported the clarification that a State has authority over whether to allow LEAs to request to use a locally selected, nationally recognized high school academic assessment. Others asked for more details regarding this authority, such as whether States would need to provide justification for choosing not to allow LEAs to request such an assessment and whether a State could, in subsequent years, revoke its approval of an individual LEA’s use of a locally selected, nationally recognized high school academic assessment.

*Discussion:* Section 1111(b)(2)(H) of the ESEA affirms a State’s authority to decide whether to allow LEAs in the State to request to use a locally selected,

nationally recognized high school academic assessment in place of the statewide test. If a State decides to implement this authority, it must establish technical criteria to determine whether an assessment an LEA proposes meets those criteria and warrants approval, or disapproval if it does not meet the criteria. Because a State may decide not to offer LEAs this flexibility initially, the State has inherent authority to revoke, for good cause, the authority after it has been granted. Good cause might include, for example, concern about an LEA’s implementation, such as when a substantial portion of students are not assessed in the LEA or when students are not receiving appropriate accommodations. Additionally, a State might revoke approval in general as a result of changes in State statute, regulation, or policy. We encourage a State to establish the criteria for doing so to ensure transparency in the system for LEAs and other stakeholders and to ensure there is sufficient time and a process in place for any such LEAs to revert to administration of the statewide assessment in all high schools.

*Changes:* We have revised § 200.3(b)(3) to specify that a State may approve or disapprove a request from an LEA based on whether the request meets the requirements of this section. We have also added § 200.3(b)(3)(iii) to specify that a State may, for good cause, revoke approval once granted.

#### Parental Consultation and Notification

*Comments:* Some commenters supported the requirements for an LEA to notify parents and offer them an opportunity to provide meaningful input into the LEA’s application to the SEA regarding the use of a locally selected, nationally recognized high school academic assessment. One commenter opposed this requirement and suggested that notification of, and consultation with, parents be permitted but not required. Another commenter requested that the Department further strengthen consultation requirements regarding locally selected, nationally recognized high school academic assessments.

*Discussion:* We affirm the importance of parental notification and meaningful input from families regarding LEA use of a locally selected, nationally recognized high school academic assessment. The negotiated rulemaking committee strongly supported such parental engagement and notification. Since administration of a locally selected, nationally recognized high school academic assessment might impact the local instructional program,

parents and families should have the opportunity to engage in such a decision in order to ensure that it meets the needs of the whole district. Further, we are revising the final regulations to require that an LEA notify parents of how students, as appropriate, can be involved in providing input, recognizing that high school students are also significantly affected by the LEA's choice to use a locally selected, nationally recognized high school academic assessment, especially as these assessments may support their efforts to enroll in, or receive academic credit, in postsecondary institutions. At the same time, we believe that requiring notification and input prior to an LEA application to use such an assessment, along with notification upon approval of such application and in each subsequent year of use, is adequate to facilitate ongoing and meaningful parental involvement in decision making on this topic.

*Changes:* We have revised § 200.3(c)(1)(i)(B) to require an LEAs to afford students, as appropriate, an opportunity to provide meaningful input regarding the LEA's intent to use a locally selected, nationally recognized high school academic assessment.

#### Charter School Consultation

*Comments:* Several commenters specifically supported § 200.3(c)(1)(ii) and (c)(2)(ii) concerning charter school and charter school authorizer consultation when LEAs, including charter school LEAs, plan to propose using a locally selected, nationally recognized high school academic assessment in place of the statewide test.

*Discussion:* We agree with the commenters that the provisions requiring explicit consultation with charter schools and charter school authorizers are important and appreciate the commenters' support.

*Changes:* None.

#### LEA-Wide Assessment

*Comments:* A number of commenters supported the proposed regulations as written, including by affirming the importance of a single consistent assessment across a district. One commenter further requested that the Department require that any LEA in a State using a locally selected, nationally recognized high school academic assessment in place of the statewide test use the same such assessment as all other LEAs in that State not using the statewide high school test.

Other commenters opposed the requirement that an LEA use the same locally selected, nationally recognized

high school academic assessment for all high school students in the LEA and requested that the Department revise the language in § 200.3(a)(2) to permit an LEA to administer multiple locally selected, nationally recognized high school assessments, arguing that decisions should be made at either the school or student level. Of these, certain commenters were particularly concerned that requiring a single assessment across an entire LEA makes it harder for larger LEAs to take advantage of this flexibility. Some commenters argued that the Department exceeded its authority, including one commenter who asserted that the Department violated prohibitions in section 1111(e) of the ESEA, in requiring a single locally selected, nationally recognized assessment in a district, and others expressed concern that requiring a single assessment would limit career and technical education pathways. Another commenter argued that the limit of one assessment per district should be unnecessary if any locally selected, nationally recognized high school academic assessment must be as rigorous as or more rigorous than the statewide test.

*Discussion:* Requiring a single assessment across an entire LEA intentionally promotes fairness and access by continuing to require a consistent measure of student achievement for all students in a district, except for students with the most significant cognitive disabilities whose performance under this subpart may be assessed with an AA-AAAS. We acknowledge that the complexity involved in implementing any assessment is greater in a large school district than it is in a small school district. Broadly speaking, large and small school districts face different challenges and approach them with disparate resources. The alternative—allowing multiple high school academic assessments within the same district—opens the door to the problematic situation whereby expectations may decrease over time for some students if higher-achieving students consistently take a different test. In addition to being required by the ESEA, the same high expectations for all students are needed to ensure that all students have the opportunity to graduate college and career ready. It is for this reason more than any other that the Department affirms the importance of an LEA offering a single LEA-wide assessment. Particularly given that the statute allows for an assessment that is more rigorous than the statewide test, it is important to ensure that implementing this new

flexibility in the law does not lead to “tracking” students at a young age, creating lower expectations for some students than the ones that exist for their peers.

Given that locally selected, nationally recognized high school academic assessments would be used in the Academic Achievement indicator for purposes of the statewide accountability system under section 1111(c) of the ESEA, including the requirements that a State must meet regarding annual meaningful differentiation and identification of schools having the greatest success and those in need of additional support, meaningful school-to-school comparisons of student achievement are needed. During negotiated rulemaking, the negotiators reached consensus on the value of preserving within-district direct comparability of results, particularly for reporting on LEA report cards, transparency, and school accountability determinations.

Furthermore, the statutory language in this case is singular, articulating what a State does if it chooses to allow an LEA to request “a” locally selected, nationally recognized assessment. For all of these reasons, we believe that the application of the single assessment per LEA is consistent with the statute. However, we believe section 1111(b)(2)(H)(iii) of the ESEA is clear that LEAs could each select a distinct nationally recognized high school academic assessment so long as such assessment is supported with evidence that it meets the State's technical criteria and the Department's assessment peer review.

In response to questions about the Department's authority, the regulations are well within the Department's rulemaking authority. As provided in section 1601(a) of the ESEA, the Secretary may “issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance with this title.” As discussed above, we believe requiring an LEA to administer the same nationally recognized high school academic assessment to all high school students in the LEA is necessary to ensure, as required by section 1111(b)(1) and (b)(2)(B)(i) of the ESEA, that an LEA applies the same high expectations to all students so that all students have the opportunity to graduate college and career ready. The alternative opens the door to an LEA's decreasing expectations over time for some students if higher-achieving students consistently take a different test. The

Department followed the requirements in section 1601(b) of the ESEA by subjecting the proposed regulations to negotiated rulemaking and the negotiating committee agreed with the proposed regulations by consensus. Moreover, the final regulations do not violate section 1111(e) of the ESEA, which prohibits the Secretary from promulgating any regulations that are inconsistent with or outside the scope of title I, part A. Rather, these regulations are consistent and specifically intended to ensure compliance with section 1111(b)(1) and (b)(2)(B) of the ESEA. The Department also has rulemaking authority under section 410 of the General Education Provisions Act (GEPA), 20 U.S.C. 1221e–3, and section 414 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3474.

*Changes:* None.

*Comments:* Certain commenters proposed allowing LEAs to phase in a locally selected, nationally recognized high school academic assessment over a number of years, such as over the course of two years.

*Discussion:* While an LEA may elect any number of transition strategies, it must annually assess all students in the district using the same assessment. Long-standing practice holds that entire States—including both large and small districts within them—transition in a single year from one assessment to another. An LEA, whether large or small, could rely on lessons learned and strong practices from such prior transitions in making a change for all schools in the district. For example, an LEA could pilot a locally selected, nationally recognized assessment with a subset of students in one year, so long as those students also take the statewide assessment. In some cases, students might already be taking such assessments for other purposes, which would limit the burden of such a transition since it would allow an LEA to implement the assessment without requiring students to take additional tests beyond those the students already plan to take. While best practice would encourage substantial training and preparation in advance of the new assessment, the transition itself must occur in a single year.

*Changes:* None.

#### Technical Requirements of a Locally Selected, Nationally Recognized High School Academic Assessment

*Comments:* Some commenters expressed concern that some locally selected, nationally recognized high school academic assessments may not fairly evaluate the performance of all

students or all subgroups of students, particularly low-performing students. Commenters included citations to recent research regarding specific assessments. These commenters proposed revising the regulations to provide that a State may only approve a locally selected, nationally recognized assessment that measures the full range of student academic performance against the challenging State academic standards. On the contrary, other commenters expressed concern that the regulations as proposed would preclude the use of one or more assessments they are particularly interested in using under this flexibility.

*Discussion:* The Department agrees with the commenters' focus on the importance of an assessment providing meaningful information across the full performance spectrum. The Department believes that the technical requirements for assessment, articulated in § 200.2 and applied to locally selected, nationally recognized high school academic assessments through the provision in § 200.3(b)(1)(iv), are adequate to address this concern. In addition, if a State determines that an assessment an LEA requests to use meets the State's technical criteria, the State must also submit that assessment to the Department for assessment peer review. Issues of technical quality, such as this one, would be addressed through that peer review.

Regarding commenters' concerns that the regulations would preclude use of a particular assessment, the regulations are intended to ensure that assessments approved by a State through this flexibility meet all requirements for statewide assessments in general. This flexibility is only appropriate in such cases. The regulations do not either preclude, or proactively include, any particular assessments. However, if an assessment does not meet all general assessment requirements and statutory and regulatory requirements specific to this flexibility, including the definition of a "nationally recognized high school academic assessment," it would not be eligible for use under this flexibility.

*Changes:* None.

#### Requests for Clarification Regarding Implementing a Locally Selected, Nationally Recognized High School Academic Assessment

*Comments:* One commenter asked whether a State may approve a particular assessment for an LEA within the State but deny another LEA's request to use the same assessment. Another commenter asked for guidance for States on developing technical

criteria to review assessment requests from LEAs.

*Discussion:* Section 1111(b)(2)(H)(iii)(III) of the ESEA explains that, once a State approves a particular assessment within the State, other LEAs within the same State may use that assessment without again completing the full technical review process. However, a State would expect an LEA requesting to use a locally selected, nationally recognized high school academic assessment to complete an application for that authority, including required consultation and parent notification. A State would consider all available evidence relative to that application before granting flexibility under this section, and would have the authority to deny or request modification to an application if it felt that consultation and parental notification of an LEA had not been adequate.

Regarding requests for specific guidance, we encourage States to work with support organizations, such as Regional Education Laboratories, Comprehensive Centers, and State program officers at the Department, to gain technical assistance for implementation, including on establishing technical criteria for reviewing locally selected, nationally recognized academic assessments.

*Changes:* None.

#### Appropriate Accommodations for Students With Disabilities and English Learners on Locally Selected, Nationally Recognized High School Academic Assessments

*Comments:* Numerous commenters wrote in support of § 200.3(b)(2)(i) that requires a State to ensure that accommodations under § 200.6(b) and (f) used on a locally selected, nationally recognized high school assessment do not deny a student with a disability or an English learner either the opportunity to participate in the assessment or any of the benefits from participation in the assessment that are afforded to students without disabilities or who are not English learners. Other commenters requested clarification that accommodations need only be offered if they can be administered in a way that maintains the validity and reliability of the test items based on the specific construct the items are intended to measure. One commenter requested that the Department address specific assessment vendors, and not States, regarding this issue. Finally, a commenter asked for guidance regarding how States should address accommodations requests, particularly in the context of requests for

accommodations that would normally be allowed under State guidelines but that a particular assessment vendor for a locally selected, nationally recognized high school academic assessment does not permit.

*Discussion:* As described in detail in § 200.2(b)(4)(i) and section 1111(b)(2)(B)(iii) of the ESEA, State assessments must be valid and reliable for their intended purposes. Assessments must also provide for the participation of all students, as required in § 200.2(b)(2)(i) and section 1111(b)(2)(B)(vii) of the ESEA. At the same time, each State has discretion over which assessments it uses to meet these requirements, including any nationally recognized assessment the State approves an LEA to select and administer in high schools. In general, with respect to students with disabilities, if a State typically allows a particular accommodation on a State assessment in accordance with the State accommodations guidelines required under section 612(a)(16)(B) of the IDEA, which indicates that such an accommodation does not invalidate the assessment's results, it is the additional responsibility of the State to ensure that a student who requires and uses such an accommodation is not denied any benefit afforded to a student who does not need such an accommodation. Similarly, if an English learner needs appropriate accommodations to demonstrate what the student knows and can do in academic content areas, those accommodations must be available on a locally selected, nationally recognized academic assessment. A State is responsible under the ESEA and under the Federal civil rights laws (including Title VI, section 504, and title II of the ADA) for ensuring that the assessments it provides, or approves its LEAs to provide, are fully consistent with these requirements. If a given assessment would offer some students a benefit, such as a college-reportable score, that would not be available to another student taking the same assessment using an accommodation allowed on the State test, the State may not offer or approve such an assessment under the exception for locally selected, nationally recognized high school academic assessments. A State, rather than an assessment vendor, is the recipient of a title I, part A grant. As a result, the responsibility lies with the State to approve only a nationally recognized assessment that meets all applicable requirements, which may include working with affected vendors to ensure

all appropriate accommodations are available.

*Changes:* None.

#### Implications for Students Taking an AA-AAAS

*Comments:* One commenter expressed concern that, if students in an LEA who take a general assessment shift to a locally selected, nationally recognized high school academic assessment for which there is no AA-AAAS, conclusions drawn across subgroups of students could be impacted, since students taking the AA-AAAS would be taking an alternate version of the statewide assessment, not the locally selected assessment.

*Discussion:* The Department acknowledges this concern, and is committed to supporting States in ensuring the validity of interpretations across subgroups. Because a State must develop an AA-AAAS against the same challenging State academic content standards that both the statewide general assessment and any locally selected, nationally recognized academic assessment also measure, conclusions drawn across the locally selected, nationally recognized assessment and an AA-AAAS should be valid if all tests are well designed and implemented. A State must demonstrate through assessment peer review that this is the case.

*Changes:* None.

#### Comparability

*Comments:* One commenter requested that the Department clarify that "comparability" across two assessments does not necessarily mean that the specific raw scores on the two assessments have the same meaning. Another commenter asked that the Department emphasize the importance of any locally selected, nationally recognized assessment providing comparable data between and among student subgroups, schools, and districts, including for low-performing students. One commenter expressed support for the statutory language, also reflected in the proposed regulations, requiring that locally selected, nationally recognized high school academic assessments be equivalent to or more rigorous than statewide assessments.

*Discussion:* The Department agrees that comparability does not imply that two assessments produce identical scale scores for students performing at the same level. Rather, comparability in this context means that students who perform similarly should be likely to meet the same academic achievement level on both assessments. Since the

State will separately examine and confirm, through the approval process, that each locally selected, nationally recognized high school academic assessment measures the challenging State academic content standards, the State should have strong evidence that any approved assessment appropriately measures the challenging State academic standards in a manner comparable to the statewide assessment. Specifically, any assessment a State or LEA uses to meet the requirements of title I, part A must, among other requirements, cover the breadth and depth of the challenging State academic standards and be valid and reliable for all students, including high- and low-performing students. To be fully comparable at the level of student academic achievement determinations, the locally selected, nationally recognized high school academic assessment must provide results relative to each of the academic achievement levels in a similar manner to that provided by the statewide assessment. We believe these requirements are adequately enumerated in § 200.2, and we note that § 200.3(b)(1)(iv) requires locally selected, nationally recognized academic assessments to meet all requirements of § 200.2 except the requirement in § 200.2(b)(1) that all students in the State take the same assessment.

The Department agrees that additional specificity is needed in § 200.3(b)(1)(v) to clarify that the comparability expected is at each level of the State's academic achievement standards, not scale scores. We also note that, in addition to producing comparable data as described in § 200.3(b)(1)(v), section 1111(b)(2)(H)(v)(I) of the ESEA and § 200.3(b)(1)(iii) require that a locally selected, nationally recognized high school academic assessment must be equivalent to or more rigorous than the statewide assessments regarding academic content coverage, difficulty, overall quality, and any other aspect of assessments that a State may choose to identify in its technical criteria.

*Changes:* We have revised § 200.3(b)(1)(v) to clarify that comparability between a locally selected, nationally recognized high school academic assessment and the statewide assessment is expected at each level of a State's challenging academic achievement standards.

#### Highly Mobile Students

*Comments:* A commenter expressed concern for highly mobile students who could face increasingly disparate educational environments across districts within a State as a result of the

districts administering locally selected high school assessments.

*Discussion:* We share the commenter's concern for supporting the unique needs of highly mobile students, including migratory students, students in foster care, homeless students, and military-connected youth. We have recently released non-regulatory guidance regarding ESSA provisions related to homeless students and youth (please see <http://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>) and students in foster care (please see <http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf>).

A locally selected, nationally recognized high school academic assessment approved by a State must measure the same challenging State academic standards and produce valid, reliable, and comparable results to the statewide high school assessment. These requirements should serve to ensure reasonable continuity across LEAs for mobile students.

*Changes:* None.

#### Locally Selected Academic Assessments in Grades Other Than High School

*Comments:* One commenter recommended that the Department change the regulations to allow for locally selected, nationally recognized academic assessments in grades three through eight, particularly since the commenter was from a State that passed a law allowing for such flexibility.

*Discussion:* Section 1111(b)(2)(H) only authorizes locally selected high school academic assessments; it does not permit locally selected assessments in grades lower than high school. The regulations are consistent with the statute in limiting locally selected, nationally recognized academic assessments to high school.

*Changes:* None.

#### Processes for Local Selection and State Technical Review

*Comments:* One commenter requested details of the processes by which an LEA would select a nationally recognized high school academic assessment, including whether there would be an election to determine who can make such a decision and what the needed qualifications for such a person would be.

*Discussion:* Section 1111(b)(2)(H)(iii)(I) of the ESEA, requires a State to create a review process and examine the technical quality of locally selected, nationally recognized high school academic assessments. However, neither the statute nor the regulations prescribe the

specific process a State must undertake. Since a locally selected, nationally recognized high school academic assessment must meet all requirements of § 200.2 (except the requirement that all students in the State take the same assessment), a State could reasonably use the technical expectations articulated in that section as a basis for its review. As described above, we encourage States to work with support organizations, such as Regional Education Laboratories, Comprehensive Centers, and State program officers at the Department, for technical assistance with implementation.

Since a State will determine the specific process for review and approval, it will also have discretion over the individuals involved in such a decision, including whether any election would be held. We expect that State education officials, who may be elected, appointed, or otherwise selected, would lead the process; however, States have discretion in this area.

*Changes:* None.

#### Departmental Assessment Peer Review

*Comments:* One commenter objected to the requirement in § 200.3(b)(2)(ii) that a State submit locally selected, nationally recognized high school academic assessments to the Department for assessment peer review, including by contending that this requirement is contrary to the spirit of the ESSA. Another commenter requested that peer review not create preferential treatment for any particular assessments, especially assessments developed by consortia of States. An additional commenter asked that the Department expand the assessment peer review process in the context of a locally selected, nationally recognized high school academic assessment in order to require that a State submit a plan for how it will ensure that all assessments administered across the State are comparable and how they ensure stakeholders had the opportunity for meaningful consultation. Other commenters asked that the Department make public the results of ongoing assessment peer review as soon as possible, particularly in cases where a State has submitted a nationally recognized high school academic assessment as its statewide test.

*Discussion:* Section 1111(b)(2)(H)(iii)(II) of the ESEA, requires each State to submit evidence to the Department for assessment peer review following the State's own technical review that a locally selected, nationally recognized high school academic assessment meets the

requirements of §§ 200.2 and 200.3. Generally, assessment peer review is intended to serve as an opportunity for technical experts to provide objective feedback regarding an assessment system and to ensure that any assessments administered meet the requirements of title I of the ESEA. The Department anticipates that it will be necessary to update the assessment peer review non-regulatory guidance to include consideration of locally selected, nationally recognized high school academic assessments, which would outline examples of relevant evidence. We think considerations related to such examples are best suited for such non-regulatory guidance. While members of an assessment consortium may be able to submit some evidence in common, the process is intended to provide balanced feedback regarding any assessment system to ensure that States and districts meet the requirements of the law and that there is no preferential treatment for particular assessments or consortia. The Department will release results of 2016 assessment peer review as soon as possible, and has provided general information regarding the process moving forward through a Dear Colleague Letter on October 6, 2016 (see <http://www2.ed.gov/admins/lead/account/saa/dclletterassepeerreview1072016ltr.pdf>).

Regarding opportunities for consultation, § 200.3(c)(1) requires an LEA to notify all parents of high school students it serves that the LEA intends to request to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment and inform parents of how they may provide meaningful input regarding the LEA's request as well as of any effect such request may have on the instructional program in the LEA. It also requires meaningful consultation with all public charter schools whose students would be included in such assessment. In addition, § 200.3(c)(2) requires an LEA to update its LEA plan under section 1112 or section 8305 of the ESEA, including by describing how the request was developed consistent with all requirements for consultation under the respective sections of the ESEA. While the Department appreciates the commenter's suggestion that review of this requirement become a requirement of assessment peer review, the Department declines to specify the mechanism for monitoring this requirement at this time, but notes that monitoring of this and all other

provisions will be established as implementation moves forward.

*Changes:* None.

#### Section 200.5 Assessment Administration

##### Grades and Subjects Assessed

*Comments:* Some commenters appreciated the need for high-quality annual assessments that provide useful data for educators, parents, and the public. Others, however, suggested that annual reading/language arts and mathematics assessments in grades 3 through 8 should not be required in all grades, recommending less frequent assessment (*e.g.*, only administer the assessments once in each of grades 3 through 5 and 6 through 8; only administer assessments in particular grades, such as high school) or assessing only a sample of students annually.

*Discussion:* Section 1111(b)(2)(B)(i) and (v)(I) of the ESEA requires that a State administer an assessment in reading/language arts and mathematics to all students annually in each of grades 3 through 8 and at least once in grades 9 through 12. In addition to being required by the statute, annually assessing all students provides important information about the progress students are making toward achieving the State's challenging academic standards. It also provides valuable information to parents, families, stakeholders, and the public about the performance of schools and LEAs.

*Changes:* None.

*Comments:* Two commenters requested that the grades for which a State must administer an assessment in high school should be consistent between reading/language arts, mathematics, and science.

*Discussion:* The proposed and final regulations in § 200.5(a)(1) are consistent with the statute; section 1111(b)(2)(B)(v)(I)(bb) of the ESEA requires that each State administer a reading/language arts and mathematics assessment in high school at least once in grades 9 through 12, and section 1111(b)(2)(B)(v)(II)(cc) requires the State to administer a science assessment in high school at least once in grades 10 through 12.

*Changes:* None.

*Comments:* One commenter expressed concern about any reading/language arts assessments that do not include writing, speaking, and listening. This commenter urged increased involvement of educators in assessment development.

*Discussion:* The Department agrees with the commenter about the importance of educator involvement in

assessment development. Regarding the specific components of a reading/language arts assessment, a State must adopt challenging State academic standards and develop assessments that are fully aligned with the domains represented in those standards. The Department does not prescribe content to be covered in a State's academic standards. If a State includes specific content in its standards, it will need to demonstrate through assessment peer review that the corresponding assessment is fully aligned to those challenging State academic standards, including their depth and breadth as described in § 200.2(b)(3). Accordingly, we decline to make further changes to the regulations.

*Changes:* None.

*Comments:* One commenter requested that we clarify the grades in which the State must administer an ELP assessment, specifically whether the annual ELP assessment is required in preschool programs.

*Discussion:* Section 1111(b)(2)(G) of the ESEA requires a State to annually administer its ELP test to all students who are identified as English learners in schools served by the State. We are clarifying this in the final regulations, as a State's ELP assessments are an important piece, alongside assessments of academic content in reading/language arts, mathematics, and science, in the statewide assessment system. Further, we are revising the final regulations to clarify that this requirement applies to all students in the State's public education system, kindergarten through grade 12, who are identified as English learners.

*Changes:* We have revised § 200.5(a)(2) to clarify that a State must administer its ELP assessment, described in § 200.6(h) (proposed § 200.6(f)(3)), annually to all English learners in schools served by the State, kindergarten through grade 12, and made conforming edits in § 200.6(h)(1)(ii).

*Comments:* One commenter requested that we require a State to administer an assessment in social studies.

*Discussion:* The subjects in which a State must administer an assessment are specified in section 1111(b)(2)(B)(v)(I)–(II) of the ESEA, and do not include social studies. Since the statute does not require social studies assessments, we cannot require it in the regulations. However, a State, at its discretion, may always elect to assess students in additional grade levels or subject areas as authorized in section 1111(b)(2)(A) and (b)(2)(B)(v)(III) of the ESEA.

*Changes:* None.

##### Middle School Mathematics Exception

*Comments:* While some commenters appreciated the flexibility afforded States for students taking advanced mathematics in middle school, one commenter asked that the flexibility not be permitted as it leads to not all students being assessed against the same challenging academic standards and creates confusion as to the implications for the State's accountability system and transparent data reporting.

*Discussion:* Section 1111(b)(2)(C) of the ESEA clearly permits a State flexibility to exempt eighth graders taking advanced courses and related end-of-course assessments in mathematics from the statewide eighth grade mathematics assessment and to use the results of those advanced mathematics assessments in the Academic Achievement indicator for purposes of the State's accountability system, provided the State meets certain statutory requirements. The regulations reinforce this flexibility.

*Changes:* None.

*Comments:* One commenter expressed concern about the requirements for the assessment a student would take in high school if that student took advantage of the flexibility under § 200.5(b) in eighth grade. This commenter appeared to understand the regulatory language to mean that such subsequent assessment must be administered statewide to all students.

*Discussion:* The requirement in § 200.5(b)(3)(i) is that a subsequent assessment be State-administered, not that it be statewide. A more advanced high school assessment is, in fact, unlikely to be administered statewide to all students. However, as the results of such assessment will inform high school accountability determinations in the State and be part of the overall State assessment system, such assessment must be administered by the State, rather than developed locally.

*Changes:* None.

*Comments:* A few commenters objected to § 200.5(b)(4), which requires an SEA taking advantage of the flexibility to describe, in the State plan, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school consistent with section 1111(b)(2)(C) of the ESEA. The commenters interpreted this portion of the regulations as requiring advanced mathematics for all students, and some commenters voiced concerns that pushing students into coursework for which they were unprepared could have negative consequences. One commenter felt this would create a

burden for LEAs that do not have sufficient resources.

*Discussion:* Section 200.5(b)(4), based on the consensus language from negotiated rulemaking, only requires an SEA to describe its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school if the State administers end-of-course mathematics assessments to high school students to meet the requirements under section 1111(b)(2)(B)(v)(I)(bb) of the ESEA, and uses the exception for students in eighth grade to take such assessments under section 1111(b)(2)(C) of the ESEA. An SEA wishing to take advantage of this new statutory flexibility must describe these strategies in its State plan—not every SEA must do so.

Further, this requirement does not create the expectation that all students must take advanced mathematics coursework in middle school, even in the limited number of SEAs covered by this section. Rather, the SEA must provide the opportunity to all students to become prepared and, if prepared, to take such advanced courses in middle school in order to ensure that this flexibility benefits students across the State, not only those in certain communities or from certain backgrounds. This is consistent with the statutory purpose of title I to “provide all children significant opportunity to receive a fair, equitable, and high-quality education.” In seeking waivers under ESEA flexibility between 2012 and 2015, States demonstrated their efforts to make such opportunity widely available, including through support for distance and virtual learning, flexibility regarding course-taking across campuses, and other appropriate methods.

*Changes:* None.

*Comments:* Several commenters requested that the flexibility in § 200.5(b) for middle school mathematics be expanded beyond eighth graders taking advanced mathematics courses. Some of these commenters wanted the flexibility to be expanded to other grades in mathematics; others wanted it expanded to assessments in reading/language arts or science. Other commenters expressed interest in this flexibility being expanded to States that do not administer an end-of-course mathematics assessment in high school to meet the requirements in § 200.5(a)(1)(i)(B) or by permitting the use of an end-of-course assessment that is not used statewide. One commenter requested that the regulations clarify

that the Department can grant waivers in this area.

*Discussion:* Section 1111(b)(2)(C) of the ESEA clearly limits to eighth-grade mathematics the exception for a student in middle school taking advanced coursework to be exempt from the State’s grade-level test and instead take the State’s high school end-of-course assessment used to meet the requirement in section 1111(b)(2)(B)(v)(I)(bb) of the ESEA. While we know that some students take advanced coursework in mathematics in earlier grades, and in subjects other than mathematics, the negotiating committee came to consensus that the regulations not expand the flexibility beyond what was expressly permitted in the statute.

The ESEA limits the middle school advanced mathematics exception to States that administer a high school end-of-course assessment to meet the requirements of section 1111(b)(2)(B)(v)(I)(bb) of the ESEA. The statute indicates that only States using an end-of-course mathematics assessment as the State’s high school assessment may take advantage of the middle school mathematics exception and only for students who are taking that end-of-course assessment in eighth grade (*i.e.*, the State may not administer a different end-of-course assessment, other than the assessment used by the State to meet the requirements in section 1111(b)(2)(B)(v)(I)(bb) of the ESEA, in place of the State’s eighth grade assessment).

A State may request a waiver to extend this flexibility to other grades or subjects if the State meets the requirements in section 8401 of the ESEA. We do not believe it is necessary or appropriate, however, to highlight in the final regulations this one example of a provision subject to a waiver.

*Changes:* None.

*Comments:* Two commenters recommended that States taking advantage of this flexibility be permitted to meet the requirement to administer a more advanced assessment in high school by administering a test other than an end-of-course test in high school, such as the ACT, SAT, or a test that leads to college credit, such as an Advanced Placement test or an assessment other than a nationally recognized test.

*Discussion:* For States taking advantage of this flexibility, we think it is important to have safeguards in the State’s assessment system for the higher-level mathematics assessment that is administered to these students in high school once they have taken the State’s high school mathematics assessment in eighth grade, particularly since the

assessments will be used for accountability and reporting purposes under title I. In addition to a higher-level mathematics end-of-course assessment given by the State, the regulations would permit a State to administer a higher-level mathematics assessment to these students that meets the definition of a “nationally recognized high school academic assessment,” which may include the SAT or ACT, depending on whether it meets the requirements in § 200.3. A test, such as an Advanced Placement test, that leads to college credit, would also meet the definition in § 200.3(d), and the State could consider permitting LEAs to select that assessment and administer it in high school to students who have already taken the State’s high school assessment in eighth grade, provided it meets the other requirements for nationally recognized high school academic assessments in § 200.3.

With respect to options other than an end-of-course test or a nationally recognized test, since a State taking advantage of this flexibility is using an end-of-course assessment as its high school assessment to meet the requirements in § 200.5(a)(1)(i)(B), the State will likely not have a non-end-of-course, State-administered assessment in high school unless the State is taking advantage of the ability to permit LEAs to administer a nationally recognized assessment in place of the State test.

*Changes:* None.

*Comments:* One commenter requested that the regulations require a State to provide disaggregated performance data of eighth graders taking the advanced mathematics assessment separately from the other eighth graders taking the eighth grade assessment and separately from the high school students taking the high school assessment.

*Discussion:* The statute does not require this level of disaggregation and therefore we decline to require it through the regulations. However, a State has flexibility to disaggregate the data if it believes such disaggregation would provide beneficial information to parents, educators, and the public.

*Changes:* None.

#### Section 200.6 Inclusion of All Students

*Comments:* Some commenters expressed general support for provisions in § 200.6 related to assessment of students with disabilities, including students with the most significant cognitive disabilities who may participate in an assessment aligned with alternate academic achievement standards. They found the proposed regulations helpful to ensure that all

students receive the supports they need to fully participate in the public education system, including in general education settings with their peers.

*Discussion:* We appreciate the commenters' support of the requirements related to assessment of students with disabilities, including students with the most significant cognitive disabilities whose performance may be assessed with an AA-AAAS if the State has adopted alternate academic achievement standards.

*Changes:* None.

*Comments:* A few commenters asserted that it was inappropriate to assess students with the most significant cognitive disabilities, even using an AA-AAAS and appropriate accommodations, believing these assessments are outside such students' range of ability. Other commenters advocated for allowing some students with disabilities to take modified assessments or to take assessments aligned with content standards other than those for the grade in which the student is enrolled.

*Discussion:* We strongly disagree with the commenters' contention that it is always inappropriate to assess students with the most significant cognitive disabilities. Section 1111(b)(2) of the ESEA requires each State to annually administer a set of high-quality student academic assessments in, at a minimum, reading/language arts, mathematics, and science to all public elementary and secondary school students in the State, including students with disabilities. The requirement to include all public elementary and secondary school students is a requirement to include 100 percent of students in a State in either the general assessment or an AA-AAAS for students with the most significant cognitive disabilities. An AA-AAAS, however, must be reserved for no more than 1.0 percent of students who are assessed in a State in a subject area—*i.e.*, those with the most significant cognitive disabilities, as defined by the State. Congress made clear in section 1111(b)(1)(E)(ii) of the ESSA that an AA-AAAS for students with the most significant cognitive disabilities aligned with a State's challenging academic content standards and alternate academic achievement standards is the only AA-AAAS permitted for such students; a State is prohibited from developing or implementing any other alternate academic achievement standards for students with disabilities and assessing performance under this subpart.

We are heartened by progress in the field of assessments generally, and in

the development of alternate assessments and accessibility features. These advances expand opportunities for all students to demonstrate their knowledge and skills, including students with disabilities. Further, research shows positive impacts of instructing and assessing students, including students with the most significant cognitive disabilities, to high academic standards.<sup>6</sup> Involving such students in assessments of grade-level content using an AA-AAAS is one important way to ensure that such students receive a rigorous education like their peers.

*Changes:* None.

*Comments:* One commenter expressed concern that the proposed regulations would replace or contradict 34 CFR 300.160 and suggested incorporating the text from that regulation into this rule.

*Discussion:* These regulations address assessment requirements under title I, part A of the ESEA, while 34 CFR 300.160 implements the requirement in the IDEA regarding participation in assessments (see 20 U.S.C. 1412(a)(16)). Consistent with this statutory provision, 34 CFR 300.160 also requires the participation of children with disabilities in assessments described in section 1111 of the ESEA. Therefore, title I and IDEA assessment provisions for children with disabilities must be read and implemented together. While the regulations in this document cannot alter the IDEA regulations, we note that the ESEA also amended the IDEA's participation in assessment requirements, and the Department anticipates updating the IDEA regulations in 34 CFR 300.160 to reflect those amendments.

*Changes:* None.

*Comments:* One commenter suggested that private schools and private, non-approved, non-licensed, or other entities providing educational services as part of a child with a disability's individualized education program (IEP) should be subject to the proposed regulations, and that any IEP should include evidence-based goals.

*Discussion:* Under section 612(a)(16) of the IDEA, States must ensure that all children with disabilities are included in all general State and districtwide assessment programs, including

assessments required under this subpart, with appropriate accommodations and alternate assessments where necessary as indicated in their respective IEPs. While section 614(d)(1)(A)(i)(II) requires that annual IEP goals must be measurable, it does not specifically require that IEP goals be evidence-based. Therefore, no further clarification is necessary.

The applicability of the requirements in this section to students with disabilities in private schools depends upon whether the student has been enrolled in the private school by the LEA in order to meet the student's special education and related services needs under the IDEA, as opposed to a student attending a private school at the discretion of the parents. For students with disabilities who have been placed in a private school by an LEA, the requirements in this subpart apply.

*Changes:* None.

*Comments:* Multiple commenters suggested that the Department issue non-regulatory guidance on assessments for students with disabilities, noting a particular need for further guidance on topics such as providing appropriate accommodations, related professional development, and processing requests for accommodations; flagging the scores of students taking assessments with accommodations for colleges; developing an AA-AAAS; providing accessible information to parents; measuring student growth for students with disabilities; ensuring the technical quality of assessments that are partially in the form of portfolios, projects, or extended performance tasks; and suggested examples and additional considerations for States as they define students with the most significant cognitive disabilities.

*Discussion:* We appreciate the commenters' suggestions for areas where non-regulatory guidance related to assessment of students with disabilities is particularly needed, and we will take these suggestions into consideration as future non-regulatory guidance—including non-regulatory assessment peer review guidance—is developed and updated.

*Changes:* None.

#### Students With Disabilities in General

*Comments:* A number of commenters wrote in support of the requirement in § 200.6(a)(2)(i) requiring students with disabilities (except those with the most significant cognitive disabilities) to be assessed against the challenging State academic standards for the grade level in which the student is enrolled, noting that this provision is a critical safeguard against students with disabilities being

<sup>6</sup> For a discussion of research regarding these benefits, see previously cited research noted in footnote 2, including in U.S. Department of Education (2015). Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children with Disabilities. 80 FR 50774–50775 and 50777. Available at <https://www.federalregister.gov/documents/2015/08/21/2015-20736/improving-the-academic-achievement-of-the-disadvantaged-assistance-to-states-for-the-education-of>.

tested based on below-grade level content and would help support implementation of the Department's November 16, 2015, Dear Colleague Letter on Free and Appropriate Public Education (FAPE).<sup>7</sup> Some of these commenters also supported § 200.6(a)(2)(ii), noting that it provides needed clarity that students with the most significant cognitive disabilities must either be assessed using the general assessment for the grade-level in which the student is enrolled (aligned to the State's challenging academic standards), or using an AA-AAAS that is aligned with the State's academic content standards for the grade in which the student is enrolled. In particular, commenters appreciated the clear distinction made in the regulations between grade-level academic content standards that apply to all children with disabilities, and academic achievement standards.

*Discussion:* We agree with commenters that these distinctions between content standards and achievement standards are essential to emphasize that each child with a disability, including students with the most significant cognitive disabilities, must be assessed with assessments aligned with the challenging State academic content standards for the grade in which the student is enrolled. Further, under section 1111(b)(1)(E)(i)(V) and § 200.2(b)(3)(ii)(B)(2), alternate academic achievement standards must now be aligned to ensure that a student who meets those standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the Rehabilitation Act of 1973, as amended by WIOA.

*Changes:* None.

*Comments:* One commenter argued that the provision requiring students with the most significant cognitive disabilities to be assessed either using the general assessment for the grade in which a student is enrolled (aligned to the State's challenging academic standards), or using an alternate assessment aligned with the State's academic content standards for the grade in which a student is enrolled and the State's alternate academic achievement standards, is beyond the scope of the ESEA, as the regulations further specify how these standards are aligned with the grade in which a student is enrolled. The commenter believed that sections 1111(b)(2)(B) and (D) of the ESEA provide a State

significant discretion with regard to its challenging State academic standards, and that section 1111(b)(2)(J) allows a State using computer-adaptive assessments to be exempted from assessing students with the most significant cognitive disabilities based on grade-level standards. The commenter recommended modifying the proposed regulations to no longer require that an AA-AAAS be related to a specific grade level.

Similarly, two commenters recommended greater flexibility, given the 1.0 percent cap statewide, on student participation in the AA-AAAS. These commenters suggested that States be permitted to administer an assessment that is not aligned to grade-level academic content standards to a subset of students with severe cognitive disabilities, which one of these commenters believed would be consistent with section 1111(b)(2)(B)(vii)(II) of the ESEA.

*Discussion:* We disagree that it is either inappropriate, or inconsistent with the statute, to expect students with the most significant cognitive disabilities to be assessed with an assessment aligned with the challenging State academic content standards for the grade in which they are enrolled. Under section 1111(b)(1)(E)(i)(I) of the ESEA, a State may adopt alternate academic achievement standards for assessing the performance under this part of students with the most significant cognitive disabilities provided those standards are aligned with the challenging State academic content standards that the State has adopted for all students for the grade in which they are enrolled. Further, section 1111(b)(2)(B)(ii) of the ESEA links alignment of assessments with the State's challenging academic standards to providing timely information about whether students are performing at their grade level. Therefore, the statute is clear in requiring that a State must, at a minimum, assess all students in a valid and reliable manner against grade-level academic content standards consistent with the Federal assessment requirements under title I, part A. Section 1111(b)(1)(E)(ii) of the ESEA additionally prohibits a State from developing or implementing for any use under title I, part A, any other alternate academic achievement standards for children with disabilities that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the statutory requirements.

As previously discussed, a State has the right also to assess a student against academic content standards above and

below the grade in which the student is enrolled, including by using a computer-adaptive assessment, provided the State meets all applicable requirements. Those requirements include: Producing a summative score that measures a student's academic achievement against the State's academic achievement standards; reporting that score and the corresponding achievement level to parents and educators and, in the aggregate and disaggregated by subgroups, reporting student academic achievement information on State and LEA report cards; and using that score in the Academic Achievement indicator and long-term goals in the State's accountability determinations. The State does not need specific authority to offer a student assessment items, in addition to items that produce the student's annual summative score measuring achievement of the challenging State academic content standards for the grade in which the student is enrolled, regardless of whether the student takes a general assessment or an AA-AAAS.

*Changes:* None.

*Comments:* One commenter indicated that the general assessment is most appropriate for students with minor cognitive disabilities rather than an AA-AAAS, and that, if a student cannot pass the end-of-year assessment, then the student should likely be retained until it is determined the student is ready to advance to the next grade.

*Discussion:* The commenter is correct that, consistent with section 1111(b)(2)(D) of the ESEA, an AA-AAAS is reserved for students with the most significant cognitive disabilities, subject to the limitation that in each subject assessed, the total number of students assessed with an AA-AAAS does not exceed 1.0 percent of the total number of students who are assessed in the State in that subject. An IEP team is responsible for determining which assessment a particular child with a disability takes, in keeping with the State guidelines under § 200.6(d). While we appreciate the commenter's concern about students mastering the full scope of the State's academic content standards for their grade, the Department is prohibited by section 1111(l) of the ESEA from prescribing the use of the academic assessments required under the ESEA for student promotion or graduation purposes. This concern is more appropriately addressed at the State and local levels.

*Changes:* None.

*Comments:* Several commenters wrote regarding clarifications in proposed § 200.6(a) that specify these regulations pertain to both children with disabilities

<sup>7</sup> Available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>.

that receive services provided under the IDEA, as well as children that receive services under other acts including section 504 and title II of the ADA. Many of these commenters expressed support for the clarity in the regulations regarding students covered under laws besides the IDEA to ensure all students with disabilities receive the accommodations they need. However, one commenter recommended narrowing the inclusion of students who receive services under other laws besides the IDEA to requirements related to assessment accommodations only, believing the limitation would be more consistent with the statute.

*Discussion:* Section 1111(b)(2)(B)(vii)(II) of the ESEA provides that appropriate accommodations for students with disabilities must extend to children with disabilities covered under the IDEA and students with a disability who are provided accommodations under laws besides the IDEA. The topic of accommodations was addressed in detail at negotiated rulemaking, where the negotiators reached consensus that it would be appropriate to include references to students who receive accommodations under section 504 and title II of the ADA in the proposed regulations. We agree with the consensus reached at negotiated rulemaking that it is important to recognize that there are students with disabilities who receive accommodations under laws other than the IDEA and to clarify that these laws include section 504 and title II of the ADA. Further, we disagree with the commenter that the regulations expand these requirements beyond assessment accommodations. As written, the provisions of the regulations that apply to students who receive accommodations under laws other than the IDEA relate to identifying students in need of assessment accommodations and do not address any other rights or responsibilities not derived from those laws. Therefore, we decline to make any changes to this section.

*Changes:* None.

#### Appropriate Accommodations and Assistive Technology

*Comments:* A number of commenters expressed concern that § 200.6(b)(1) suggested that States should, but did not require States to, implement assessments with accommodations that include interoperability with, and ability to use, assistive technology devices that meet nationally recognized accessibility standards, such as Web Content Accessibility Guidelines (WCAG) 2.0 and the National

Instructional Materials Accessibility Standard (NIMAS). These commenters were concerned that, without changes, the regulations would not adequately support students with disabilities using assistive technology in accessing and benefitting from assessments under the ESEA. They further noted that the proposed regulations, as drafted, imply assistive technology devices would need to meet these nationally recognized accessibility standards when, they contend, it is the assessment that should meet the accessibility standards. Accordingly, such commenters suggested rewording the provision to require that State assessments be developed consistent with nationally recognized accessibility standards.

Separately, one commenter interpreted § 200.6(b)(1) in the opposite manner—that it required any accommodation selected by an IEP team to be subject to the accessibility standards—and opposed the purported requirement as unduly limiting IEP teams. Another commenter requested that the Department strike any reference to “nationally recognized accessibility standards” on the basis that the Department should not cede control of a regulatory provision to third parties. However, an additional commenter generally supported the provision as proposed, finding it sufficient to promote appropriate accommodations for all students with disabilities.

*Discussion:* We appreciate the support of commenters for the proposed regulations to ensure State assessments are accessible to all students. Section 1111(b)(2)(B)(vii) of the ESEA and these final regulations clearly require that States provide for the participation of all students in required assessments and develop assessments that are accessible to all students and that provide appropriate accommodations for English learners and students with disabilities. Section 1111(b)(2)(B)(vii)(II) of the ESEA also provides an example of one aspect of making assessments accessible by referencing interoperability with, and ability to use, assistive technology. During negotiated rulemaking, a negotiator suggested the language proposed for the negotiations regarding nationally recognized accessibility standards, and the committee came to consensus on adding such language.

Optimal use of nationally recognized accessibility standards applies equally to assessment development and to assistive technology devices. When a State identifies the technical and data standards with which its assessment system is compatible, this creates the conditions for successful, continuous integration with assistive technology

devices if such devices are also consistent with the nationally recognized accessibility standards a State uses. Since both assessment development and assistive technology device development are continuous processes, clarity and common understanding are keys to integration. Data standards are a useful method of communication between States or assessment developers and assistive technology device-makers (and those who use such devices). The change most commenters requested would apply the expectation for interoperability in a manner distinct from the statute, where it is an example and not a requirement, and would place full responsibility for consistency with nationally recognized standards on States in developing the assessment system, without recognizing the importance of also expecting that assistive technology devices be compatible with common data standards. Accordingly, the Department disagrees with those commenters that such a change is needed or is appropriate.

Regarding the concern that the provision as written would limit IEP teams, the Department disagrees with the commenter. Consistent with § 200.6(b)(1)(i), IEP teams may identify needed accommodations for any child with a disability on an individualized, case-by-case basis, and must follow the State guidelines for appropriate accommodations when making such decisions. In accordance with section 612(a)(16)(B) of the IDEA and 34 CFR 300.160(b), a State’s guidelines for IEP teams must identify for each assessment only those accommodations that do not invalidate the score, and instruct teams to select for each assessment only those accommodations that do not invalidate the test score. Both the ESSA and these regulations use “interoperability with assistive technology devices” as an example of appropriate accommodations, but do not necessarily require their use. However, if an IEP team determines that it is necessary for a student with a disability to use an assistive technology device in order to participate in an assessment under this part, the team would need to ensure that the device selected for the student will not invalidate the student’s test score. States and school districts will need to communicate this information to IEP teams to ensure that they can make informed decisions in this regard. The same expectations apply to the State with respect to making information about assistive technology devices available to the teams and individuals described in § 200.6(b)(1)(ii) and (iii).

The Department disagrees with the commenter who requested removal of all references to nationally recognized accessibility standards. First, as previously stated, interoperability with assistive technology devices is included in the statute and these regulations as an example of how to provide appropriate accommodations and ensure assessments are accessible to all students. Further, we do not believe that the Department would be ceding control over regulatory implementation to a third party. Generally, we enforce regulatory assessment expectations through assessment peer review, which is a process that the Department, with input from external experts, administers. The Department does not propose specifying any particular nationally recognized accessibility standards that should be used; however, the Department has previously worked with States and the broader field to develop the Common Education Data Standards (CEDS), which could serve as one option. Further, in the experience of the Department's Office for Civil Rights, where an SEA provides or collects information through electronic and information technology, such as on Web sites, it is difficult to ensure compliance with Federal civil rights accessibility requirements without adherence to modern standards such as the WCAG 2.0 Level AA standard. More broadly, we rely on nationally recognized professional and technical testing standards regarding assessment technical quality, which substantially inform assessment peer review. In certain cases, such as this one, collaboration with professionals in the field is essential to successful regulatory implementation.

*Changes:* None.

*Comments:* One commenter pointed out that some students, though identified as having a disability, do not need an accommodation. This commenter was concerned that § 200.6(b)(1) might inappropriately require every student identified as having a disability to receive an accommodation, even if such accommodation were not necessary.

*Discussion:* The regulation refers repeatedly to the use of "appropriate" accommodations. If no accommodations are needed or appropriate, a student would not be forced to receive an accommodation.

*Changes:* None.

*Comments:* One commenter recommended modifying § 200.6(b)(1)(iii) to specify that a team—not an individual—designated by an LEA must determine when accommodations are needed for a

student with a disability that is covered under section 504 or title II of the ADA in order to support the inclusion of multiple professionals with the appropriate expertise, including specialized instructional support personnel, in making these decisions. Other commenters generally supported the provisions, as written, which they said clarified the role of the IEP or other placement team in determining the appropriate accommodations.

*Discussion:* Section 200.6(b)(1)(ii) does in fact provide that a team of individuals (the student's placement team) make this determination when a student is provided accommodations under section 504. However, when accommodations are provided under title II of the ADA, § 200.6(b)(1)(iii) provides that the determination is made by "the individual or team designated by the LEA to make these decisions." As the title II regulations do not specify that such decisions must be made by a team, we decline to adopt the change proposed by this commenter. This interpretation is consistent with the Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, jointly issued by the Department and the Department of Justice in November 2014.<sup>8</sup>

*Changes:* None.

*Comments:* One commenter supported § 200.6(b)(2)(i), noting that developing and disseminating information for parents and schools on the use of appropriate accommodations is critical for ensuring all students with disabilities can participate fully in the general curriculum and be held to high academic standards.

*Discussion:* We agree with the commenter that transparent information is a linchpin of ensuring students with disabilities receive instruction based on grade-level academic content standards and have access to the general education curriculum for the grade in which the student is enrolled. This information can empower parents to advocate on behalf of their children and equip educators with knowledge they need to provide high-quality instruction to all students, including students with disabilities. We are revising § 200.6(b)(2)(i) to include dissemination of information to LEAs, as school districts are also a critical stakeholder in ensuring students with disabilities receive appropriate accommodations, are likely to be the entities that support

States in disseminating this information directly to schools and parents, and are included in similar provisions added to new § 200.7(a)(1)(i). We are also restructuring this provision to make clear that a State must (1) develop appropriate accommodations for students with disabilities; (2) disseminate information and resources on use of these accommodations to LEAs, schools, and parents; and (3) promote the use of those accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments.

*Changes:* We have revised § 200.6(b)(2)(i) to require States to disseminate information and resources on the use of appropriate accommodations to LEAs, in addition to schools and parents, and to clarify, separately, that States must also develop appropriate accommodations and promote their use.

*Comments:* Numerous commenters voiced support for § 200.6(b)(2)(ii), which requires States to ensure that general and special education teachers, paraprofessionals, specialized instructional support personnel, and other appropriate staff receive training and know how to administer assessments, including, as necessary, alternate assessments, and know how to make use of appropriate accommodations during testing for all students with disabilities. The commenters indicated that the requirement would help ensure that staff members receive sufficient training related to administering assessments to students with disabilities. In particular, this training would help staff learn to administer portfolio-based assessments, provide assistive technology, collaborate in professional learning communities, and provide accommodations to support students.

However, two commenters recommended not listing in the regulations the specific types of staff required to receive training (*i.e.*, general and special education teachers, paraprofessionals, and specialized instructional support personnel), thereby providing LEAs greater discretion to determine which staff members need to participate in this professional development. An additional commenter recommended clarifying that a State could work with high-quality external partners or intermediaries in developing this training to bolster the limited capacity of some LEAs in this area.

*Discussion:* We agree with the commenters who support maintaining the language in § 200.6(b)(2)(ii). These

<sup>8</sup> Available at: <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>.

provisions emphasize the importance of training for school-based staff members who may administer assessments to ensure that such staff members know how to make use of appropriate accommodations during assessments for all students with disabilities, including students with the most significant cognitive disabilities who may take an AA-AAAS to assess their performance under this part, if the State has adopted such standards. We agree with the commenters that the determination as to which training is “necessary” is best made at the State, LEA, and school levels. In different places, distinct individuals require training to administer different types of assessments, and the level of training such individuals need in order to ensure appropriate use of accommodations may vary. We believe the language as drafted addresses the concerns of commenters by providing sufficient flexibility to tailor training to meet their needs, and therefore, decline to make any changes.

*Changes:* None.

*Comments:* A number of commenters wrote in support of § 200.6(b)(3), which requires a State to ensure that the use of appropriate accommodations on assessments does not deny a student with a disability the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students without disabilities. The commenters noted that this would help ensure that test accommodations do not prevent students with disabilities from receiving a college-reportable score on entrance examinations that a State administers to high school students as part of the State’s assessment system. This commenter also indicated that it would help if accommodations on entrance examinations are available equitably to all students, citing: Overly burdensome requests for documentation of a disability that requires accommodations on the entrance examination; failure by test administrators to respond to requests promptly; and failure to provide needed accommodations for students with disabilities.

Some commenters also suggested that the Department clarify § 200.6(b)(3)(ii), which requires a State to ensure that the use of appropriate accommodations on assessments does not deny a student with a disability any benefit from participation in the assessment that is afforded to students without disabilities by defining appropriate accommodations within the scope of accommodations that may be provided without jeopardizing test validity and reliability. To illustrate, one commenter cited examples where the use of an

accommodation would invalidate test scores for a particular student (such as measuring an English learner’s reading comprehension by administering a test with a third-party “read-aloud” accommodation)—which the commenter believed would help ensure that all scores could be college-reportable.

*Discussion:* A State is responsible for ensuring that all students receive appropriate accommodations in keeping with the State’s general responsibilities to provide assessments that are accessible to all students under section 1111(b)(2)(B)(vii) of the ESEA, and applicable requirements under the IDEA, as discussed above with regard to comments addressing § 200.6(a). This responsibility applies regardless of whether the assessment is a statewide assessment or a locally selected, nationally recognized high school academic assessment under § 200.3, which is why relevant language appears in §§ 200.2, 200.3, and 200.6. States are responsible for determining which accommodations are appropriate and for administering assessments such that a student who needs and receives such an accommodation is not denied any benefit afforded to students who do not need the accommodation. While it is true that a State is also responsible for ensuring that it administers assessments in a valid and reliable manner, these provisions must work together. The requirement that a State administer a valid and reliable assessment does not relieve the State of any responsibility related to appropriate accommodations. Rather, the State must ensure that any assessment it administers to meet the requirements of title I, part A meets all requirements of this subpart.

*Changes:* None.

*Comments:* One commenter recommended requiring in the final regulations that all assessments, including any AA-AAAS, meet a number of criteria. In particular, they must: (1) Be standardized assessments that meet the *Standards for Psychological and Educational Testing*; (2) be high quality, fair, and reliable; and (3) produce valid results and interpretations. This commenter also suggested promoting the use of principles of UDL and other best practices. The commenter noted that AA-AAAS in the past have often been overly individualized in an attempt to better comply with IDEA requirements. The commenter further said that, absent these criteria, comparability between general assessments and AA-AAAS may be lost, noting that both are used for accountability purposes under the ESEA. Finally, the commenter suggested

that the regulations should require States and test developers to create a list of accommodations that have been determined as suitable for student use without jeopardizing the validity and reliability of scores for students with disabilities, which States could then share with IEP and other placement teams.

*Discussion:* The Department believes that the statute and regulations already require many of the actions the commenter requests. In particular, both section 1111(b)(2)(B)(iii) of the ESEA and § 200.2(b)(4)(ii) require consistency with relevant, nationally recognized professional and technical testing standards. The *Standards for Psychological and Educational Testing* are a strong example of such standards, and the Department’s peer review of State assessment systems under title I, part A is based on these technical standards, which we believe helps mitigate one of the commenter’s concerns. Section 1111(b)(2)(B)(iii) and (iv) and § 200.2(b)(4)(i) also address the importance of strong technical quality, including validity, reliability, and fairness. Finally, section 1111(b)(2)(B)(xiii) and 1111(b)(2)(D)(i)(IV) of the ESEA require that a State apply the principles of UDL, to the extent practicable, to both the general statewide assessments and the AA-AAAS, requirements that are reiterated in §§ 200.2(b)(2)(ii) and 200.6(d)(6).

The Department expects that assessment peer review will provide an opportunity to promote and enforce the use of high-quality assessments, which includes the AA-AAAS. While an AA-AAAS must be aligned with the challenging State academic content standards, the Department notes that, by definition, such an assessment will not be comparable to the general statewide assessments, since students taking an AA-AAAS are measured against alternate academic achievement standards. Similarly, each State is already required by section 1111(b)(2)(B)(vii) of the ESEA and section 612(a)(16)(A) of the IDEA to ensure that children with disabilities served under the IDEA are provided appropriate accommodations on title I, part A assessments, where necessary, as determined on an individualized case-by-case basis by their IEP team. To ensure that this occurs, section 612(a)(16)(B) of the IDEA requires a State to develop guidelines for the provision of appropriate accommodations. Under 34 CFR 300.160(b), these State guidelines must identify only those accommodations for each assessment that do not invalidate

the score and instruct IEP teams to select for each assessment only those accommodations that do not invalidate the score. These State guidelines apply to the provision of appropriate accommodations under the IDEA on regular and alternate assessments. Therefore, the Department does not believe changes are needed in this regard.

*Changes:* None.

#### AA-AAAS for Students With the Most Significant Cognitive Disabilities

*Comments:* Many commenters wrote either in broad support of, or broad opposition to, the criteria outlined in § 200.6(c)(4) that a State must follow in order to request from the Department a waiver of the requirement to assess no more than 1.0 percent of assessed students in each subject with an AA-AAAS. The commenters supporting the proposed regulations generally asserted that the elements included in the proposed regulation provide a comprehensive picture of the State's efforts to address and correct its assessment of more than 1.0 percent of assessed students on an AA-AAAS. The commenters opposing the proposed regulations generally favored additional local flexibility. Such commenters asserted that the waiver criteria as proposed are unduly burdensome and infringe on IEP team authority. A few commenters expressed concern that a burdensome process could discourage States from submitting a waiver.

*Discussion:* We appreciate the broad support for the proposed regulations and suggestions for revisions suggested by the commenters. We agree that strong waiver criteria are necessary to ensure that a waiver is only granted when appropriately justified and when a State demonstrates necessary progress towards assessing no more than 1.0 percent of assessed students in each subject with an AA-AAAS. Therefore, we generally maintain the criteria in the final regulations. However, we have considered the need for specific changes addressed by some commenters, particularly with regard to State and LEA burden, and discuss those in response to specific comments below.

*Changes:* None with respect to the overall need for waiver criteria. Changes with respect to specific criteria are discussed in response to specific comments below.

*Comments:* A few commenters contended that provisions in proposed § 200.6 infringe on an IEP team's authority to make an individual determination about the most appropriate assessment for an individual student, one noting that the

proposed regulations could be amended to direct IEP teams to follow State participation guidelines when making decisions about which assessment a student should take.

*Discussion:* We agree with the commenters that, for a child with a disability who receives services under the IDEA, the decision about which type of assessment is most appropriate for the student rests with the IEP team. However, we do not think that any changes to the regulations are necessary to address this comment. With respect to the suggestion to amend the regulations to direct IEP teams to follow State participation guidelines, we emphasize that the State guidelines required under § 200.6(d) are intended to serve that very purpose—to provide clarity for IEP teams as to how to make appropriate assessment decisions. In particular, § 200.6(d)(1) provides that IEP teams are to apply the State guidelines on a case-by-case basis to determine whether an individual child is a student with the most significant cognitive disabilities who should be assessed with an AA-AAAS.

*Changes:* None.

*Comments:* One commenter contended that any waiver criteria are contrary to the intent of Congress, asserting that Congress intended that States should better support and more accurately assess students with the most significant cognitive disabilities rather than be required to conduct oversight in a way that may intrude on high-quality LEA programming. Another commenter broadly suggested that the waiver criteria are contrary to the Congressional intent in section 8401 of the ESEA, which the commenter asserts presumes the Department will grant waivers provided the request demonstrates the need for and assumed benefit of the waiver, without any additional requirements. Additionally, a commenter asserted that a number of the waiver requirements involve unrelated information requirements and external conditions, in direct violation of the respective prohibitions included in section 8401(b)(1)(E) and 8401(b)(4)(D) of the ESEA.

*Discussion:* We disagree. In section 1111(b)(2)(D)(i)(I) of the ESEA, Congress explicitly prescribed a cap of 1.0 percent on the number of students who may be assessed with an AA-AAAS, which Congress specified is only for students with the most significant cognitive disabilities. Although the statute prohibits a State from imposing a cap on an LEA's use of an AA-AAAS, section 1111(b)(2)(D)(ii)(II) requires an LEA that exceeds the State cap to submit information to the SEA justifying

the need to exceed the cap. Moreover, section 1111(b)(2)(D)(ii)(III) requires a State to provide "appropriate oversight, as determined by the State," of any such LEA.

Because a State must ensure that the total number of students assessed using the AA-AAAS in each subject does not exceed 1.0 percent of assessed students in that subject in the State, but cannot impose any similar cap on its LEAs, § 200.6(c)(3) helps ensure that States review and act upon information from LEAs, provide sufficient oversight, and take meaningful steps to ensure that, under State and LEA policies, only students with the most significant cognitive disabilities are assessed with an AA-AAAS, consistent with the statutory requirement limiting participation in the AA-AAAS. Section 200.6(c)(3), therefore, is well within the Department's rulemaking authority under section 1601(a) of the ESEA, which authorizes the Secretary to "issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance with this title." As discussed above, the regulations are necessary to support a State in meeting its statutory obligations. Moreover, § 200.6(c)(3) was submitted to negotiated rulemaking under section 1601(b) and the negotiating committee reached consensus on it. Finally, in light of the statutory requirements in section 1111(b)(2)(D)(i)(I) and (b)(2)(D)(ii)(I)–(III) of the ESEA, § 200.6(c)(3) certainly is not inconsistent with or outside the scope of title I, part A, and therefore does not violate section 1111(e)(1)(B)(i) of the ESEA. The Department also has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474.

Similarly, the waiver criteria outlined in § 200.6(c)(4) do not exceed the Department's authority. We are well aware that section 1111(e)(1)(B) of the ESEA prohibits the Department from requiring, as a condition of approval of a waiver request under section 8401, requirements that are inconsistent with or outside the scope of part A of title I. Clearly, the waiver criteria in § 200.6(c)(4) are not inconsistent with or outside the scope of section 1111(b)(2)(D) of the ESEA. Rather, they are consistent with ensuring that the statutory restriction on a State's use of an AA-AAAS is not vitiated through waivers. In order to evaluate whether a State has a legitimate justification for a waiver to assess more than 1.0 percent of assessed students in a given subject with an AA-AAAS, it is necessary for

the Department to evaluate certain data about which students are being assessed with an AA-AAAS and to receive assurances from a State that it is verifying certain information with any LEAs that the State anticipates will exceed the statewide 1.0 percent cap, including that such LEAs have followed the State guidelines for determining which students may be appropriately assessed with an AA-AAAS and addressing any disproportionality in the percentage of students in certain subgroups of students who are assessed with an AA-AAAS. Moreover, the requirements that a State must submit a plan and timeline to improve the implementation of its State guidelines, to support and provide oversight to LEAs, and to address any disproportionality in the percentage of students who take an AA-AAAS are all requirements directly related to evaluating whether the State, if it receives a waiver, has a sufficient plan for coming into compliance with the statutory 1.0 percent cap. The criteria to receive a waiver of the 1.0 percent cap in § 200.6(c)(4) also help to reinforce the other statutory requirements that a State seeking a waiver, in general, must meet (as described in section 8401(b)(1)(C), (D), and (F)), including that the waiving of the requested requirements will advance student academic achievement, that the SEA will monitor and regularly evaluate the effectiveness of its waiver plan, and in cases where a State is seeking to waive statutory requirements related to student assessment and data reporting under title I, part A, that the SEA and its LEAs will maintain or improve transparency in reporting to parents and the public on student achievement, including subgroups of students. For the same reasons § 200.6(c)(4) does not violate section 1111(e) of the ESEA, the Department would not violate section 8401(b)(4)(D) if it were to disapprove a State's waiver request to exceed the 1.0 percent cap if the State cannot demonstrate that it has met the criteria in § 200.6(c)(4), because the criteria in § 200.6(c)(4) do not impose conditions outside the scope of a waiver request. In sum, each of the elements described above is within the scope of a waiver request and title I, part A. Particular elements of the waiver criteria which commenters noted were outside the scope of a waiver request are discussed in greater detail below.

*Changes:* None.

*Comments:* One commenter contended that the waiver requirements present particular challenges for rural States and LEAs where the numbers of assessed students are so small that, even if one or two students are assessed with

an AA-AAAS, the LEA would then exceed the statewide 1.0 percent cap. The commenter noted that increased monitoring of such LEAs would tax SEA resources and may inadvertently pressure rural LEAs to recommend general assessments for students who should more appropriately be taking an AA-AAAS. The commenter asserted that LEAs that partner to provide specialized programming for students with the most significant cognitive disabilities in rural States will necessarily assess more than 1.0 percent of assessed students, and that any heightened monitoring of such LEAs implies mistrust of the work in such schools and is counterproductive to the needs of the students in these schools.

*Discussion:* We appreciate the comment specific to the needs of rural States and LEAs and have taken these suggestions into consideration with regard to specific changes discussed in response to other comments, particularly with regard to SEA oversight requirements as described in § 200.6(c)(4). However, section 1111(b)(2)(D)(ii)(III) of the ESEA provides that a State will exercise oversight of an LEA that exceeds the statewide 1.0 percent cap, regardless of the number of students enrolled in the LEA. We note that it is the State's responsibility to develop State guidelines under § 200.6(d) that ensure that IEP teams within the State appropriately identify, on a case-by-case basis, only students with the most significant cognitive disabilities for an AA-AAAS. A rural State has discretion to develop its State guidelines in a way that best meets the State's unique needs, so long as the guidelines meet the requirements contained in the statute and regulations. Therefore, we decline to make any changes directly related to this comment but note that we are incorporating other changes to the waiver criteria that partially address rural concerns.

*Changes:* None.

*Comments:* One commenter contended that the regulations should take into account that some States have a low-incidence of children with disabilities, whereas others have a high-incidence, explaining that States with a high-incidence may assess the same number of students with the most significant cognitive disabilities with an AA-AAAS as a State with a low incidence, and only the State with the high-incidence of children with disabilities would exceed the 1.0 percent statewide cap.

*Discussion:* We appreciate the commenter's concern about variations in the numbers of children with

disabilities nationwide. Section 1111(b)(1)(D)(i)(I) of the ESEA, however, establishes that all States must limit the number of students assessed in each subject with an AA-AAAS to no more than 1.0 percent of assessed students, with the only exception being a State that applies for and receives a waiver to exceed this prohibition. Therefore, we decline to make this suggested change.

*Changes:* None.

*Comments:* A few commenters suggested that proposed § 200.6 does not give States enough authority to act when an LEA has assessed more than 1.0 percent of assessed students in a given subject with an AA-AAAS and does not explain how the Secretary will decide whether to grant a waiver. One such commenter articulated that, in accordance with the proposed regulation, any rationale provided by an LEA would be sufficient and that the Department would grant every State request for a waiver. The commenter further noted that the Department should revise the regulation so that it explains the steps that a State should take to comply absent an approved waiver. Another commenter questioned whether there is also a statewide cap on the number of scores from an AA-AAAS that can count as proficient in school accountability determinations (similar to the regulation applied under the ESEA, as amended by NCLB), and if so, whether there would be a separate waiver process to request such a waiver. The commenter asked for greater detail about potential consequences for a State that assesses more than 1.0 percent of assessed students in a given subject with an AA-AAAS.

*Discussion:* While we appreciate the commenter's request for additional specificity, we do not agree that additional clarity is needed in the regulation. The waiver criteria outlined in § 200.6(c)(4) specify the elements a State must address in a request for a waiver. Further, should a State request a waiver for an additional year, under § 200.6(c)(4)(v) the Department expects to see substantial progress towards the State's plan and timeline for meeting the requirement to assess no more than 1.0 percent of students with an AA-AAAS. With regard to the request to address the steps a State should take absent an approved waiver, the Department notes that it maintains general enforcement authority, as it does with any ESEA violation.

With regard to the application of a 1.0 percent cap on the number of proficient scores that may be counted in accountability determinations, we do not believe such a cap is appropriate. Rather than codifying the regulations

under the ESEA, as amended by NCLB, that imposed such a cap, Congress chose in section 1111(b)(2)(D)(i)(I) of the ESEA to apply a cap on the number of students who may be assessed with an AA-AAAS. Thus, the scores of all students who take an AA-AAAS, no matter how many are proficient, must be reported on State and LEA report cards and included in school accountability determinations under section 1111(c) of the ESEA, including performance against long-term goals and in the Academic Achievement indicator.

*Changes:* None.

*Comments:* A few commenters expressed concern that the existence of waivers, generally, will dilute the importance of the requirement to assess no more than 1.0 percent of assessed students with an AA-AAAS.

*Discussion:* We agree with the commenters that the number of children with disabilities who take an AA-AAAS should be limited to no more than 1.0 percent of assessed students, as the vast majority of children with disabilities are most appropriately assessed with general assessments alongside their peers without disabilities. However, section 1111(b)(2)(D)(ii)(IV) of the ESEA specifies that the waiver authority under section 8401 of the ESEA allows a State to apply for a waiver of the 1.0 percent limitation. The negotiators thoroughly discussed the topic of waiver criteria during negotiated rulemaking, and we continue to agree that the majority of the criteria agreed to by the committee are appropriate. We believe those criteria will sufficiently protect the statutory limitation on the percentage of students with the most significant cognitive disabilities who may be assessed with an AA-AAAS. As these provisions are implemented, we will continue to evaluate the need for additional non-regulatory guidance.

*Changes:* None.

*Comments:* A number of commenters opposed the requirement in § 200.6(c)(4)(i) that a State's waiver request be submitted at least 90 days prior to the start of the State's first testing window. One commenter suggested that the timeline be abbreviated to 30 days before the start of the testing window due to the differences in timing of testing windows nationwide, and noted that the submission should occur before the "main" testing window rather than the "first" testing window. A few commenters indicated it will be difficult to predict 90 days in advance how many students will need to take an AA-AAAS, with some noting that this is a particular challenge for States with highly mobile populations, and in areas

served by multiple LEAs, the Bureau of Indian Education (BIE), and tribal schools, or when parents decide that their children will not participate in assessments. The commenters requested that States be permitted to apply for waivers after the close of the State's testing windows. A few commenters indicated that when waiver requests are due before testing the State does not know the total number of students who will be assessed (the denominator for the participation rate calculation), so there is an increased administrative burden for some States who will request a waiver that they do not need, and other States that may need a waiver may not apply. A few commenters noted that since IEP teams meet year round, decisions about proper assessment placements may not have been made prior to the start of the first testing window, and suggested either that the submission timeline be after the assessment window or be removed altogether.

*Discussion:* While we appreciate the suggestions for changes with regard to the requirement to submit a waiver request 90 days prior to the first testing window, we believe these concerns are outweighed by the benefits of maintaining the requirement. As a request for a waiver is a request for permission to avoid non-compliance with the law, such a waiver should be requested before a State is non-compliant, rather than retroactively when a State will have already been non-compliant for a period of time. While we understand the contention that a more abbreviated timeline, such as 30 days prior to the start of the testing window, would be appropriate, we decline to adopt such a change, as the Department would not have sufficient time to address such requests; section 8401(b)(4) of the ESEA specifies that the Department has 120 days to respond to waiver requests, so the proposed 90-day period is already abbreviated from what is typically needed in order for the Department to approve waiver requests prior to a State becoming non-compliant. We acknowledge that IEP teams meet throughout the school year, but believe there is value in reinforcing the general principle that decisions about the assessment a student will take should be made in the beginning of the school year. Such advance planning allows the student, parents, teachers, and other instructional staff to have clear expectations and sufficient time to prepare for the assessment, which may include identifying appropriate accommodations. Given that some forms of an AA-AAAS are administered

throughout a school year, it is furthermore appropriate that such decisions are made early to ensure that a student's performance is fully measured. We are, however, revising § 200.6(c)(4)(i) to clarify that a State's waiver must be submitted 90 days prior to the start of the testing window for the relevant subject, recognizing that a State may request a waiver for only one subject, and that the testing windows can, but need not necessarily, vary among assessments.

Commenters supporting the waiver criteria as drafted acknowledge that the data that will be submitted along with such waiver requests are necessary so that States are transparent about how many students are assessed with an AA-AAAS, and we likewise value the transparency that will be provided by requiring this information prior to receipt of a waiver. Furthermore, a State should be able to determine whether there will be a need to request a waiver in a particular school year based on the prior year's data, and we note that the data a State submits along with a waiver request, consistent with § 200.6(c)(4)(ii) may be State-level data from either the current or previous school year. Therefore, we maintain that it is necessary to receive waiver requests in advance of the State's testing window and decline to make these requested changes.

*Changes:* We have revised § 200.6(c)(4)(i) to clarify that a waiver must be submitted 90 days prior to the start of the testing window for the relevant subject.

*Comments:* Many commenters specifically opposed § 200.6(c)(4)(ii)(B) of the waiver criteria for a State that exceeds the 1.0 percent cap, which requires the State to submit State-level data from the current or previous school year to show that the State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup who are enrolled in assessed grades. A few commenters suggested that the Department has overstepped its authority by linking a requirement for 95 percent test participation to receipt of a waiver of the 1.0 percent State cap on participation in the AA-AAAS, since the ESEA requires 95 percent participation on assessments used for Federal accountability but allows each State to determine how low student participation will be factored in its accountability system. One commenter argued that this requirement exceeds the plain statutory language of the ESEA and is therefore outside the scope of the waiver requirements in section 8401 of

the ESEA, which the commenter asserted requires only information directly related to the waiver request. Various commenters appeared to view the 95 percent test participation requirement as a punitive requirement for States with high numbers of parents choosing to opt their students out of statewide assessments, and contended it may result in competing parent advocacy groups working against each other. Another commenter suggested this requirement contradicts the increased flexibility in the measurement of student achievement that the commenter associated with the ESEA.

*Discussion:* We disagree with the commenters who suggest that it is inappropriate to require that 95 percent of all students and 95 percent of students in the subgroup of children with disabilities be assessed in order to receive a waiver from the statutory prohibition on assessing more than 1.0 percent of assessed students with an AA-AAAS. Section 1111(b)(2)(B)(i)(II) of the ESEA requires a State to annually administer an assessment to *all* public school students in the State, not just 95 percent of them. Since the 1.0 percent statewide cap on participation in the AA-AAAS is a cap on the number of students assessed, a State's data on proper use of the AA-AAAS will only be transparent and accurate if it is based on the entire population of students that must be assessed in the State. We believe this must be achieved by requiring the State to provide State-level data to show that it is assessing at least 95 percent of all students and 95 percent of children with disabilities as part of its waiver request. This recognizes that a small number of students may not be able to participate in the assessments for various reasons, without losing an accurate and representative sample of the whole student population in determining whether a State requires a waiver. Further, without such a protection, there is no guarantee that an LEA will not encourage certain students to avoid testing all together, thereby keeping those students out of the denominator of students who count for purposes of calculating the 1.0 percent cap. We note that since a waiver request must be submitted to the Department 90 days prior to the State's first relevant testing window, a State will likely submit data from the previous school year to fulfill this requirement.

With regard to the commenters who believe this requirement inappropriately ties an accountability requirement to a waiver request, we disagree. We acknowledge that, under section 1111(e)(1)(B)(i) of the ESEA, the

Department is prohibited from requiring a State to add any requirements for receipt of a waiver that are inconsistent with or outside the scope of title I, part A. The requirement to ensure that at least 95 percent of all students and 95 percent of students in the subgroup of children with disabilities participate in State assessments is not in conflict with such a prohibition, given that section 1111(b)(2)(B)(i)(II) of the ESEA requires *all* students to be administered an assessment, and that such an expectation is specifically needed in the context of granting a waiver of the 1.0 percent statewide cap on participation in an AA-AAAS, as the cap is on the number of students assessed. The full inclusion of children with disabilities in academic assessments, either the general assessment or an AA-AAAS, is essential to ensure that they are held to the same high expectations as their peers, and the 1.0 percent cap on participation in an AA-AAAS is only effective as a guardrail when full participation in assessments is ensured. Further, the waiver criteria for a *State* related to the 1.0 percent cap on participation in the AA-AAAS is separate and distinct from—and has no effect on—how the State meets the statutory requirement to hold *schools* accountable for 95 percent participation in assessments, which will be determined by the State consistent with section 1111(c)(4)(E) of the ESEA.

Finally, it is not necessary for the ESEA to specifically authorize the Secretary to include the 95 percent participation requirement as a waiver criterion in order for us to do so. Section 1601(a) of the ESEA allows the Secretary to “issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance” with the statute. Section 200.6(c)(4)(ii)(B) is necessary to ensure that only those States that truly need to assess more than 1.0 percent of assessed students with an AA-AAAS are eligible for a waiver; otherwise, waivers would vitiate the statutory prohibition. Moreover, § 200.6(c)(4)(ii)(B) was submitted to negotiated rulemaking under section 1601(b) and the negotiating committee reached consensus on it. Finally, as noted above, § 200.6(c)(4)(ii)(B) is not inconsistent with or outside the scope of title I, part A, and therefore does not violate section 1111(e)(1)(B)(i) of the ESEA. The Department also has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474.

We also disagree with the contention that the requirement to ensure 95

percent test participation for all students and students in the subgroup of children with disabilities is in violation of section 8401(b)(4)(D) of the ESEA. Such a requirement is not an external condition outside the scope of a waiver request but, rather, is consistent with requirements for the administration of assessments to all students in section 1111(b)(2)(B)(i)(II) of the ESEA and necessary to ensure that the 1.0 percent cap on the number of assessed students who may participate in an AA-AAAS is applied in such a way that continues to expect full test participation for all students and all children with disabilities.

*Changes:* None.

*Comments:* While many commenters supported the waiver criteria as drafted, one commenter noted that instances of disproportionate identification for an AA-AAAS should be examined and addressed, but generally opposed the proposed waiver criterion. Another commenter asserted that requirements to address disproportionality in the number and percentage of students assessed with an AA-AAAS when a State applies for a waiver of the statewide 1.0 percent cap are outside the scope of the waiver requirements in section 8401 of the ESEA, since such waivers must include only information directly related to the request.

*Discussion:* We disagree with the assertion that the requirement in § 200.6(c)(4)(ii)(A) that a State provide data on the number and percentage of students in the subgroups of economically disadvantaged students, major racial and ethnic groups, and English learners who are assessed with an AA-AAAS, and the requirement in § 200.6(c)(4)(iii)(B) that a State must assure any LEA that the State anticipates will assess more than 1.0 percent of students using an AA-AAAS will address any disproportionality in the percentage of students from such subgroups who take an AA-AAAS, are outside the scope of the requirements for a waiver under section 8401 of the ESEA. The 1.0 percent limitation on the number of students in a State who may be assessed with an AA-AAAS is a critical protection to ensure that the vast majority of children with disabilities are included in the general assessment alongside their peers and that only the small number of students with the most significant cognitive disabilities are assessed with an AA-AAAS. However, such a protection is minimized if a disproportionate percentage of students from any one subgroup is assessed with an AA-AAAS, and such disproportionate identification indicates that the State should revisit its

guidelines for how IEP teams within the State identify which students are those with the most significant cognitive disabilities who may be assessed with an AA-AAAS. Thus, we believe that maintaining a focus on disproportionate use of the AA-AAAS is necessary within the criteria for a waiver of the 1.0 percent statewide cap on the number of students who may be assessed with an AA-AAAS. Further, it is not necessary for the ESEA to specifically authorize the Secretary to address disproportionality through waiver criteria. As noted in the discussion of the prior comment, section 1601(a) of the ESEA authorizes the Secretary to issue regulations as are necessary to reasonably ensure that there is compliance with title I, part A. For the reasons we express above, we believe a waiver of the 1.0 percent cap is only warranted if a State is not disproportionately including in the AA-AAAS students who are poor, English learners, or students from a major racial or ethnic group, thereby raising concerns that the State's guidelines for identifying students with the most significant cognitive disabilities are not being carried out responsibly. Like the other assessment-related regulations submitted to negotiated rulemaking, the committee reached consensus on § 200.6(c)(4)(ii)(A), (iii)(B), and (iv)(C), consistent with 1601(b) of the ESEA. In addition, the Department has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e-3, and the DEOA, 20 U.S.C. 3474.

That said, we are revising § 200.6(c)(4)(iii)(B) and (iv)(C) to clarify that the assurances a State must provide and its plan and timeline related to disproportionality in the AA-AAAS must be focused on the "percentage" of students in each subgroup that are assessed using an AA-AAAS in a particular subject, and not the raw "number" of students in each subgroup. Using the "number" of students assessed using an AA-AAAS would be insufficient to identify disproportionalities given that raw numbers also reflect the size of the student population in the State. However, the data that must be included as part of the waiver request described in § 200.6(c)(4)(ii)(A) must still include the number and percentage of students in each subgroup assessed using an AA-AAAS in the relevant subject.

*Changes:* We have revised § 200.6(c)(4)(iii)(B) and (iv)(C) so that only the percentage of students in each subgroup assessed using an AA-AAAS is considered related to disproportionality in the assurances and

plan included in a State's waiver request to exceed the 1.0 percent cap.

*Comments:* A few commenters contended that LEAs should not be required to assess less than 1.0 percent of assessed students with an AA-AAAS because some LEAs have legitimate reasons to assess more than 1.0 percent of students with an AA-AAAS based on student needs and city demographics (e.g., medical facilities located within the city or other specialized programming located in certain LEAs). One such commenter acknowledged that LEAs need to submit justification to the State to assess more than 1.0 percent of assessed students with an AA-AAAS, but asserted that such justification should not be a complex annual process.

A few commenters more broadly objected to the requirement that SEAs verify information with LEAs through the assurances required under § 200.6(c)(4)(iii), with one commenter noting that in a State with a large number of LEAs this is a significant burden on SEA resources. A few other commenters opposed the same assurances, specifically objecting to the proposed language that allows a State discretion to verify certain information with LEAs that "contribute to the State's exceeding" the 1.0 percent cap. A few commenters contended that the proposed regulations would result in a de facto, or back-door, LEA-level cap on participation in the AA-AAAS in LEAs that have no record of assessing more than 1.0 percent of students with such an assessment. One commenter asserted that the proposed regulations regarding LEAs that "contribute to the State's exceeding" the 1.0 percent cap exceed the scope of the law since the ESEA provides that LEAs that assess more than 1.0 percent of students with an AA-AAAS shall submit information to the SEA justifying the need to exceed such cap, and permits the SEA to provide oversight of such LEAs, but it does not extend such oversight to LEAs that do not exceed the cap. Thus, the commenter argued that the ESEA prohibits these proposed regulations.

One commenter argued that the assurance in proposed § 200.6(c)(4)(iii)(B) is unattainable because an LEA will not be able to predict the extent to which it will assess less than 1.0 percent of students with an AA-AAAS since a decision as to which assessment a student will take is an individualized decision based on whether the student is a student with the most significant cognitive disabilities and eligible for the assessment.

*Discussion:* While we generally agree with the commenters who supported the waiver criteria, and place great value on the consensus reached during negotiated rulemaking, we have determined that there is reason to address a few of the specific concerns with regard to the criteria for assurances from the State included in § 200.6(c)(4)(iii).

With regard to the comment that § 200.6(c)(4)(iii) should be revised so that it extends only to LEAs that the State anticipates will assess more than 1.0 percent of the number of students assessed with an AA-AAAS and not to other LEAs that the State determines will significantly contribute to the State's exceeding the cap, we agree. Both LEAs that the State anticipates will assess more than 1.0 percent of students in the LEA with an AA-AAAS and LEAs that do not assess more than 1.0 percent of students with an AA-AAAS but that significantly contribute to a State's exceeding the 1.0 percent State cap were incorporated into the waiver criteria during negotiated rulemaking. Including both categories of LEAs was intended to provide a State with discretion to focus attention on those LEAs that assess less than 1.0 percent of students with an AA-AAAS but significantly contribute to the State exceeding its 1.0 percent cap, as well as those LEAs already assessing more than 1.0 percent. However, we acknowledge that this may, in some States, unfairly call attention to LEAs that will not assess more than 1.0 percent of assessed students with an AA-AAAS. While we strongly encourage States to look not only to LEAs that are assessing more than 1.0 percent of students with an AA-AAAS but also those significantly contributing to the State exceeding the cap of 1.0 percent, we are removing the language in § 200.6(c)(4)(iii) that extends the assurances that a State submits with a waiver to LEAs that "significantly contribute" to the State exceeding the 1.0 percent State cap.

With regard to the commenters asking for changes in proposed § 200.6(c)(4)(iii) to the specific assurances that a State has verified certain information with respect to LEAs that the State anticipates will assess more than 1.0 percent of their assessed students with an AA-AAAS, we maintain that the requirements in § 200.6(c)(4)(iii)(A), to follow each of the State's guidelines, and § 200.6(c)(4)(iii)(C), to address any disproportionality in the percentage of students in any subgroup assessed with an AA-AAAS, are critical to ensure that IEP teams within a State comply with the State's guidelines to determine that only students with the most significant

cognitive disabilities are most appropriately assessed with an AA-AAAS. We are, however, revising § 200.6(c)(4)(iii)(A) to remove duplicative language and improve clarity; specifically, the assurance States provide in their waiver requests must indicate that LEAs follow each of the State's guidelines under § 200.6(d), except § 200.6(d)(6), which only applies at a State level. All of the guidelines under § 200.6(d) are critically important for LEAs to follow, and we believe it is confusing and unnecessary to emphasize those in § 200.6(d)(1) over other pieces of the guidelines in this assurance.

In response to the specific commenter who suggested that proposed § 200.6(c)(4)(iii)(B) be removed, we agree. While LEAs should not significantly increase, from the prior year, the extent to which they assess more than 1.0 percent of all students assessed using an AA-AAAS without a demonstration of a higher prevalence rate of students with the most significant cognitive disabilities, we have determined that the practices this assurance are intended to address will also be addressed through the plan and timeline requirements in § 200.6(c)(4)(iv) and that some burden on the State and LEAs can be reduced by eliminating this assurance.

Given the changes that we are making to the waiver requirements contained in § 200.6(c)(4)(iii) to remove language referring to LEAs that significantly contributed to a State's exceeding the 1.0 percent cap, which commenters alleged was outside the Department's regulatory authority, the remaining assurances that are required in this section clearly do not exceed that authority. Based on the authority discussed above in response to comments regarding SEA oversight and disproportionality, the assurances a State is required to make related to an LEA that the State anticipates will exceed the State's 1.0 percent cap are necessary to evaluate whether a State is only assessing students with the most significant cognitive disabilities with an AA-AAAS and therefore warrants a waiver to exceed the 1.0 percent cap. Section 200.6(c)(4)(iii), as revised, is therefore well within the Department's regulatory authority under section 1601(a) of the ESEA as well as under section 410 of GEPA, 20 U.S.C. 1221e-3, and section 414 of the DEOA, 20 U.S.C. 3474.

*Changes:* We have revised § 200.6(c)(4)(iii) by removing the reference to LEAs that assess fewer than 1.0 percent of students using an AA-AAAS that the State determines will

significantly contribute to the State's exceeding the cap. We have also removed § 200.6(c)(4)(iii)(B) and renumbered former § 200.6(c)(4)(iii)(C) as § 200.6(c)(4)(iii)(B). Finally, we have revised § 200.6(c)(4)(iii)(A) by removing "including criteria in paragraph (d)(1)(i) through (iii)" because it is included in the reference to guidelines under paragraph (d).

*Comments:* One commenter broadly objected to § 200.6(c)(4)(iv), which requires a State to submit a plan and timeline with its waiver request. A few commenters also objected more particularly to § 200.6(c)(4)(iv)(B), which requires a State to explain in the plan and timeline how it will support and provide appropriate oversight to an LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a school year with an AA-AAAS, and any other LEA that the State determines will significantly contribute to the State's exceeding the cap. The commenters asserted that this creates intrusive State oversight of LEAs that are not exceeding the State cap by assessing less than 1.0 percent of their students with an AA-AAAS. One commenter contended that this interferes with IEP team authority and asserted that, since the IDEA provides a mechanism for monitoring compliance with IDEA requirements, this provision should be struck from the proposed regulations.

*Discussion:* We agree with the comment that § 200.6(c)(4)(iv) should be revised so that it applies only to LEAs that a State anticipates will assess more than 1.0 percent of the students assessed with an AA-AAAS and not to other LEAs that the State determines will significantly contribute to the State's exceeding the cap. The rationale for this change was discussed in the prior discussion. However, we also note that an effective plan and timeline, as required under § 200.6(c)(4)(iv), will likely need to consider both LEAs that have assessed more than 1.0 percent of their students with an AA-AAAS as well as LEAs that may approach but not exceed 1.0 percent. Nonetheless, we believe that a State will exercise proper discretion as to which LEAs must receive oversight from the State so that the State is able to meet the requirement to assess no more than 1.0 percent of assessed students with an AA-AAAS in future years. Given that a State must demonstrate substantial progress towards meeting each component of the State's plan and timeline to extend a waiver for additional years, we believe that a State will place great weight on how it exercises this discretion.

*Changes:* We have revised § 200.6(c)(4)(iv)(B) by removing the phrase referencing LEAs that the State determines will significantly contribute to the State's exceeding the cap, but do not themselves assess more than 1.0 percent of assessed students with an AA-AAAS.

*Comments:* One commenter asked the Department to allow States to monitor appropriate use of the AA-AAAS as a component of its existing accountability plan rather than as a new, separate process.

*Discussion:* We agree that there is benefit to streamlining processes at the State level and encourage States to consider how various aspects of their monitoring systems may be streamlined. These regulations merely articulate areas for technical assistance and oversight, as required under section 1111(b)(2)(D)(ii)(III) of the ESEA, rather than prescribe to States how to conduct such oversight. Therefore, we decline to make any changes.

*Changes:* None.

*Comments:* A few commenters opposed § 200.6(c)(4) that limits a State's waiver request to exceed the 1.0 percent cap to one year at a time. One commenter suggested that a State should be allowed to apply for a waiver for up to three years, but noted that a State could still be required to report annually against progress on meeting the requirement to assess no more than 1.0 percent of assessed students in each subject with an AA-AAAS.

*Discussion:* We do not anticipate a need to grant a State a multi-year waiver. The ESEA requires a State to assess no more than 1.0 percent of assessed students in a subject with an AA-AAAS each year, and it would be inconsistent with this requirement to provide a waiver to a State multiple years in advance, rather than expecting the State to take action to comply with the requirements of the law and only assess 1.0 percent of students in a subject using an AA-AAAS. On an annual basis, should a State apply for a waiver from the 1.0 percent cap, the State is expected to include a plan and timeline to improve implementation of its State guidelines, which guide IEP team decision making, so that the State is able to assess less than 1.0 percent of students in the State with an AA-AAAS in future years. While this may be a difficult transition for some States and may result in a State requesting a waiver from the requirement, we agree with the consensus reached during negotiated rulemaking that such waivers be limited to one year. We believe that an annual waiver submission will allow the Department to evaluate whether the

State is making necessary progress towards complying with the law. However, we do not intend to prohibit a State from applying for a waiver in subsequent years should the State determine there is a continued need for such a request, particularly if the State is making progress against its plan and timeline toward meeting the statutory requirement.

Therefore, we decline to make the suggested change.

*Changes:* None.

*Comments:* A few commenters opposed § 200.6(c)(4)(v) that any subsequent waiver request to the initial request must demonstrate “substantial progress” toward achieving each component of the plan and timeline that the State submitted with the waiver in the prior year. One such commenter asserted that this requires additional, burdensome evidence of intervention in LEAs that assess more than 1.0 percent of assessed students with an AA-AAAS. Another such commenter noted that “substantial progress” is an undefined term and open to subjective interpretation and would prefer that any measurable amount of progress towards achieving the plan and timeline be considered sufficient to receive a waiver in a future year. Another commenter noted there should be recognition that the numbers of students eligible for an AA-AAAS are based on factors that may be outside the State’s or LEA’s control, such as students entering and leaving a district and students who may choose not to participate in assessments.

*Discussion:* We disagree with the commenters and believe there is great value in ensuring that a State demonstrate substantial progress towards achieving the objectives outlined in the State’s plan and timeline for assessing no more than 1.0 percent of assessed students with an AA-AAAS—because limiting the use of the AA-AAAS to 1.0 percent of the total number of students assessed in each subject is a statutory requirement. While there is a waiver authority, the expectation for States should be to meet that requirement, or work toward meeting it over time, rather than to perpetually receive a waiver of the requirement. While we agree with the commenter that the term “substantial progress” is undefined, the use of the word “substantial” is intentional and represents more than simply any measurable amount of progress towards achieving the plan and timeline. Nonetheless, we also acknowledge that a State is best positioned to describe in a subsequent waiver request how it has made substantial progress based on the State’s context and unique needs, and

note that, by maintaining the current language, a State is encouraged to make such a demonstration. Therefore, we decline to make the suggested change.

*Changes:* None.

#### Computer-Adaptive AA-AAAS

*Comments:* A few commenters strongly supported the provision in § 200.6(c)(7) that a computer-adaptive AA-AAAS must measure student performance against the academic content standards for the grade-level in which the student is enrolled, feeling it provides an important safeguard to ensure students with the most significant cognitive disabilities are held to high expectations and receive grade-level content even when taking adaptive assessments.

*Discussion:* We agree that it is essential for all children with disabilities to be held to the same high expectations as their peers without disabilities, including students with the most significant cognitive disabilities taking a computer-adaptive alternate assessment aligned with alternate academic achievement standards. Like a general computer-adaptive assessment, a computer-adaptive alternate assessment must be aligned with the challenging State academic content standards for the grade in which the student is enrolled, as required under section 1111(b)(2)(D)(i) of the ESEA.

*Changes:* None.

#### State Guidelines With Respect to Students With the Most Significant Cognitive Disabilities

*Comments:* Numerous commenters noted support for § 200.6(d)(1), which specifies that a State’s guidelines for IEP teams must include a State definition of students with the most significant cognitive disabilities. Many commenters, in particular, believed these provisions were essential to protect the validity of assessments for children with disabilities, to prevent misidentification of students for an AA-AAAS, and to emphasize that students with the most significant cognitive disabilities are to be assessed against grade-level content standards, while recognizing that both cognitive functioning and adaptive behavior should be considered in determining student supports.

In addition, one commenter suggested adding specific examples to the regulations to provide States greater understanding of what might qualify as a “significant cognitive disability,” and provided several suggested examples such as students who require dependence on others for daily living activities. Two commenters supported

adding that a student’s intelligence quotient (IQ) score may not be a factor in determining whether a student should take an AA-AAAS. Finally, a commenter recommended modifying one of the parameters for States’ definitions to emphasize the role of IEP teams and not equivocally state these students require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled. Instead, the commenter proposed that IEP teams consider the provision of such instruction and supports.

*Discussion:* We appreciate the suggestions that the commenters provided and acknowledge that the negotiators engaged in robust discussion on the topic of how to define “students with the most significant cognitive disabilities” during negotiated rulemaking. We believe that the regulations reflect the consensus of the negotiators and appropriately balance the need for regulatory parameters to ensure that State guidelines incorporate key protections for students with the most significant cognitive disabilities while balancing the ability for States to construct such guidelines in consultation with local stakeholders to devise a State definition of “students with the most significant cognitive disabilities” that will ensure students within a given State are appropriately identified and assessed. We note that, should a State apply for a waiver to exceed the 1.0 percent cap on the number of students with the most significant cognitive disabilities who may be assessed with an AA-AAAS, under § 200.6(c)(4)(iv)(A) the State must include a plan and timeline in its waiver request to improve the implementation of those State guidelines, which may include revising its definition of “students with the most significant cognitive disabilities” if necessary so that the State can ensure it will assess no more than 1.0 percent of students with such an AA-AAAS. These revisions could include considering additional factors, such as those indicated by the commenters. However, in reviewing the proposed regulations, the Department believes it is necessary to update § 200.6(d) for consistency with regulations under the IDEA (34 CFR 300.306(b)(1)(iii)) and to clarify that status as an English learner may not be considered in determining whether a student is a student with the most significant cognitive disabilities, even in part. The only relevance of English learner status to that

determination is ensuring that the evaluation of the student's disability is conducted in an appropriate language.

With regard to the comments about IEP team discretion, we refer to the discussion above in which we note that, under both the ESEA and the IDEA, decisions of IEP teams must be informed by State guidelines. We agree with the consensus reached by the negotiated rulemaking committee that students with the most significant cognitive disabilities require extensive, direct individualized instruction and substantial supports to achieve measurable gain on the challenging State academic content standards for the grade in which the student is enrolled. However, we believe this is only one factor for a State to consider in the development of its State guidelines and strongly encourage States to work with local stakeholders to develop State definitions that best reflect local needs.

*Changes:* We have revised § 200.6(d)(1)(i) to clarify that a student's status as an English learner, similar to the identification of a student as having a particular disability under the IDEA, does not determine whether a student is a student with the most significant cognitive disabilities.

*Comments:* One commenter expressed general concern with requirements related to State guidelines for IEP teams under § 200.6(d), believing that the proposed regulations unduly limit the discretion of a student's IEP team with regard to determinations of which assessment is appropriate for a student, especially given that the State may only assess 1.0 percent of students assessed in a given subject with an AA-AAAS. Similarly, another commenter argued that § 200.6(d) violated section 1111(b)(2)(D)(ii)(I)-(II) of the ESEA because the requirements for State guidelines usurped the authority of the IEP team to determine which students with the most significant cognitive disabilities may take an AA-AAAS.

*Discussion:* We appreciate the commenters' concern and agree that under sections 1111(b)(1)(E) and 1111(b)(2)(D)(ii) of the ESEA IEP teams are responsible for determining whether a student has a significant cognitive disability and is most appropriately assessed against alternate academic achievement standards. However, IEP teams do not have unlimited discretion in this regard. Rather, under section 1111(b)(2)(D)(ii) of the ESEA and section 614(d)(1)(A)(i)(VI)(bb) of the IDEA, IEP teams must decide which children with the most significant cognitive disabilities will participate in an AA-AAAS, consistent with State guidelines under section 612(a)(16)(C)

of the IDEA, as amended by the ESSA, governing the participation of children with disabilities in the AA-AAAS. Those State guidelines inform decisions of IEP teams as to which children with disabilities are those with the most significant cognitive disabilities who should participate in an AA-AAAS. As agreed in negotiated rulemaking, we continue to believe that it is appropriate, consistent with section 1111(b)(2)(D)(i)(II) and (D)(ii)(I) of the ESEA and section 612(a)(16)(C) of the IDEA, to establish the parameters included in § 200.6(d) and therefore decline to make any changes.

*Changes:* None.

*Comments:* One commenter argued that § 200.6(d)(1) violated section 1111(e)(2) of the ESEA by imposing on States a definition of "students with the most significant cognitive disabilities" in conflict with a prohibition on the Secretary's authority for defining terms that are inconsistent with or outside the scope of the law.

*Discussion:* We appreciate the commenter's concern, but note that we are not defining the term "students with the most significant cognitive disabilities;" rather, the regulations require States to define this term and establish criteria for States to adhere to in establishing their own definition. Further, given that an AA-AAAS, as described in section 1111(b)(2)(D) of the ESEA, is only for students with the most significant cognitive disabilities, and that States must now ensure that no more than 1.0 percent of assessed students in the State take such assessments, we believe requiring a State to define "students with the most significant cognitive disabilities" in accordance with factors related to cognitive functioning and adaptive behavior is both consistent with and within the scope of the ESEA. Therefore, we decline to adopt any changes in response to this comment.

*Changes:* None.

*Comments:* A few commenters supported § 200.6(d)(2), which requires the State guidelines to help explain differences between assessments based on grade-level academic achievement standards and alternate academic achievement standards to IEP teams, including any effects of State or local policies on students as a result of taking an AA-AAAS (e.g., how participation in such assessments may delay or otherwise affect the student's ability to complete requirements for a regular high school diploma). They noted that this provision will help provide IEP teams with needed information as such teams make potentially high-stakes

decisions regarding whether a student will take an AA-AAAS.

Additionally, a commenter wrote in support of § 200.6(d)(3), which requires a State to notify parents of students participating in an AA-AAAS that their child's achievement will be measured based on alternate academic achievement standards and provide information on how participation in such assessment may delay or affect their child's completion of the requirements for a regular high school diploma, noting that these provisions empower parents to effectively advocate for their child's inclusion in the general assessment and the course of study that will help them prepare for the general assessment.

*Discussion:* We appreciate the commenters' support and agree that these provisions will help ensure IEP teams, including parents, are equipped with the information they need to make decisions that are in the best interests of the students they serve. We further agree that § 200.6(d)(3) will help ensure parents have the necessary information to advocate on behalf of their children in order to support their educational needs.

*Changes:* None.

*Comments:* A few commenters wrote in support of § 200.6(d)(4)-(5), which clarifies that States may not prevent students taking an AA-AAAS from pursuing a regular high school diploma and must promote (consistent with the IDEA) students with the most significant cognitive disabilities' access to the general education curriculum.

*Discussion:* We strongly agree with the commenters that it is critical for students with the most significant cognitive disabilities taking an AA-AAAS to not be precluded from attempting to complete the requirements for a regular high school diploma and to ensure that the instruction they receive promotes their involvement and progress in the general education curriculum for the grade in which the student is enrolled. Section 200.6(d)(4)-(5) incorporates requirements in sections 1111(b)(2)(D)(i)(III) and 1111(b)(2)(D)(i)(VII) of the ESEA.

*Changes:* None.

*Comments:* Multiple commenters wrote in support of the emphasis on maintaining high expectations for all students, including students with the most significant cognitive disabilities. These commenters expressed support for assessing students with the most significant cognitive disabilities with an AA-AAAS, which is aligned with the State's academic content standards for the grade in which the student is enrolled.

*Discussion:* We strongly agree with the commenters on the importance of ensuring that all students, including those with the most significant cognitive disabilities are provided access to the State's academic content standards for the grade in which the student is enrolled. As § 200.6(a)(2)(ii)(B) provides that students with the most significant cognitive disabilities may take an AA-AAAS aligned with the challenging State academic content standards for the grade in which the student is enrolled, we believe it is likewise important to emphasize the importance of providing students with the most significant cognitive disabilities with access to grade-level content standards throughout the school year.

*Changes:* We have revised § 200.6(d)(5) to clarify that the reference to promoting the involvement and progress of students with the most significant cognitive disabilities in the "general education curriculum" refers to curriculum that is based on the State's academic content standards for the grade in which the student is enrolled.

*Comments:* Several commenters wrote in support of the emphasis on developing any AA-AAAS consistent with the principles of UDL, expressing that UDL will make an AA-AAAS more accessible to students with the most significant cognitive disabilities.

*Discussion:* We agree with commenters on the importance of incorporating UDL principles into developing an AA-AAAS, as required under section 1111(b)(1)(D)(i)(IV) of the ESEA. We believe the best way to incorporate this requirement is to make it an affirmative requirement, to the extent feasible, in § 200.6(d)(6) and add using UDL with respect to an AA-AAAS along with general assessments that the State administers consistent with § 200.2(b)(2)(ii). These changes will help support States' efforts to more thoughtfully and efficiently develop assessment systems that are fully accessible to all students.

*Changes:* We have revised § 200.6(d)(6) to remove a reference to the State plan and add a reference to the requirements related to UDL in § 200.2(b)(2)(ii).

*Comments:* One commenter suggested requiring that State guidelines for IEP teams be developed based on input from stakeholders, including local special education directors, citing a need for greater understanding of accommodation policies for assessing students with disabilities.

*Discussion:* While we appreciate the importance that this commenter is placing on the need for stakeholder

engagement, we do not believe this suggested change is necessary. The State guidelines to be established in accordance with § 200.6(d) must be established consistent with section 612(a)(16)(C) of the IDEA. While States are in the best position to determine how to develop such guidelines, we encourage States to meaningfully consult with and incorporate feedback from relevant stakeholders, including teachers, parents of children with disabilities, children with disabilities, paraprofessionals, specialized instructional support personnel, school administrators, local special education directors, and the State advisory panel required under section 612(a)(21) of the IDEA.

*Changes:* None.

#### English Learners in General

*Comments:* None.

*Discussion:* In developing the final regulations, the Department determined that it would be helpful to devote separate paragraphs in § 200.6 to describe each of the requirements regarding the inclusion of English learners in State assessments required under title I, part A of the ESEA. To distinguish better among these provisions, we are revising § 200.6 to include paragraphs (f) on inclusion of English learners in general; (g) on assessing reading/language arts in English for English learners; (h) on assessing English language proficiency of English learners; and (i) on recently arrived English learners—rather than include all of these provisions in a single paragraph, as proposed. As a result, requirements pertaining to the inclusion of students enrolled in Native American language schools or programs have been moved to new § 200.6(j), and we have added a single paragraph that includes all related definitions in new § 200.6(k). By restructuring these requirements that were included in proposed § 200.6(f)–(h), we believe they are more clearly stated and emphasized in the final regulations. In addition, we are moving proposed § 200.6(i) on highly mobile student populations to § 200.2(b)(1)(ii)(A)–(D) in the final regulations, which we feel is a more logical location for these provisions, as it is in the same section as related requirements for administering assessments to all students in § 200.2(b)(1)(ii) and for disaggregating assessment data for these particular student groups in § 200.2(b)(11).

*Changes:* We have renumbered and reorganized proposed § 200.6(f) regarding inclusion of English learners so that these requirements appear in separate paragraphs in new § 200.6(f)–

(i). In addition, we have moved proposed § 200.6(g) regarding students in Native American language schools or programs to new § 200.6(j) and proposed § 200.6(i) regarding highly mobile student populations to new § 200.2(b)(1)(ii)(A)–(D). We have also made conforming edits to cross-references throughout the final regulations.

#### English Learners With Disabilities

*Comments:* Some commenters expressed general support for proposed § 200.6(f)(1)(i)(A), which clarified that English learners who are also identified as students with disabilities under § 200.6(a) must be provided accommodations as necessary based on both their status as English learners and their status as students with disabilities. Some commenters recommended adding language to proposed § 200.6(f)(1)(i) to clarify that staff responsible for identifying the appropriate accommodations for English learners with disabilities receive necessary training to select and administer assessments, and the accommodations appropriate for each individual child, in order to yield accurate and reliable information. One commenter specifically recommended training that addresses cultural sensitivities.

*Discussion:* We appreciate the commenters' support of the requirements related to assessment of English learners and agree that appropriate accommodations on assessments are important to ensure that English learners are assessed in a valid and reliable manner so they can demonstrate what they know and can do, as described in section 1111(b)(2)(B)(vii)(III) of the ESEA. In addition to providing assessments to an English learner with disabilities in the student's native language, consistent with section 1111(b)(2)(B)(vii)(III) of the ESEA, providing appropriate accommodations may also include providing the accommodations for the student's disabilities in the student's native language. We agree that appropriate staff should receive necessary training to administer assessments in order for school staff to know how to make use of appropriate accommodations during assessment for all English learners with disabilities. While § 200.6(b)(2)(ii), as proposed, includes staff that work with all students with disabilities, including those who are English learners, we are revising the regulations to more clearly indicate that teachers of English learners must also receive any necessary training regarding administration of assessments,

including alternate assessments, and the use of assessment accommodations.

*Changes:* We have revised § 200.6(b)(2)(ii) to indicate that States must ensure that teachers of English learners receive necessary training to administer assessments, that they know how to administer assessments, including, as necessary, alternate assessments under § 200.6(c) and (h)(5), and that they know how to make use of appropriate accommodations during assessments for all students with disabilities, including English learners with disabilities.

*Comments:* One commenter requested flexibility from the regulatory requirements for ELP assessments in the event that an English learner has a disability that prevents the student from accessing a particular domain of the ELP test, even with accommodations.

*Discussion:* We appreciate the commenter's suggestion and agree that greater clarity is needed to ensure that States fulfill their responsibility to assess all English learners annually on the State's ELP assessment, consistent with section 1111(b)(2)(G)(i) of the ESEA. We acknowledge that there are English learners with a disability covered under the IDEA, section 504, or title II of the ADA who may have a disability that precludes assessment of the student in one or more domains of the State's ELP assessment such that there are no appropriate accommodations for the affected domain(s) (e.g., a non-verbal English learner who because of that identified disability cannot take the speaking portion of the assessment, even with accommodations). We are revising the regulations accordingly to specify that, in these very rare circumstances, such an English learner must be assessed on all of the remaining domains of the State's ELP assessment. The exclusion of these students from the ELP assessment entirely would be not only contrary to the law, but could also lead to a lack of proper attention and services for such students.

*Changes:* We have added § 200.6(h)(4)(ii) to clarify that, for English learners who have a disability that precludes assessment of the student in one or more domains of the State's ELP assessment such that there are no appropriate accommodations for the affected domain(s), as determined on an individualized basis by the student's IEP team, 504 team, or individual or team designated by the LEA to make these decisions under title II of the ADA, as set forth in § 200.6(b)(1), a State must assess the student in the remaining domains on the ELP assessment.

*Comments:* One commenter asked that the Department provide clarity as to how the 1.0 percent cap on the number of students who may take an AA-AAAS is applicable to recently arrived students with the most significant cognitive disabilities who are exempted from one administration of the reading/language arts assessment.

*Discussion:* We appreciate this request for clarification. Consistent with applicable regulations, a recently arrived English learner may be counted as a participant in the State's reading/language arts assessment if the student takes either the State's ELP assessment or reading/language arts assessment regardless if the student takes the AA-AAAS or the alternate ELP assessment. Accordingly, when calculating the denominator to determine if the State will exceed the 1.0 percent cap on student participation in an AA-AAAS for reading/language arts (i.e., the number of students who were assessed in reading/language arts), the denominator would include any such recently arrived English learner who participated in either the ELP or reading/language arts assessment. The numerator would only include those students who take the AA-AAAS. For calculating the 1.0 percent cap for student participation in a mathematics or science alternate assessment, all ELs are included in both the numerator and the denominator because there is no similar exemption for recently-arrived ELs from the mathematics assessment.

*Changes:* None.

*Comments:* The same commenter asked that the Department clarify if the 1.0 percent cap applies to the number of English learners who are students with the most significant cognitive disabilities taking an alternate assessment to the ELP assessment.

*Discussion:* The 1.0 percent statewide cap on the number of assessed students in a particular subject who may take an AA-AAAS is limited to the assessments that measure the achievement of students with the most significant cognitive disabilities against alternate academic achievement standards permitted under section 1111(b)(1)(E) of the ESEA, and applies only to assessments in mathematics, reading/language arts, and science. Thus, the 1.0 percent statewide cap on the number of students assessed in a particular subject who may take an AA-AAAS, required in section 1111(b)(2)(D) of the ESEA, does not apply to the number of English learners who are students with the most significant cognitive disabilities taking an alternate assessment to the ELP assessment. Section 200.6(h)(5) (proposed § 200.6(f)(3)(v)) requires that

a State provide an alternate ELP assessment for each English learner covered under § 200.6(a)(1)(ii)—that is, those with the most significant cognitive disabilities—who cannot participate in the general ELP assessment even with appropriate accommodations. Although the ELP assessment is not subject to the 1.0 percent cap in section 1111(b)(2)(D) of the ESEA, we nevertheless expect that the vast majority of English learners with disabilities will be able to take the general ELP assessment with or without appropriate accommodations. The alternate ELP assessment is for only the very small fraction of English learners with the most significant cognitive disabilities, for whom the student's IEP team determines it to be necessary.

*Changes:* None.

#### Inclusion of English Learners in Academic Assessments

*Comments:* Some commenters expressed general support for provisions in proposed § 200.6(f) related to the appropriate inclusion of English learners in academic assessments required under § 200.2. Commenters found the proposed regulations helpful to ensure that all students receive the supports they need to fully participate in the public education system, including receiving appropriate accommodations with respect to a student's status as an English learner. Some commenters also expressed support for provisions in proposed § 200.6(f)(1)(ii)(A) that required States to ensure that the use of appropriate accommodations on assessments does not deny an English learner the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students who are not English learners.

*Discussion:* We appreciate the commenters' support of the requirements related to assessment of English learners and agree that appropriate accommodations on State assessments are important to ensure that English learners are fairly and accurately assessed so they can demonstrate what they know and can do. These requirements will also help ensure that receipt of assessment accommodations does not prevent English learners from receiving the same benefits from assessments that are afforded to non-English learners, such as college-reportable scores on entrance examinations that a State administers to all high school students in the State as part of the State's academic assessment system. We are maintaining these provisions in the regulations, but revising § 200.6(f)(2)(i) and (ii) (proposed § 200.6(f)(1)(ii)) for clarity.

Specifically, the information in § 200.6(f)(2)(ii) must be described in each State's plan, while the requirement in § 200.6(f)(2)(i)—for each State to ensure that the use of appropriate accommodations on assessments does not deny an English learner the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students who are not English learners—is a requirement without a related description in the State plan, consistent with similar provisions in §§ 200.3 and 200.6(b)(3) of these regulations.

*Changes:* We have moved the requirements from proposed § 200.6(f)(1)(ii)(A) to § 200.6(f)(2)(i) and have removed the requirement that State plans include a description related to this requirement. We have moved the requirements from proposed § 200.6(f)(1)(ii)(B)–(E) to § 200.6(f)(2)(ii).

*Comments:* One commenter stated that English learners should be excluded from all administrations of the reading/language arts and mathematics assessments until they demonstrate a sufficient level of English proficiency to produce valid results on these assessments.

*Discussion:* We disagree with the commenter that the regulations should exempt English learners from all administrations of the reading/language arts and mathematics assessments until they attain English proficiency. Section 1111(b)(2)(B)(vii)(III) of the ESEA requires States to provide for the inclusion of all English learners in all required content assessments, including by providing assessments in the language and form most likely to yield accurate data on what English learners know and can do in the content areas until such students attain English language proficiency. Additionally, § 200.6(f)(1)(i) and (2)(ii) (proposed § 200.6(f)(1)) require that each State take further steps to demonstrate that it is meeting its responsibility to provide assessments for English learners in the language that is most likely to assess an English learner's knowledge and skills accurately and fairly (*i.e.*, through providing assessments in the native language of English learner students). Given this responsibility, we strongly encourage States to provide native language assessments for English learners and firmly believe that utilizing this option will ensure that English learners are meaningfully included in a State's assessment and accountability system, rather than excluding such students altogether as the commenter suggested. In addition, we believe this will help ensure that schools, teachers, and parents can take advantage of the

valuable information provided by student assessments to inform and improve instruction for English learners.

*Changes:* None.

*Comments:* One commenter recommended allowing States to use their aligned ELP assessments as a measure of students' proficiency in reading/language arts.

*Discussion:* It would be both inconsistent with the statute and inappropriate to permit a State to use an ELP assessment as a measure of students' proficiency in reading/language arts. A State's annual ELP assessment is designed specifically to measure an English learner's proficiency in the English language. Under section 1111(b)(1)(F) and 1111(b)(2)(G) of the ESEA, ELP assessments must be aligned to the ELP standards and measure English learners' proficiency levels annually in the four recognized domains of language: speaking, listening, reading, and writing. The State's required reading/language arts assessments, on the other hand, measure what students know and are able to do in the specific academic content area of reading/language arts, based on the challenging State academic standards in section 1111(b)(1) of the ESEA. States are required to provide for the participation of all English learners, as described in section 1111(b)(2)(B)(vii)(III) of the ESEA, in the annual reading/language arts assessments in the grades specified in section 1111(b)(2)(B)(v)(I) of the ESEA. We do note, however, that States may administer reading/language arts assessments in a student's native language for students who have been enrolled in schools in the United States for less than three consecutive years (or five consecutive years, in certain unique circumstances) for an English learner for whom such assessment would yield more accurate information on what the student knows and can do in the content area, as described in section 1111(b)(2)(B)(ix) of the ESEA. Further, section 1111(b)(3)(A)(i)(I) of the ESEA provides a limited exception for recently arrived English learners from one administration of the State's reading/language arts assessment only; otherwise, all English learners must take both the State's ELP assessment annually and the reading/language arts assessment in each of grades 3–8 and once in high school.

*Changes:* None.

*Comments:* A few commenters suggested the Department clarify that accommodations for English learners must result in valid, reliable, and predictable test scores.

*Discussion:* We agree that it is important to ensure that assessments are

fair, valid, reliable, and high quality, resulting in meaningful scores. However, we believe no further clarification is needed as § 200.6(f)(1) (proposed § 200.6(f)(1)(i)) requires that States assess English learners in a valid and reliable manner that includes appropriate accommodations with respect to a student's status as an English learner. The regulations further require consistency with § 200.2, including § 200.2(b)(2) regarding accommodations for all students, including English learners, and § 200.2(b)(4) requiring assessments to be valid, reliable, and fair for the purposes for which they are used and consistent with relevant, nationally recognized professional and technical testing standards. Finally, we believe that the inclusion of a State's ELP assessments, in addition to its academic content assessments, in the assessment peer review process under § 200.2(d) will be critically important to ensure *all* assessments administered to English learners are fair, valid, reliable, and high-quality.

*Changes:* None.

*Comments:* A few commenters suggested the regulations require that each LEA offer accommodations to English learners needing linguistic support to access the State's content assessments and asserted that reporting the availability of accommodations alone is insufficient.

*Discussion:* Section 1111(b)(2)(B)(vii)(III) of the ESEA, and § 200.6(f)(1)(i) (require States to provide for the participation of all English learners, including needed accommodations. While this is a State responsibility under the statute, we agree with the commenters that States should proactively provide LEAs and schools with the necessary information and tools to ensure that English learners receive needed accommodations on required State assessments. Thus, we are revising the final regulations to require that States (1) develop appropriate accommodations; (2) disseminate information and resources to, at a minimum, LEAs, schools, and parents about these accommodations; and (3) promote the use of appropriate accommodations to ensure that all English learners are able to participate in academic instruction and assessments. This language is similar to that in section 1111(b)(2)(D)(i)(VI) of the ESEA regarding accommodations for students with the most significant cognitive disabilities and § 200.6(b)(2) with respect to other students with disabilities. We believe States should ensure information about available accommodations is transparent and

clear to LEAs and schools, as information on accommodations is critical for ensuring that all English learners are able to participate in academic instruction and assessments.

*Changes:* We have revised § 200.6(f)(1)(i) to require that a State (1) develop appropriate accommodations for English learners; (2) disseminate information and resources about such accommodations to, at a minimum, LEAs, schools, and parents; and (3) promote the use of those accommodations to ensure that all English learners are able to participate in academic instruction and assessments.

#### Assessing Reading/Language Arts in English

*Comments:* Several commenters asked for additional flexibility in proposed § 200.6(f)(2). Specifically, the commenters recommended extending the period that English learners can be assessed for reading/language arts in their native language beyond three years.

*Discussion:* We disagree with the commenters and believe additional flexibility is both inconsistent with the statute and unnecessary. Section 1111(b)(2)(B)(ix) of the ESEA and § 200.6(g)(1)–(2) (proposed § 200.6(f)(2)(i)–(ii)) permit a State to assess English learners' achievement in reading/language arts in the student's native language if they have been enrolled in schools in the United States for less than three consecutive years, with provisions permitting assessment in the native language for an additional two consecutive years if the LEA determines, on a case-by-case basis, that the student has not reached a sufficient level of English language proficiency to yield valid and reliable information on reading/language arts assessments written in English. Because the statute and final regulations already allow for LEAs to determine, on an individualized basis, whether it is necessary to assess an English learner in reading/language arts in his or her native language for an additional two years, we believe the flexibility these commenters seek is sufficiently addressed. We also note that, because the statute requires students to be assessed in reading/language arts in English if they have been enrolled in U.S. schools for three or more consecutive years, a highly mobile student who attends school in the United States for two years, exits the country, and then returns to a school in the United States in later years would still be able to be assessed in reading/

language arts in his or her native language upon return to U.S. schools.

*Changes:* None.

#### Assessing English Language Proficiency

*Comments:* One commenter asked that we clarify the frequency or grade level in which an ELP test must be administered for accountability purposes.

*Discussion:* We appreciate the suggestion that we clarify the grade levels in which an annual statewide ELP assessment must be administered for accountability purposes, but note that requirements for school accountability are outside the scope of these regulations. Section 1111(c)(4)(B)(iii) of the ESEA describes the years in which an ELP assessment must be used for school accountability determinations. We note that § 200.5(a)(2) of these regulations specifies the requirement to administer an ELP assessment annually in any grade in which there are English learners, kindergarten through twelfth grade. The requirement for assessment administration, however, is distinct from the requirement for use of assessment results in accountability determinations, which, as explained above, is outside the scope of these regulations.

*Changes:* We have updated §§ 200.5(a)(2) and 200.6(h)(1)(ii) to clarify that the requirement is to administer the ELP assessment annually in any grade in which there are English learners, kindergarten through twelfth grade.

*Comments:* None.

*Discussion:* In preparing the final regulations, the Department believes it is helpful to clarify that the requirement for a State's ELP assessment to be aligned with its ELP standards, as described in section 1111(b)(1)(F) of the ESEA, is distinct from the requirement for a State to provide coherent and timely information to parents of English learners about their child's attainment of the State's ELP standards, and we are revising § 200.6(h)(2)(i) and (iii) (proposed § 200.6(f)(3)(ii)(A)) to list these requirements separately. In addition, we are revising § 200.6(h)(2)(iii) (proposed § 200.6(f)(3)(ii)(A)) to clarify that information given to parents must be consistent with the requirements of both § 200.2(e) and section 1112(e)(3) of the ESEA, which specifies that information related to language instruction (including student performance on the State's ELP assessment) that is provided to parents under the parents right-to-know requirements must be in a uniform and understandable format and,

to the extent practicable, in a language parents can understand.

*Changes:* We have moved proposed § 200.6(f)(3)(ii) to § 200.6(h)(2) and have (1) listed separately the requirements for a State's ELP assessment to be aligned with its ELP standards (in § 200.6(h)(2)(i)) and for a State to provide coherent and timely information to parents of English learners about their child's attainment of the State's ELP standards (in § 200.6(h)(2)(iii)); and (2) clarified that information to parents must be consistent with both § 200.2(e) and section 1112(e)(3) of the ESEA (in § 200.6(h)(2)(iii)).

#### Recently Arrived English Learners

*Comments:* A few commenters expressed general support for the provisions in proposed § 200.6(f)(4), which clarified the statutory provision allowing States to exempt a recently arrived English learner from one administration of the State's reading/language arts assessment as described in section 1111(b)(3)(A)(i)(I) of the ESEA. Some commenters suggested the Department modify the regulations to allow States to also exempt a recently arrived English learner from one administration of the State's mathematics and science assessments. Particularly, one commenter expressed concern that many newly arrived students have not had enough language exposure to take these assessments.

*Discussion:* We appreciate the support for this provision and disagree with the commenters who argued that we should modify the regulations to exempt recently arrived English learners from required State assessments in mathematics and science, as this change would be inconsistent with the statute. Section 1111(b)(2)(B)(i) and (vii) of the ESEA requires a State's assessment system to be administered to all students and to provide for the participation of all students, including English learners. If a State chooses to use this flexibility, the one-year exemption for administering content assessments to recently arrived English learners in section 1111(b)(3)(A)(i)(I) of the ESEA applies only to the reading/language arts assessment, and not to mathematics or science. Annual assessments, as required by the ESEA, are valuable tools for schools, teachers, and parents to inform and improve student instruction; in order to reliably assess what English learners know and can do in the content area, we strongly encourage States to develop and use assessments in the native language of English learners, where needed.

*Changes:* None.

*Comments:* One commenter suggested the Department modify proposed § 200.6(f)(4) to allow States to exempt a recently arrived English learner for up to three years from the administration of the State's reading/language arts assessment. The commenter specifically voiced concern with any requirement that would not allow English learners who have been in the country for three years or less to be exempted from the administration of the State's reading/language arts assessment.

*Discussion:* We appreciate the commenter's concerns, but note that, while the ESEA provides additional flexibility for how recently arrived English learners may be included in school accountability determinations, as described in section 1111(b)(3)(A)(ii) of the ESEA, it does not change the requirements pertaining to the inclusion of recently arrived English learners in a State's academic content assessments. Section 1111(b)(3)(A)(i)(I) of the ESEA permits a State, at its discretion, to exempt recently arrived English learners from one, and only one, administration of the State's reading/language arts assessment during a student's first 12 months enrolled in schools in the United States (which may, consistent with past practice, be non-consecutive months). Section 200.6(i) (proposed § 200.6(f)(4)) is consistent with the statutory requirements.

*Changes:* None.

#### Assessments in Languages Other Than English

*Comments:* Some commenters expressed general support for the provisions in proposed § 200.6(f)(1)(ii) and (iv) that require a State to make every effort to develop, for English learners, annual academic assessments in languages other than English that are present to a significant extent in the participating student population, including a description in its State plan of how it will make every effort to develop assessments where such assessments are not available and are needed, and an explanation, if applicable, of why the State is unable to complete the development of those assessments despite making every effort. One commenter requested that the regulations clarify that results from assessments in native languages must be included in the accountability system, and that the regulations provide a timeline for such inclusion.

A few commenters, however, voiced concern with requiring States to develop native language assessments, citing concerns with: the number of assessments that must be peer reviewed; assessments that would measure

different constructs, thus yielding data that are not comparable; and encouraging student assessment in languages in which they are not necessarily receiving academic instruction.

*Discussion:* We appreciate the commenters' support for the requirements related to assessments in languages other than English. While we recognize the concerns of some commenters, we note that section 1111(b)(2)(F) of the ESEA requires States to make every effort to develop assessments in languages other than English that are needed and, as part of that effort, States must identify languages present to a significant extent in the State's student population, and languages for which academic assessments are needed. The regulations do not require that States develop a specific number of assessments in languages other than English; they do require, in the process of identifying the languages present to a significant extent, that States identify at least the language other than English that is most commonly spoken in the State. The regulations also provide that, if a State has been unable to develop assessments in languages other than English that are present to a significant extent despite making every effort, it include a description in its State plan articulating its reasons.

We agree that results from State assessments in languages other than English that meet the requirements of these final regulations should be included in the State's accountability system; however, provisions related to school accountability are outside the scope of these regulations.

With regard to a timeline, § 200.6(f)(2)(ii)(D)(1) (proposed § 200.6(f)(1)(ii)(E)(1)) requires States to submit in their State plan a specific plan and timeline for developing assessments in languages other than English, and upon successfully implementing such assessments, States will include the results in their accountability system. In large part because these assessments will be used for accountability and reporting purposes under title I, part A, we believe it is critical that States submit evidence regarding how the assessments meet statutory requirements for assessment peer review under § 200.2(d)—as they do with all other assessments that are used for these purposes.

We further agree that it is important that any content assessments that States develop in languages other than English measure the same construct as the assessments administered in English, including alignment to the same

challenging State academic standards, as required in section 1111(b)(2)(B)(ii) of the ESEA, but believe that the regulations, as proposed, help mitigate the concern that the assessments will be non-comparable to those in English. The Department's peer review of these assessments will help ensure that all content assessments in languages other than English are valid, reliable, fair, of high technical quality, and aligned to the challenging State academic content and achievement standards. Finally, with regard to the concerns that these provisions encourage students to be assessed in languages for which they are not receiving academic instruction, we note that an English learner is not required to be assessed using a reading/language arts or mathematics assessment in their native language, if a State develops one (*i.e.*, the student may always be assessed in English if that is the language most likely to yield accurate and reliable information on what such student knows and can do). We are also revising § 200.6(f)(2)(ii)(D)(2) to require States to gather meaningful input from students, as appropriate, on the need for assessments in languages other than English and include this in the State's description in its State plan of how it is making every effort to development assessments in languages other than English that are present to a significant extent in the State.

*Changes:* We have revised § 200.6(f)(2)(ii)(D)(2) so that States will describe their process to consult with students, as appropriate, as well as educators, parents and families of English learners, and other stakeholders on the need for assessments in languages other English.

*Comments:* One commenter suggested requiring States to develop assessments in languages other than English that may not be "present to a significant extent," and specifically mentioned the Hawaiian language and the needs of tribal communities.

*Discussion:* While the Department appreciates the intent of this comment, we decline to make further changes to require States to develop assessments in languages other than English that may not be "present to a significant extent." Section 1111(b)(2)(F) of the ESEA requires States to make every effort to develop assessments in languages other than English that are needed and, as part of that effort, States must identify languages "present to a significant extent" in the State's student population. A State may always develop and administer assessments in any languages needed regardless of their prevalence in the State, including

Native American languages, and tribal communities could certainly work together with States to create such assessments. We encourage States to engage stakeholders, including tribal communities when relevant, in the process. However, we believe efforts to support assessment in less prevalent languages are most likely to be successful and meaningful if they are undertaken in response to community demand and buy-in from classroom teachers, school leaders, and local administrators—not in response to a Federal requirement.

*Changes:* None.

*Comments:* Several commenters wrote in support of proposed § 200.6(f)(1)(iv), which requires a State, in defining “languages other than English that are present to a significant extent in the participating student population,” to ensure that its definition includes at least the most populous language other than English spoken by the participating student population, and to consider languages spoken by distinct populations and spoken in various LEAs, as well as across grade levels. A few commenters also suggested that States make the criteria they use to establish the definition of languages present to a significant extent publicly available (e.g., on the State’s Web site). In addition, one commenter recommended that States with a significant number of English learners or growing populations of English learners due to immigration or migration patterns identify, at minimum, five languages using the criteria noted in the proposed regulations. Finally, one commenter asked for clarity in situations in which a language is significant in one LEA but not statewide.

Other commenters, however, opposed the specific factors a State must consider regarding establishing a definition of languages present to a significant extent, particularly the requirement to identify the most populous language, arguing that the requirements are outside the scope of the law.

*Discussion:* We appreciate the commenters’ support of proposed § 200.6(f)(1)(iv) and recommendations for ways to improve these provisions in the final regulations. We disagree with other commenters that these provisions are unnecessary. By statute, a State must create a definition of “languages other than English that are present to a significant extent in the participating student population” and the most commonly spoken language as required in § 200.6(f)(4)(i) (proposed § 200.6(f)(1)(iv)(A)) is logically

appropriate to include in such a definition. We note that § 200.6(f)(4)(ii)–(iii) (proposed § 200.6(f)(1)(iv)(B)–(C)) provides guidance for States to consider in making every effort to develop native language assessments in required subjects for languages present to a significant extent in the State, rather than requirements, and that parameters regarding “languages present to a significant extent” were addressed in detail at negotiated rulemaking, where the negotiators reached consensus that it would be appropriate to include these considerations in the proposed regulations. “Languages present to a significant extent” is an ambiguous term, and we agree with the negotiating committee that the provisions in § 200.6(f)(4) (proposed § 200.6(f)(1)(iv)) are reasonably necessary to clarify for States how they may consider defining this term as they “make every effort” to develop native language assessments. Accordingly, § 200.6(f)(4) is fully consistent with the Secretary’s authority under section 1601(a) of the ESEA to issue regulations that are necessary to reasonably ensure that there is compliance with title I, part A as well as his authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474. As required by section 1601(a), we submitted proposed § 200.6(f)(1)(iv)(B)–(C) to negotiated rulemaking and received consensus on the language from the negotiators. Further, as noted above, § 200.6(f)(4)(ii)–(iii) (proposed 200.6(f)(1)(iv)(B)–(C)) are considerations, not requirements, to help support a State in meeting the statutory requirement to identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the languages for which annual student academic assessments are not available and are needed. Clearly, then, the regulations are within the Secretary’s authority under section 1601(a) and not inconsistent with or outside the scope of title I, part A under section 1111(e)(1)(B)(i). In sum, these provisions provide significant flexibility for States in identifying languages other than English that are present to a significant extent in the participating student population without being overly burdensome or prescriptive, and are therefore maintained in the final regulations.

In response to commenters requesting additional parameters for States to consider, we note that § 200.6(f)(2)(ii)(D) (proposed § 200.6(f)(1)(ii)(E)) requires a State to describe the process it used to

gather meaningful input on the need for assessments in languages other than English; collect and respond to public comment; and consult with educators, parents and families of English learners, and other stakeholders. In order to meet these requirements, we believe a State will need to make the criteria used to establish its definition of “languages present to a significant extent” publicly available. Therefore, we believe no further clarification is needed. Additionally, as States have different populations, with different backgrounds and needs, we do not believe that it is appropriate to further specify the number of languages States must identify as present to a significant extent. With regard to a State in which one LEA has a particular language spoken to a significant extent, we leave to the State’s discretion how to define “languages present to a significant extent,” and we believe such a situation is already sufficiently addressed in § 200.6(f)(4)(iii) (proposed § 200.6(f)(1)(iv)(C)).

*Changes:* None.

#### Students in Native American Language Schools or Programs

*Comments:* A small number of commenters wrote in support of the language in proposed § 200.6(g) which would allow a State to administer a reading/language arts assessment in the language of instruction to students who are enrolled in a school or program that provides instruction primarily in a Native American language, as long as certain guidelines are followed; and for the corresponding provision in proposed § 200.6(f)(2)(i). One commenter requested that we add language to proposed § 200.6(f)(2)(i) to include the expectation that students in these schools or programs will be provided instruction in English as well as in the Native American language (i.e., that such schools or programs offer dual language instruction).

On the other hand, a number of commenters urged the Department to remove all restrictions pertaining to the use of assessments in Native American languages for a school or program that provides instruction primarily in a Native American language in the final regulations. These commenters indicated that various Federal statutes, including the Native American Languages Act (NALA) and portions of the ESEA (specifically sections 3124 and 3127 of title III), protect the right of Tribes to use Native American languages in education without restriction and that the limitations on their assessments in Native American languages in the proposed regulations

are inconsistent with these laws. Several of the commenters also reiterated the importance of the use of Native American languages and the positive impacts of education in these languages in terms of student learning and social, emotional, and cultural benefits.

Some of these commenters suggested changes to the proposed regulations that would make the use of this flexibility (*i.e.*, to use assessments in Native American language) an option that tribal communities could utilize directly, rather than requiring that the use of Native American language assessments be determined by the State. A number of commenters requested that we remove the requirement that such assessments be submitted for assessment peer review; one argued that the Department does not have the capacity or expertise to review assessments in these languages. Additionally, a number of commenters encouraged the Department to extend the flexibility to assess students in their Native American language of instruction to all content areas for which the ESEA requires statewide assessments. Commenters also proposed that, instead of maintaining the requirement that all English learners in Native American schools or programs take the annual ELP assessment, the Department require an annual language proficiency assessment in the particular Native American language of instruction for all students who have not yet attained proficiency in that language. These commenters cited Puerto Rico, which uses Spanish language proficiency assessments, as an example and requested the same treatment. Using the same reasoning, they also requested that we remove the requirement that students in Native American language schools or programs take reading/language arts assessments written in English by the end of eighth grade, arguing that no grade-level restriction should be placed on the option to use Native American language assessments. Some commenters claimed that the proposed regulations are discriminatory towards students enrolled in schools that use a Native American language, or violate the civil rights of such students. Finally, a portion of these commenters also encouraged the Department to allow Native American language assessments in the content areas to be aligned with a different set of standards than a State's challenging academic content standards with which all other State content assessments must be aligned.

*Discussion:* The Department agrees with commenters that the teaching and learning of Native American languages can have significant positive benefits for

students, families, and communities as a whole, and that assessments in Native American languages are important to achieving that goal. We decline, however, to add a requirement to § 200.6(g)(1) (proposed § 200.6(f)(2)) regarding instruction in both English and the Native American language. While dual language instruction can provide valuable benefits to students, school districts are free to implement programs of their choosing, subject to State and local law; the Department cannot regulate the type of program or curriculum offered. We believe it is appropriate for the regulations in § 200.6(g)(1) and (j) (proposed § 200.6(f)(2) and (g)) to focus on requirements for assessments that are part of a State's assessment system under title I, part A.

We also agree that States should have more flexibility to administer Native American language assessments to students in Native American language schools or programs. Therefore, we have made changes to § 200.6(j) (proposed § 200.6(g)) to make it clear that a State may administer mathematics and science assessments in Native American languages to students enrolled in Native American language schools and programs, in addition to reading/language arts assessments.

We agree that the Department should extend the flexibility for students in Native American language schools or programs to take reading/language arts assessments written in English past eighth grade. However, we disagree with removing the requirement entirely. We believe requiring the use of a reading/language arts assessment in English is essential to support all students in meeting the State's challenging academic content standards under section 1111(b)(1) of the ESEA, which, consistent with section 1111(b)(1)(D) and § 200.2(b)(3), must be aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards. Therefore, we have revised § 200.6(j)(2) (proposed § 200.6(g)(2)) to require States to assess students in reading/language arts least once during grades 9 through 12 using an assessment written in English. This change is consistent with the statutory requirement in 1111(b)(2)(B)(v)(I) for reading/language arts to be assessed once during grades 9 through 12. Furthermore, assessing the achievement of students enrolled in a Native American language school or program in reading/language arts in English, during high school, at a minimum, is necessary to ensure that educators and schools

provide supports to these students prior to their graduation. Regardless of whether students take reading/language arts assessments in elementary and middle school in a Native American language or in English, participating students should have the opportunity to become college and career ready in English.

In addition, the Department declines to make changes to shift the authority to utilize this flexibility from States to Tribes. We note that these regulations only apply to State-funded public schools and not to schools funded only by the BIE or by Tribes. For State-funded public schools, each State is responsible for the development and administration of the statewide assessment system, and the use of assessments in languages other than English is a core part of this responsibility. Nevertheless, collaboration with tribal communities will be essential in developing high-quality Native American language assessments. While we decline to make the requested change, we strongly encourage States to engage and to work closely with Tribes in developing and administering these assessments.

The Department also declines to remove the requirement that a State must ensure that it administers the annual English language proficiency assessments to all English learners enrolled in Native American schools or programs, and to add a required assessment of Native American language proficiency instead. First, we note that a State is free to develop and administer an assessment of Native American language proficiency, in addition to the assessments required under the ESEA; if it chooses so to do, we encourage the State to work collaboratively with Tribal communities to create such an assessment. However, there is no statutory authority for exempting English learners from the annual ELP assessment requirement. Puerto Rico provides a unique situation because all public school instruction is in Spanish in all schools and Spanish is the language of instruction at the public institutions of higher education; therefore, English language acquisition is not required to ensure college and career readiness. Puerto Rico provides services to limited Spanish proficient students in order for those students to access the general curriculum, and provides an assessment of limited Spanish proficiency to such students. We also note that the ESEA provisions cited by commenters (sections 3124 and 3127) are provisions of title III that apply only to the use of title III funds.

We disagree that § 200.6(j) (proposed § 200.6(g)) results in either discrimination or a civil rights violation for students in schools that use a Native American language. The section expressly permits students in such schools to be assessed in a Native American language, and it applies only to State-funded public schools, which are subject to State and local law. This Federal provision only provides flexibility to States with regard to assessments in such schools, rather than continuing to treat such schools the same as all schools as under prior regulations; it does not impose any new restrictions.

We also decline to remove the requirement that evidence regarding Native American language assessments be submitted for assessment peer review, as this is a critical means of ensuring that a State's assessments meet the statutory requirements. We note that the language of the proposed regulations led some commenters to believe that the assessments themselves would be submitted to the Department; we are clarifying in the final regulations that, consistent with § 200.2(d), States need submit for assessment peer review only evidence relating to compliance with applicable requirements, rather than the actual assessments, so that the Department can determine that the assessment meets all of the statutory and regulatory requirements. We are also clarifying that, in addition to submitting evidence for assessment peer review, the State must receive approval through the assessment peer review in order to use this flexibility.

Finally, the Department declines to change the regulations to allow Native American language assessments to be aligned with different standards than are used for a State's other assessments. There is no statutory authority for allowing separate academic content and achievement standards for students in Native American language schools or programs (see sections 1111(b)(1) and (b)(2)(B) of the ESEA).

*Changes:* We have revised § 200.6(j) (proposed § 200.6(g)) to specify that a State may administer Native American language assessments in any content area, including mathematics, science, and reading/language arts. We have also changed the requirement for assessing students in English in reading/language arts from requiring such assessment beginning in at least eighth grade to requiring such assessment only once in high school. Additionally, we have clarified that the State submits evidence for peer review regarding the assessments, rather than the assessments themselves, consistent with

§ 200.2(d), and must receive approval that the assessment meets all applicable requirements.

#### **Executive Orders 12866 and 13563**

##### *Regulatory Impact Analysis*

Under Executive Order 12866, OMB must determine whether this regulatory action is significant and, therefore, subject to the requirements of the Executive order and to review by the OMB. Section 3(f) of Executive Order 12866 defines "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is significant and is subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the

behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives such as user fees or marketable permits, to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

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

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Elsewhere in this section under *Paperwork Reduction Act of 1995*, we identify and explain burdens specifically associated with information collection requirements.

##### Discussion of Costs and Benefits

The Department believes that this regulatory action will generally not impose significant new costs on States or their LEAs. This action implements and clarifies the changes to the assessment provisions in part A of title I of the ESEA made by the ESSA, which as discussed elsewhere in this document are limited in scope. The costs to States and LEAs for complying with these changes will similarly be limited, and can be financed with Federal education funds, including funds available under Grants for State Assessments and Related Activities.

Moreover, the regulations implement statutory provisions that can ease assessment burden on States and LEAs. For example, § 200.5(b) implements the provision in section 1111(b)(2)(C) of the ESEA under which a State that administers an end-of-course mathematics assessment to meet the high school assessment requirement may exempt an eighth-grade student who takes the end-of-course assessment from also taking the mathematics assessment the State typically administers in eighth grade (provided that the student takes a more advanced mathematics assessment in high school), thus avoiding the double-testing of eighth-grade students who take advanced mathematics coursework.

In general, the Department believes that the costs associated with the regulations (which are discussed in more detail below for cost-bearing requirements not related to information collection requirements) are outweighed by their benefits, which include the administration of assessments that produce valid and reliable information on the achievement of all students, including students with disabilities and English learners, that can be used by States to effectively measure school performance and identify underperforming schools, by LEAs and schools to inform and improve classroom instruction and student supports, and by parents and other stakeholders to hold schools accountable for progress, ultimately leading to improved academic outcomes and the closing of achievement gaps, consistent with the purpose of title I of the ESEA.

#### Locally Selected, Nationally Recognized High School Academic Assessments

Section 200.3(b) implements the new provision in section 1111(b)(2)(H) of the ESEA under which a State may permit an LEA to administer a State-approved nationally recognized high school academic assessment in reading/ language arts, mathematics, or science in lieu of the high school assessment the State typically administers in that subject. If a State seeks to approve a nationally recognized high school academic assessment for use by one or more of its LEAs, § 200.3(b)(1) requires, consistent with the statute, that the State establish technical criteria to determine whether the assessment meets specific requirements for technical quality and comparability. In establishing these criteria, we expect States to rely in large part on existing Department non-regulatory assessment peer review guidance and other assessment technical quality resources.

Accordingly, we believe that the costs of complying with § 200.3(b)(1) will be minimal for the 20 States that we estimate will seek to approve a nationally recognized high school academic assessment for LEA use. Further, we believe the costs of this regulation are outweighed by its benefit to LEAs in those States, namely, the flexibility to administer for accountability purposes the assessments they believe most effectively measure the academic achievement of their high school students and can be used to identify and address their academic needs.

#### Native Language Assessments

Section 200.6(f) implements the new provision in section 1111(b)(2)(F) of the ESEA requiring a State to make every effort to develop, for English learners, annual academic assessments in languages other than English that are present to a significant extent in the participating student population. In doing so, § 200.6(f) requires a State, in its title I State plan, to define “languages other than English that are present to a significant extent in the participating student population,” ensure that its definition includes at least the most populous language other than English spoken by the participating student population, describe how it will make every effort to develop assessments consistent with its definition where such assessments are not available and are needed, and explain, if applicable, why it is unable to complete the development of those assessments despite making every effort. Although a State may incur costs in complying with the requirement to make every effort to develop these assessments consistent with its definition, we believe these costs are outweighed by the potential benefits to States and their LEAs, which include fairer and more accurate assessments of the achievement of English learners. In addition, and in response to several commenters expressing concern about the potential costliness of developing assessments in multiple languages other than English, we note that § 200.6(f) does not require a State to complete development of an assessment in a language other than English if it is unable to do so, including for reasons related to cost.

#### Regulatory Flexibility Act Certification

The Secretary certifies that these final requirements will not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration’s Size Standards, small entities include small governmental jurisdictions such as

cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive ESEA funds qualify as small entities under this definition, these regulations will not have a significant economic impact on these small LEAs because the costs of implementing these requirements will be borne largely by States and will be covered by funding received by States under Federal education programs including Grants for State Assessments and Related Activities. The Department believes the benefits provided under this final regulatory action outweigh any associated costs for these small LEAs. In particular, the final regulations will help ensure that assessments administered in these LEAs produce valid and reliable information on the achievement of all students, including students with disabilities and English learners, that can be used to inform and improve classroom instruction and student supports, ultimately leading to improved student academic outcomes.

#### Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

#### Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 200.2, 200.3, 200.5, 200.6, and 200.8 contain information collection requirements. Under the PRA, the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control

number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

The regulations affect currently approved information collections, 1810-0576 and 1810-0581. Under 1810-0576, the Department is approved to collect information from States, including assessment information. Under 1810-0581, the Department is approved to require States and LEAs to prepare and disseminate State and LEA report cards. On November 29, 2016, the Department published in the **Federal Register** a notice of final rulemaking titled **Elementary and Secondary Education Act of 1965, As Amended By the Every Student Succeeds Act—Accountability and State Plans** 81 FR 86076, which identified changes to information collections 1810-0576 and 1810-0581. These regulations result in additional changes to the existing information collection; these changes were described in the NPRM and subject to comments at that time.

One commenter stated that the reporting requirements were both understated and represented a significant burden on all SEAs. The commenter did not provide specific feedback explaining the commenter's estimation of the burden hours. In the absence of specific feedback or explanation, we continue to believe our estimates to be accurate, and make no changes.

To demonstrate the significant of the burden, the commenter noted that the expected burden for §§ 200.2(b), 200.2(d), and 200.3(b) totals an estimated 4,133 hours, and that this would result in a workload of approximately 15 hours per day. The calculation resulted from a lack of clarity in the description; we anticipate that collectively, all States will devote 4,133 hours to this work on an annual basis, rather than that each State will devote 4,133 hours to this work on an annual basis. We expect that each State will devote 80 hours to this task annually.

Section 200.2(d) requires States to submit evidence regarding their general assessments, AA-AAASs, and English language proficiency assessments for the Department's assessment peer review process, and § 200.2(b)(5)(ii) requires that States make evidence of technical quality publicly available. Section 200.3(b)(2)(ii) requires a State that allows an LEA to administer a locally

selected, nationally recognized high school academic assessment in place of the State assessment to submit the selected assessment for the Department's assessment peer review process. We anticipate that 52 States will spend 200 hours preparing and submitting evidence regarding their general academic content assessments, AA-AAASs, and English language proficiency assessments for peer review, and that 20 States will spend an additional 100 hours preparing and submitting evidence relating to locally selected, nationally recognized high school academic assessments.

Accordingly, we anticipate the total burden over the three-year information collection period, to be 12,400 hours for all respondents, resulting in an annual burden of 4,133 hours under 1810-0576.

Section 200.5(b)(4) requires a State that uses the middle school mathematics exception to describe in its title I State plan its strategies to provide all students in the State the opportunity to be prepared for and take advanced mathematics coursework in middle school. We anticipate that this will not increase burden, as information collection 1810-0576 already accounts for the burden associated with preparing the title I State plan.

Section 200.6(b)(2)(i) requires all States to develop appropriate accommodations for students with disabilities, disseminate information to LEAs, schools, and parents regarding such accommodations, and promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments. In response to comments, § 200.6(f)(1)(i) now requires States to develop appropriate accommodations for English learners, disseminate information and resources to LEAs, schools, and parents regarding such accommodations, and promote the use of such accommodations for English learners to ensure that all English learners are able to participate in academic instruction and assessments. Because of these additional dissemination requirements, we now anticipate that 52 States will spend 80 hours developing and disseminating this information annually, resulting in an annual burden increase of 4,160 hours under 1810-0576.

Section 200.6(c)(3)(iv) requires all States to make publicly available information submitted by an LEA justifying the need of the LEA to assess more than 1.0 percent of assessed students with an AA-AAAS for

students with the most significant cognitive disabilities. We anticipate that 52 States will spend 20 hours annually making this information available, resulting in an annual burden increase of 1,040 hours under 1810-0576.

Section 200.6(c)(4) allows a State that anticipates that it will exceed the 1.0 percent cap for assessing students with the most significant cognitive disabilities with an AA-AAAS to request a waiver for the relevant subject for one year. We anticipate that 15 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 600 hours under 1810-0576.

Section 200.6(c)(5) requires each State to report annually to the Secretary data relating to the assessment of children with disabilities. We anticipate that 52 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 2,080 hours under 1810-0576.

Section 200.6(d)(3) establishes requirements for each State that adopts alternate academic achievement standards for students with the most significant cognitive disabilities. Such a State will be required to ensure that parents of students with the most significant cognitive disabilities assessed using an AA-AAAS are informed that their child's achievement will be measured based on alternate academic achievement standards, and informed how participation in such assessment may delay or otherwise affect the student from completing the requirements for a regular high school diploma. We anticipate that 52 States will spend 100 hours annually ensuring that relevant parents receive this information, resulting in an annual burden of 5,200 hours under 1810-0576.

Section 200.8(a)(2) requires a State to provide to parents, teachers, and principals individual student interpretive, descriptive, and diagnostic reports, including information regarding academic achievement on academic assessments. Section 200.8(b)(1) requires a State to produce and report to LEAs and schools itemized score analyses. Section 200.6(c)(2) specifies that if a State chooses to administer computer-adaptive assessments, such assessments must be included in the reports under section 200.8. We anticipate that 52 States will spend 1,500 hours annually providing this information, resulting in a total burden increase of 78,000 hours under 1810-0576.

Collection of Information from SEAs: Assessments and  
Notification

<u>Regulatory section</u>	<u>Information collection</u>	<u>OMB Control Number and estimated burden</u>
§ 200.2(b)(5)(ii), § 200.2(d), § 200.3(b)(2)(ii)	States will be required to submit evidence for the Department's assessment peer review process, and to make this evidence available to the public.	OMB 1810-0576. The annual burden is 4,133 hours.
§ 200.5(b)(4)	States will be required to describe in the title I State plan strategies to provide all students with the opportunity to take advanced mathematics coursework in middle school.	OMB 1810-0576. No additional burden, as this burden is already considered in the burden of preparing a title I State plan.
§§ 200.6(b)(2)(i);	States will be required to disseminate information regarding the	OMB 1810-0576. The annual burden

200.6(f)(1)(i) use of appropriate accommodations for students with disabilities to LEAs, schools, and parents; States will be required to disseminate information regarding appropriate accommodations for English learners to LEAs, schools, and parents. is 4,160 hours.

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§ Certain States will be OMB 1810-0576.

200.6(c)(3)(iv) required to make publicly available LEA-submitted information about the need to assess more than 1.0 percent of assessed students with an AA-AAAS for students with the most significant cognitive disabilities. The annual burden is 1,040 hours.

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§ 200.6(c) (4)	Certain States will request a waiver from the Secretary, to exceed the 1.0 percent cap for assessing students with the most significant cognitive disabilities with an AA-AAAS.	OMB 1810-0576. The annual burden is 600 hours.
§ 200.6(c) (5)	States will be required to report to the Secretary data relating to the assessment of children with disabilities.	OMB 1810-0576. The annual burden is 2,080 hours.
§ 200.6(d) (3)	States that adopt alternate achievement standards for students with the most significant cognitive disabilities will be required to ensure certain parents are provided with information.	OMB 1810-0576. The annual burden is 5,200 hours.

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§§ 200.8(a)(2), States will be required OMB 1810-0576.  
 200.8(b)(1), to provide student The annual burden  
 200.2(c)(2) assessment reports to is 78,000 hours.  
 States, teachers, and  
 principals, as well as  
 itemized score analyses  
 for LEAs and schools. If  
 a State chooses to  
 administer computer-  
 adaptive assessments, the  
 results must also be  
 reported on all reports.

Section 200.3(c)(1)(i) requires an LEA that intends to request approval from a State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment to notify parents. Section 200.3(c)(3) requires any LEA that receives such approval to notify all parents of high school students it serves

that the LEA received approval and will use these assessments. Finally, § 200.3(c)(4) requires the LEA to notify both parents and the State in any subsequent years in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment. We anticipate that 850 LEAs will spend 30 hours preparing

each notification and that, over the three-year information collection period, an LEA will be required to conduct these notifications four times. Accordingly, we anticipate the total burden over the three-year information collection period to be 102,000 hours, resulting in an annual burden of 34,000 hours under 1810-0576.

COLLECTION OF INFORMATION FROM LEAS—PARENTAL NOTIFICATION

Regulatory section	Information collection	OMB Control No. and estimated burden
§ 200.3(c)(1)(i), § 200.3(c)(3), § 200.3(c)(4).	Certain LEAs will be required to notify parents of high school students about selected assessments.	OMB 1810-0576. The annual burden is 34,000 hours.

Finally, § 200.6(i)(1)(iii) establishes that a State and its LEAs must report on State and local report cards the number of recently arrived English learners who are not assessed on the State's reading/

language arts assessment. Under 1810-0581, the Department is currently approved to require States to prepare and disseminate report cards. Although § 200.6(i)(1)(iii) requires the inclusion of

this specific element, there is no change to the approved burden, as the current collection estimates the burden of preparing the report card, in full.

COLLECTION OF INFORMATION FROM SEAS AND LEAS—REPORT CARDS

Regulatory section	Information collection	OMB Control No. and estimated burden
§ 200.6(i)(1)(iii) .....	States and LEAs must report on State and local report cards the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.	OMB 1810-0581. No additional burden, as this burden is already considered in the burden of preparing report cards.

## Intergovernmental Review

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

## Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. “Federalism implications” means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

In the NPRM, while we did not believe that the proposed regulations had any federalism implications, we encouraged State and local elected officials to review and comment on the proposed regulations. In the *Public Comment* section of this preamble, we discuss any comments we received on this subject.

**Accessible Format:** Individuals with disabilities can obtain this document in an accessible format (e.g., Braille, large print, or electronic format) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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## List of Subjects in 34 CFR Part 200

Elementary and secondary education, Grant programs—education, Indians—education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: November 30, 2016.

**John B. King, Jr.**,  
*Secretary of Education.*

For the reasons discussed in the preamble, the Department of Education amends part 200 of title 34 of the Code of Federal Regulations as follows:

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

■ 1. The authority citation for part 200 is revised to read as follows:

**Authority:** 20 U.S.C 6301–6576, unless otherwise noted.

■ 2. Section 200.2 is revised to read as follows:

#### **§ 200.2 State responsibilities for assessment.**

(a)(1) Each State, in consultation with its LEAs, must implement a system of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading/language arts, and science.

(2)(i) The State may also measure the achievement of students in other academic subjects in which the State has adopted challenging State academic standards.

(ii) If a State has developed assessments in other subjects for all students, the State must include students participating under this subpart in those assessments.

(b) The assessments required under this section must:

(1)(i) Except as provided in §§ 200.3, 200.5(b), and 200.6(c) and section 1204 of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (hereinafter “the Act”), be the same assessments used to measure the achievement of all students; and

(ii) Be administered to all students consistent with § 200.5(a), including the following highly-mobile student populations as defined in paragraph (b)(11) of this section:

(A) Students with status as a migratory child.

(B) Students with status as a homeless child or youth.

(C) Students with status as a child in foster care.

(D) Students with status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty;

(2)(i) Be designed to be valid and accessible for use by all students, including students with disabilities and English learners; and

(ii) Be developed, to the extent practicable, using the principles of universal design for learning. For the

purposes of this section, “universal design for learning” means a scientifically valid framework for guiding educational practice that—

(A) Provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and

(B) Reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and English learners;

(3)(i)(A) Be aligned with challenging academic content standards and aligned academic achievement standards (hereinafter “challenging State academic standards”) as defined in section 1111(b)(1)(A) of the Act; and

(B) Provide coherent and timely information about student attainment of those standards and whether a student is performing at the grade in which the student is enrolled; and

(ii)(A)(1) Be aligned with the challenging State academic content standards; and

(2) Address the depth and breadth of those standards; and

(B)(1) Measure student performance based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards consistent with section 1111(b)(1)(D) of the Act; or

(2) With respect to alternate assessments for students with the most significant cognitive disabilities, measure student performance based on alternate academic achievement standards defined by the State consistent with section 1111(b)(1)(E) of the Act that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the alternate academic achievement standards is on track to pursue

postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014;

(4)(i) Be valid, reliable, and fair for the purposes for which the assessments are used; and

(ii) Be consistent with relevant, nationally recognized professional and technical testing standards;

(5) Be supported by evidence that—

(i) The assessments are of adequate technical quality—

(A) For each purpose required under the Act; and

(B) Consistent with the requirements of this section; and

(ii) For each assessment administered to meet the requirements of this subpart, is made available to the public, including on the State's Web site;

(6) Be administered in accordance with the frequency described in § 200.5(a);

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills—such as critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content—as defined by the State. These measures may—

(i) Include valid and reliable measures of student academic growth at all achievement levels to help ensure that the assessment results could be used to improve student instruction; and

(ii) Be partially delivered in the form of portfolios, projects, or extended performance tasks;

(8) Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal or family beliefs and attitudes, except that this provision does not preclude the use of—

(i) Constructed-response, short answer, or essay questions; or

(ii) Items that require a student to analyze a passage of text or to express opinions;

(9) Provide for participation in the assessments of all students in the grades assessed consistent with §§ 200.5(a) and 200.6;

(10) At the State's discretion, be administered through—

(i) A single summative assessment; or

(ii) Multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement and, at the State's discretion, student growth, consistent with paragraph (b)(4) of this section;

(11)(i) Consistent with sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, enable results to be disaggregated within each State, LEA, and school by—

(A) Gender;

(B) Each major racial and ethnic group;

(C) Status as an English learner as defined in section 8101(20) of the Act;

(D) Status as a migratory child as defined in section 1309(3) of the Act;

(E) Children with disabilities as defined in section 602(3) of the

Individuals with Disabilities Education Act (IDEA) as compared to all other students;

(F) Economically disadvantaged students as compared to students who are not economically disadvantaged;

(G) Status as a homeless child or youth as defined in section 725(2) of title VII, subtitle B of the McKinney-Vento Homeless Assistance Act, as amended;

(H) Status as a child in foster care. “Foster care” means 24-hour substitute care for children placed away from their parents and for whom the agency under title IV–E of the Social Security Act has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, tribal, or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made; and

(I) Status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty, where “armed forces,” “active duty,” and “full-time National Guard duty” have the same meanings given them in 10 U.S.C. 101(a)(4), 101(d)(1), and 101(d)(5).

(ii) Disaggregation is not required in the case of a State, LEA, or school in which the number of students in a subgroup is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

(12) Produce individual student reports consistent with § 200.8(a); and

(13) Enable itemized score analyses to be produced and reported to LEAs and schools consistent with § 200.8(b).

(c)(1) At its discretion, a State may administer the assessments required under this section in the form of computer-adaptive assessments if such assessments meet the requirements of section 1111(b)(2)(J) of the Act and this section. A computer-adaptive assessment—

(i) Must, except as provided in § 200.6(c)(7)(iii), measure a student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level.

(2) If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student's academic proficiency for the grade in which the student is enrolled must be reported on all reports required by § 200.8 and section 1111(h) of the Act.

(d) A State must submit evidence for peer review under section 1111(a)(4) of the Act that its assessments under this section and §§ 200.3, 200.4, 200.5(b), 200.6(c), 200.6(f), 200.6(h), and 200.6(j) meet all applicable requirements.

(e) Information provided to parents under section 1111(b)(2) of the Act must—

(1) Be in an understandable and uniform format;

(2) Be, to the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(3) Be, upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act (ADA), as amended, provided in an alternative format accessible to that parent.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 10 U.S.C. 101(a)(4), (d)(1), and (d)(5); 20 U.S.C. 1003(24), 1221e–3, 1401(3), 3474, 6311(a)(4), 6311(b)(1)–(2), 6311(h), 6399(3), 6571, and 7801(20); 29 U.S.C. 701 *et seq.*; 29 U.S.C. 794; 42 U.S.C. 2000d–1, 11434a(2), 12102(1), and 12131 *et seq.*; and 45 CFR 1355.20(a))

■ 3. Section 200.3 is revised to read as follows:

**§ 200.3 Locally selected, nationally recognized high school academic assessments.**

(a) *In general.* (1) A State, at the State's discretion, may permit an LEA to administer a nationally recognized high school academic assessment in each of reading/language arts, mathematics, or science, approved in accordance with paragraph (b) of this section, in lieu of the respective statewide assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C) if such assessment meets all requirements of this section.

(2) An LEA must administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements in § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate

academic achievement standards, consistent with § 200.6(c).

(b) *State approval.* If a State chooses to allow an LEA to administer a nationally recognized high school academic assessment under paragraph (a) of this section, the State must:

(1) Establish and use technical criteria to determine if the assessment—

(i) Is aligned with the challenging State academic standards;

(ii) Addresses the depth and breadth of those standards;

(iii) Is equivalent to or more rigorous than the statewide assessments under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, with respect to—

(A) The coverage of academic content;

(B) The difficulty of the assessment;

(C) The overall quality of the assessment; and

(D) Any other aspects of the assessment that the State may establish in its technical criteria;

(iv) Meets all requirements under § 200.2(b), except for § 200.2(b)(1), and ensures that all high school students in the LEA are assessed consistent with §§ 200.5(a) and 200.6; and

(v) Produces valid and reliable data on student academic achievement with respect to all high school students and each subgroup of high school students in the LEA that—

(A) Are comparable to student academic achievement data for all high school students and each subgroup of high school students produced by the statewide assessment at each academic achievement level;

(B) Are expressed in terms consistent with the State's academic achievement standards under section 1111(b)(1)(A) of the Act; and

(C) Provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system under section 1111(c) of the Act, including calculating the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act and annually meaningfully differentiating between schools under section 1111(c)(4)(C) of the Act;

(2) Before approving any nationally recognized high school academic assessment for use by an LEA in the State—

(i) Ensure that the use of appropriate accommodations under § 200.6(b) and (f) does not deny a student with a disability or an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners; and

(ii) Submit evidence to the Secretary in accordance with the requirements for peer review under section 1111(a)(4) of the Act demonstrating that any such assessment meets the requirements of this section; and

(3)(i) Approve an LEA's request to use a locally selected, nationally recognized high school academic assessment that meets the requirements of this section;

(ii) Disapprove an LEA's request if it does not meet the requirements of this section; or

(iii) Revoke approval for good cause.

(c) *LEA applications.* (1) Before an LEA requests approval from the State to use a locally selected, nationally recognized high school academic assessment, the LEA must—

(i) Notify all parents of high school students it serves—

(A) That the LEA intends to request approval from the State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable;

(B) Of how parents and, as appropriate, students, may provide meaningful input regarding the LEA's request; and

(C) Of any effect of such request on the instructional program in the LEA; and

(ii) Provide an opportunity for meaningful consultation to all public charter schools whose students would be included in such assessments.

(2) As part of requesting approval to use a locally selected, nationally recognized high school academic assessment, an LEA must—

(i) Update its LEA plan under section 1112 or section 8305 of the Act, including to describe how the request was developed consistent with all requirements for consultation under sections 1112 and 8538 of the Act; and

(ii) If the LEA is a charter school under State law, provide an assurance that the use of the assessment is consistent with State charter school law and it has consulted with the authorized public chartering agency.

(3) Upon approval, the LEA must notify all parents of high school students it serves that the LEA received approval and will use such locally selected, nationally recognized high school academic assessment instead of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable.

(4) In each subsequent year following approval in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment, the LEA must notify—

(i) The State of its intention to continue administering such assessment; and

(ii) Parents of which assessment the LEA will administer to students to meet the requirements of § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, at the beginning of the school year.

(5) The notices to parents under this paragraph (c) of this section must be consistent with § 200.2(e).

(d) *Definition.* "Nationally recognized high school academic assessment" means an assessment of high school students' knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into courses in postsecondary education or training programs.

(Approved by the Office of Management and Budget under control number 1810-0576)

(Authority: 20 U.S.C. 1221e-3, 3474, 6311(b)(2)(H), 6312(a), 6571, 7845, and 7918; 29 U.S.C. 794; 42 U.S.C. 2000d-1)

■ 4. Section 200.4 is amended:

■ a. In paragraph (b)(2)(ii)(B), by removing the term "section 1111(b)(2)(C)(v)" and adding in its place the term "section 1111(c)(2)".

■ b. In paragraph (b)(2)(ii)(C), by removing the words "LEAs and".

■ c. In paragraph (b)(3), by removing the words "determine whether the State has made adequate yearly progress" and adding in their place the words "make accountability determinations under section 1111(c) of the Act".

■ d. By revising the authority citation at the end of the section.

The revision reads as follows:

**§ 200.4 State law exception.**

\* \* \* \* \*

(Authority: 20 U.S.C. 1221e-3, 3474, 6311(b)(2)(E), and 6571)

■ 5. Section 200.5 is revised to read as follows:

**§ 200.5 Assessment administration.**

(a) *Frequency.* (1) A State must administer the assessments required under § 200.2 annually as follows:

(i) With respect to both the reading/language arts and mathematics assessments—

(A) In each of grades 3 through 8; and

(B) At least once in grades 9 through 12.

(ii) With respect to science assessments, not less than one time during each of—

(A) Grades 3 through 5;

(B) Grades 6 through 9; and

(C) Grades 10 through 12.

(2) A State must administer the English language proficiency assessment

required under § 200.6(h) annually to all English learners in schools served by the State in all grades in which there are English learners, kindergarten through grade 12.

(3) With respect to any other subject chosen by a State, the State may administer the assessments at its discretion.

(b) *Middle school mathematics exception.* A State that administers an end-of-course mathematics assessment to meet the requirements under paragraph (a)(1)(i)(B) of this section may exempt an eighth-grade student from the mathematics assessment typically administered in eighth grade under paragraph (a)(1)(i)(A) of this section if—

(1) The student instead takes the end-of-course mathematics assessment the State administers to high school students under paragraph (a)(1)(i)(B) of this section;

(2) The student's performance on the high school assessment is used in the year in which the student takes the assessment for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act;

(3) In high school—

(i) The student takes a State-administered end-of-course assessment or nationally recognized high school academic assessment as defined in § 200.3(d) in mathematics that—

(A) Is more advanced than the assessment the State administers under paragraph (a)(1)(i)(B) of this section; and

(B) Provides for appropriate accommodations consistent with § 200.6(b) and (f); and

(ii) The student's performance on the more advanced mathematics assessment is used for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act; and

(4) The State describes in its State plan, with regard to this exception, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school.

(Approved by the Office of Management and Budget under control number 1810-0576)

(Authority: 20 U.S.C. 1221e-3, 3474, 6311(b)(2)(B)(v), (b)(2)(C), and (b)(2)(G), and 6571)

■ 6. Section 200.6 is revised to read as follows:

**§ 200.6 Inclusion of all students.**

(a) *Students with disabilities in general.* (1) A State must include students with disabilities in all

assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

(i) All children with disabilities as defined under section 602(3) of the IDEA;

(ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and

(iii) Students with disabilities covered under other acts, including—

(A) Section 504 of the Rehabilitation Act of 1973, as amended; and

(B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—

(A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

(b) *Appropriate accommodations for students with disabilities.* (1) A State's academic assessment system must provide, for each student with a disability under paragraph (a) of this section, the appropriate accommodations, such as interoperability with, and ability to use, assistive technology devices consistent with nationally recognized accessibility standards, that are necessary to measure the academic achievement of the student consistent with paragraph (a)(2) of this section, as determined by—

(i) For each student under paragraph (a)(1)(i) and (ii) of this section, the student's IEP team;

(ii) For each student under paragraph (a)(1)(iii)(A) of this section, the student's placement team; or

(iii) For each student under paragraph (a)(1)(iii)(B) of this section, the individual or team designated by the LEA to make these decisions.

(2) A State must—

(i)(A) Develop appropriate accommodations for students with disabilities;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments consistent with paragraph (a)(2) of this section and with § 200.2(e); and

(ii) Ensure that general and special education teachers, paraprofessionals, teachers of English learners, specialized instructional support personnel, and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including, as necessary, alternate assessments under paragraphs (c) and (h)(5) of this section, and know how to make use of appropriate accommodations during assessment for all students with disabilities, consistent with section 1111(b)(2)(B)(vii)(III) of the Act.

(3) A State must ensure that the use of appropriate accommodations under this paragraph (b) of this section does not deny a student with a disability—

(i) The opportunity to participate in the assessment; and

(ii) Any of the benefits from participation in the assessment that are afforded to students without disabilities.

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* (1) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, the State must measure the achievement of those students with an alternate assessment that—

(i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled;

(ii) Yields results relative to the alternate academic achievement standards; and

(iii) At the State's discretion, provides valid and reliable measures of student growth at all alternate academic achievement levels to help ensure that the assessment results can be used to improve student instruction.

(2) For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment aligned with alternate academic achievement standards under paragraph (c)(1) of this

section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

(3) A State must—

(i) Not prohibit an LEA from assessing more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) with an alternate assessment aligned with alternate academic achievement standards;

(ii) Require that an LEA submit information justifying the need of the LEA to assess more than 1.0 percent of its assessed students in any such subject with such an alternate assessment;

(iii) Provide appropriate oversight, as determined by the State, of an LEA that is required to submit information to the State; and

(iv) Make the information submitted by an LEA under paragraph (c)(3)(ii) of this section publicly available, provided that such information does not reveal personally identifiable information about an individual student.

(4) If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

(i) Be submitted at least 90 days prior to the start of the State's testing window for the relevant subject;

(ii) Provide State-level data, from the current or previous school year, to show—

(A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and

(B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);

(iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State's guidelines under paragraph (d) of this section, except paragraph (d)(6); and

(B) Will address any disproportionality in the percentage of

students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

(C) The State will address any disproportionality in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section; and

(v) If the State is requesting to extend a waiver for an additional year, meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline required under paragraph (c)(4)(iv) of this section.

(5) A State must report separately to the Secretary, under section 1111(h)(5) of the Act, the number and percentage of children with disabilities under paragraph (a)(1)(i) and (ii) of this section taking—

(i) General assessments described in § 200.2;

(ii) General assessments with accommodations; and

(iii) Alternate assessments aligned with alternate academic achievement

standards under paragraph (c) of this section.

(6) A State may not develop, or implement for use under this part, any alternate or modified academic achievement standards that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the requirements of section 1111(b)(1)(E) of the Act.

(7) For students with the most significant cognitive disabilities, a computer-adaptive alternate assessment aligned with alternate academic achievement standards must—

(i) Assess a student's academic achievement based on the challenging State academic content standards for the grade in which the student is enrolled;

(ii) Meet the requirements for alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section; and

(iii) Meet the requirements in § 200.2, except that the alternate assessment need not measure a student's academic proficiency based on the challenging State academic achievement standards for the grade in which the student is enrolled and growth toward those standards.

(d) *State guidelines for students with the most significant cognitive disabilities.* If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—

(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of "students with the most significant cognitive disabilities" that addresses factors related to cognitive functioning and adaptive behavior, such that—

(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;

(ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and

(iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(3) Ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (d) of this section are informed, consistent with § 200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(4) Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma;

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum that is based on the State's academic content standards for the grade in which the student is enrolled;

(6) Incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers consistent with § 200.2(b)(2)(ii); and

(7) Develop, disseminate information on, and promote the use of appropriate accommodations consistent with paragraph (b) of this section to ensure that a student with significant cognitive disabilities who does not meet the criteria in paragraph (a)(1)(ii) of this section—

(i) Participates in academic instruction and assessments for the grade in which the student is enrolled; and

(ii) Is assessed based on challenging State academic standards for the grade in which the student is enrolled.

(e) *Definitions with respect to students with disabilities.* Consistent with 34 CFR 300.5, "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(f) *English learners in general.* (1) Consistent with § 200.2 and paragraphs (g) and (i) of this section, a State must assess English learners in its academic assessments required under § 200.2 in a valid and reliable manner that includes—

(i) Appropriate accommodations with respect to a student's status as an English learner and, if applicable, the student's status under paragraph (a) of this section. A State must—

(A) Develop appropriate accommodations for English learners;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all English learners are able to participate in academic instruction and assessments; and

(ii) To the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in academic content areas until the students have achieved English language proficiency consistent with the standardized, statewide exit procedures in section 3113(b)(2) of the Act.

(2) To meet the requirements under paragraph (f)(1) of this section, the State must—

(i) Ensure that the use of appropriate accommodations under paragraph (f)(1)(i) of this section and, if applicable, under paragraph (b) of this section does not deny an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students who are not English learners; and

(ii) In its State plan, consistent with section 1111(a) of the Act—

(A) Provide its definition for "languages other than English that are present to a significant extent in the participating student population," consistent with paragraph (f)(4) of this section, and identify the specific languages that meet that definition;

(B) Identify any existing assessments in languages other than English, and specify for which grades and content areas those assessments are available;

(C) Indicate the languages identified under paragraph (f)(2)(ii)(A) of this section for which yearly student academic assessments are not available and are needed; and

(D) Describe how it will make every effort to develop assessments, at a minimum, in languages other than English that are present to a significant extent in the participating student population including by providing—

(1) The State's plan and timeline for developing such assessments, including a description of how it met the requirements of paragraph (f)(4) of this section;

(2) A description of the process the State used to gather meaningful input on the need for assessments in languages other than English, collect and respond to public comment, and consult with educators; parents and families of English learners; students, as appropriate; and other stakeholders; and

(3) As applicable, an explanation of the reasons the State has not been able to complete the development of such assessments despite making every effort.

(3) A State may request assistance from the Secretary in identifying linguistically accessible academic assessments that are needed.

(4) In determining which languages other than English are present to a significant extent in a State's participating student population, a State must, at a minimum—

(i) Ensure that its definition of "languages other than English that are present to a significant extent in the participating student population" encompasses at least the most populous language other than English spoken by the State's participating student population;

(ii) Consider languages other than English that are spoken by distinct populations of English learners, including English learners who are migratory, English learners who were not born in the United States, and English learners who are Native Americans; and

(iii) Consider languages other than English that are spoken by a significant portion of the participating student population in one or more of a State's LEAs as well as languages spoken by a

significant portion of the participating student population across grade levels.

(g) *Assessing reading/language arts in English for English learners.* (1) A State must assess, using assessments written in English, the achievement of an English learner in meeting the State's reading/language arts academic standards if the student has attended schools in the United States, excluding Puerto Rico and, if applicable, students in Native American language schools or programs consistent with paragraph (j) of this section, for three or more consecutive years.

(2) An LEA may continue, for no more than two additional consecutive years, to assess an English learner under paragraph (g)(1) of this section if the LEA determines, on a case-by-case individual basis, that the student has not reached a level of English language proficiency sufficient to yield valid and reliable information on what the student knows and can do on reading/language arts assessments written in English.

(3) The requirements in paragraph (g)(1)–(2) of this section do not permit a State or LEA to exempt English learners from participating in the State assessment system.

(h) *Assessing English language proficiency of English learners.* (1) Each State must—

(i) Develop a uniform, valid, and reliable statewide assessment of English language proficiency, including reading, writing, speaking, and listening skills; and

(ii) Require each LEA to use such assessment to assess annually the English language proficiency, including reading, writing, speaking, and listening skills, of all English learners in kindergarten through grade 12 in schools served by the LEA.

(2) The assessment under paragraph (h)(1) of this section must—

(i) Be aligned with the State's English language proficiency standards under section 1111(b)(1)(F) of the Act;

(ii) Be developed and used consistent with the requirements of § 200.2(b)(2), (4), and (5); and

(iii) Provide coherent and timely information about each student's attainment of the State's English language proficiency standards to parents consistent with § 200.2(e) and section 1112(e)(3) of the Act.

(3) If a State develops a computer-adaptive assessment to measure English language proficiency, the State must ensure that the computer-adaptive assessment—

(i) Assesses a student's language proficiency, which may include growth toward proficiency, in order to measure the student's acquisition of English; and

(ii) Meets the requirements for English language proficiency assessments in paragraph (h) of this section.

(4)(i) A State must provide appropriate accommodations that are necessary to measure a student's English language proficiency relative to the State's English language proficiency standards under section 1111(b)(1)(F) of the Act for each English learner covered under paragraph (a)(1)(i) or (iii) of this section.

(ii) If an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency assessment required under section 1111(b)(2)(G) of the Act such that there are no appropriate accommodations for the affected domain(s) (e.g., a non-verbal English learner who because of an identified disability cannot take the speaking portion of the assessment), as determined, on an individualized basis, by the student's IEP team, 504 team, or by the individual or team designated by the LEA to make these decisions under title II of the ADA, as specified in paragraph (b)(1) of this section, a State must assess the student's English language proficiency based on the remaining domains in which it is possible to assess the student.

(5) A State must provide for an alternate English language proficiency assessment for each English learner covered under paragraph (a)(1)(ii) of this section who cannot participate in the assessment under paragraph (h)(1) of this section even with appropriate accommodations.

(i) *Recently arrived English learners.*

(1)(i) A State may exempt a recently arrived English learner, as defined in paragraph (k)(2) of this section, from one administration of the State's reading/language arts assessment under § 200.2 consistent with section 1111(b)(3)(A)(i)(I) of the Act.

(ii) If a State does not assess a recently arrived English learner on the State's reading/language arts assessment consistent with section

1111(b)(3)(A)(i)(I) of the Act, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language consistent with paragraph (g)(1) of this section.

(iii) A State and its LEAs must report on State and local report cards required under section 1111(h) of the Act the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.

(iv) Nothing in this section relieves an LEA from its responsibility under applicable law to provide recently arrived English learners with appropriate instruction to enable them to attain English language proficiency as well as grade-level content knowledge in reading/language arts, mathematics, and science.

(2) A State must assess the English language proficiency of a recently arrived English learner pursuant to paragraph (h) of this section.

(3) A State must assess the mathematics and science achievement of a recently arrived English learner pursuant to § 200.2 with the frequency described in § 200.5(a).

(j) *Students in Native American language schools or programs.* (1) Except as provided in paragraph (j)(2) of this section, a State is not required to assess, using an assessment written in English, student achievement in meeting the challenging State academic standards in reading/language arts, mathematics, or science for a student who is enrolled in a school or program that provides instruction primarily in a Native American language if—

(i) The State provides such an assessment in the Native American language to all students in the school or program, consistent with the requirements of § 200.2;

(ii) The State submits evidence regarding any such assessment in the Native American language for peer review as part of its State assessment system, consistent with § 200.2(d), and receives approval that the assessment meets all applicable requirements; and

(iii) For an English learner, as defined in section 8101(20)(C)(ii) of the Act, the State continues to assess the English language proficiency of such English learner, using the annual English language proficiency assessment required under paragraph (h) of this section, and provides appropriate services to enable him or her to attain proficiency in English.

(2) Notwithstanding paragraph (g) of this section, the State must assess under § 200.5(a)(1)(i)(B), using assessments written in English, the achievement of each student enrolled in such a school or program in meeting the challenging State academic standards in reading/language arts, at a minimum, at least once in grades 9 through 12.

(k) *Definitions with respect to English learners and students in Native American language schools or programs.* For the purpose of this section—

(1) "Native American" means "Indian" as defined in section 6151 of the Act, which includes Alaska Native

and members of Federally recognized or State-recognized tribes; Native Hawaiian; and Native American Pacific Islander.

(2) A “recently arrived English learner” is an English learner who has been enrolled in schools in the United States for less than twelve months.

(3) The phrase “schools in the United States” includes only schools in the 50 States and the District of Columbia.

(Approved by the Office of Management and Budget under control number 1810–0576 and 1810–0581)

(Authority: 20 U.S.C. 1221e-3, 1400 *et seq.*, 3474, 6311(b)(2), 6571, 7491(3), and 7801(20) and (34); 25 U.S.C. 2902; 29 U.S.C. 794; 42 U.S.C. 2000d–1, 12102(1), and 12131; 34 CFR 300.5)

■ 7. Section 200.8 is amended:

■ a. In paragraph (a)(2)(i), by adding the word “and” following the semicolon.

■ b. In paragraph (a)(2)(ii), by removing the words “including an alternative format (e.g., Braille or large print) upon request; and” and adding in their place the words “consistent with § 200.2(e).”

■ c. By removing paragraph (a)(2)(iii).

■ d. In paragraph (b)(1), by removing the term “§ 200.2(b)(4)” and adding in its place the term “§ 200.2(b)(13)”.

■ e. By adding an OMB information collection approval parenthetical.

■ f. By revising the authority citation at the end of the section.

The addition and revision read as follows:

**§ 200.8 Assessment reports.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(x) and (xii), and 6571)

■ 8. Section 200.9 is revised to read as follows:

**§ 200.9 Deferral of assessments.**

(a) A State may defer the start or suspend the administration of the assessments required under § 200.2 for one year for each year for which the amount appropriated for State assessment grants under section 1002(b) of the Act is less than \$369,100,000.

(b) A State may not cease the development of the assessments referred to in paragraph (a) of this section even if sufficient funds are not appropriated under section 1002(b) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6302(b), 6311(b)(2)(I), 6363(a), and 6571)

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