- Section 200.6(a)(4), regarding the reporting requirements under section 1111(h)(4) of Title I, has been changed by redesignating (A) proposed paragraph (a)(4)(iv), regarding alternate assessments based on grade-level academic achievement standards, as new paragraph (a)(4)(iii); and (B) proposed paragraph (a)(4)(iii), regarding alternate assessments based on modified academic achievement standards, as new paragraph (a)(4)(iv). In addition, "to the Secretary" has been added to the introductory sentence in §200.6(a)(4) to clarify to whom States must report the data collected under section 1111(h)(4) of the Act.

Disaggregation of Data (§200.7)

- Section 200.7(a)(ii), providing that a State may not establish a different minimum number of students for separate subgroups, has been revised by clarifying that this provision also applies to the school as a whole. In addition, the final regulations make clear that this provision takes effect for AYP determinations based on 2007-08 assessment data.

Making Adequate Yearly Progress (§200.20(f))

- Proposed §200.20(f)(1), which permits a State to include, for a period of up to two years, the scores of students who were previously identified with a disability in AYP calculations, has been incorporated into current

§200.20(f)(2), which codifies the final regulations on accountability for former limited English proficient (LEP) students published in the Federal Register on September 13, 2006 (71 FR 54187).

- Proposed §200.20(f)(2) has been changed to clarify that if a State includes the scores of former students with disabilities in calculating AYP, it must include the scores of all such students. Proposed §200.20(f)(2) has been incorporated into new §200.20(f)(2)(ii).

Transition Provision regarding Modified Academic Achievement Standards (§200.20(g))

- A new §200.20(g) has been added to make explicit that the Secretary may provide States flexibility in accounting for the achievement of some students with disabilities in AYP determinations that are based on assessments administered in 2007-08 and 2008-09. States must demonstrate, for each year for which flexibility is available, that they are expeditiously moving to adopt and administer assessments based on modified academic achievement standards consistent with these regulations and meet other criteria, as the Secretary determines appropriate, in order to be considered for this flexibility.

PART 300--ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILTIES

Participation in Assessments (§300.160)

- Section 300.160(b)(2), regarding accommodation guidelines that a State must develop, has been revised to clarify that the State guidelines must (A) identify the accommodations for each assessment that do not invalidate the score; and (B) instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate the score.

- Proposed §300.160(c), which would have required a State that has adopted modified academic achievement standards to have guidelines for the participation of students with disabilities in assessments based on those standards, has been removed. With the clarification in §200.6(a)(3) that assessments based on modified academic achievement standards are alternate assessments, proposed §300.160(c) is redundant with new §300.160(c) (proposed §300.160(d)).

- Proposed §300.160(d)(1), which requires a State (or in the case of a district-wide assessment, an LEA) to develop and implement alternate assessments and guidelines for children who cannot participate in regular assessments, even with accommodations, has been redesignated as new §300.160(c)(1).

- Proposed §300.160(d)(2)(ii), which would have required a State to measure the achievement of children based

on alternate academic achievement standards if a State has adopted those standards, has been changed by replacing "alternate academic achievement standards" with "modified academic achievement standards," and clarifying that modified academic achievement standards are permitted for children who meet the State's criteria under §200.1(e)(2). Proposed §300.160(d)(2)(ii) has been redesignated as §300.160(c)(2)(ii).

- A new §300.160(c)(2)(iii) has been added, providing that, if a State has adopted alternate academic achievement standards, the State must measure the achievement of children with the most significant cognitive disabilities against those standards.

- A new paragraph (d) has been added, requiring a State to provide IEP Teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma).

- A new paragraph (e) has been added, requiring a State to ensure that parents of a student selected to be assessed based on alternate or modified academic achievement standards are informed that their child's achievement will be measured based on alternate or modified academic achievement standards.

- Proposed §300.160(e), regarding reports on the assessment of students with disabilities, has been redesignated as §300.160(f) and changed as follows:

(1) Proposed paragraph (e)(1) in §300.160, which requires a State to report on the number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations that did not result in an invalid score, has been redesignated as §300.160(f)(1).

(2) Proposed paragraph (e)(2) in §300.160 has been redesignated as §300.160(f)(2) and revised to require a State to report on the number of children participating in alternate assessments based on grade-level academic achievement standards.

(3) Proposed paragraph (e)(3) in §300.160, which requires a State to report on the number of children with disabilities who are assessed based on alternate academic achievement standards, has been changed to require a State to

report on the number of children with disabilities, if any, who are assessed based on modified academic achievement standards. The regulatory reference to alternate assessments based on alternate academic achievement standards has been deleted and proposed §300.160(e)(3) has been redesignated as §300.160(f)(3).

(4) Proposed paragraph (e)(4) in §300.160, which requires a State to report on the number of children with disabilities who are assessed based on modified academic achievement standards, has been changed to require a State to report on the number of children with disabilities, if any, who are assessed based on alternate academic achievement standards. The regulatory reference to modified academic achievement standards has been deleted and proposed §300.160(e)(4) has been redesignated as §300.160(f)(4).

(5) Proposed paragraph (e)(5) in §300.160, which required a State to report on the performance results of children with disabilities on regular assessments and on alternate assessments, has been clarified by specifically identifying alternate assessments based on grade-level academic achievement standards; alternate assessments based on modified academic achievement standards; and alternate assessments based on alternate academic achievement standards. It also has been revised to require that performance results

for children with disabilities be compared to the achievement of all students, including children with disabilities. Proposed §300.160(e)(5) has been redesignated as §300.160(f)(5).

- Proposed §300.160(f), regarding universal design, has been redesignated as §300.160(g).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, more than 300 parties submitted comments on the proposed regulations, many of which were substantially similar. An analysis of the comments and changes in the regulations since publication of the NPRM follows.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law. We also do not address comments on Title I or IDEA regulations that were not part of the NPRM published on December 15, 2005 (70 FR 74624), such as comments concerning the regulations regarding alternate academic achievement standards.

Interim Flexibility

Comment: Several commenters made recommendations regarding the Department's interim flexibility, which gave eligible States the flexibility to provide credit to schools or

districts that missed AYP solely because of the achievement of the students with disabilities subgroup. Some commenters opposed this flexibility; most others suggested extending the flexibility until the final regulations on modified academic achievement standards are in effect or until States have had time to develop modified academic achievement standards and aligned alternate assessments. One commenter recommended that the interim flexibility be made permanent instead of the Department regulating to permit States to establish modified academic achievement standards. Finally, one commenter stated that offering interim flexibility prior to rulemaking violated Title I negotiated rulemaking requirements.

Discussion: The Department permitted States that expressed interest in developing modified academic achievement standards and assessments based on those standards to take advantage of interim flexibility while the Department drafted the proposed regulations. This flexibility was granted for the 2004-05 school year and then extended for a second year (2005-06) to cover the period of time when members of the public were commenting on the proposed regulations and while the Department developed the final regulations. The interim flexibility will be extended for the 2006-07 school year for States that can show evidence of a commitment to develop modified academic achievement standards.

We believe that the flexibility to develop modified academic achievement standards provides a means to assess appropriately some students with disabilities and include them in State accountability systems. Therefore, we do not believe the interim flexibility should be used in lieu of setting modified academic achievement standards, as recommended by one commenter.

We do not believe that offering interim flexibility prior to rulemaking violated negotiated rulemaking requirements. We understand the statutory requirements for negotiated rulemaking in section 1901 of the ESEA to apply to Title I standards and assessment regulations required to be implemented within one year of enactment of NCLB, not to subsequent regulatory amendments such as those included in these regulations.

The Department recognizes that some States may need time beyond the 2006-07 school year to develop and implement alternate assessments based on modified academic achievement standards. Therefore, we are adding a new §200.20(g) providing that the Secretary may give flexibility for two additional years (through the 2008-09 school year) to States that are developing alternate assessments based on modified academic achievement standards consistent with these regulations.__

Changes: We have added a new §200.20(g) specifying that the Secretary may provide a State that is moving expeditiously to adopt and administer alternate assessments based on modified academic achievement standards flexibility in accounting for the achievement of students with disabilities in AYP determinations that are based on assessments administered in school years 2007-08 and 2008-09. To be eligible for this flexibility, a State must meet criteria, as the Secretary determines appropriate, for each year for which the flexibility is available.

State Responsibilities for Developing Challenging Academic Standards (§200.1)

Comment: A few commenters recommended revising §200.1(a)(1) to clarify when the regulation applies to academic content standards versus academic achievement standards. The commenters noted that the authority to develop modified and alternate academic achievement standards appears erroneously also to apply to academic content standards.

Discussion: We agree that the regulation in §200.1(a)(1) should be more specific when referring to academic standards. Therefore, we have clarified that the same academic content standards apply to all public schools and all public school students in a State and that the authority to develop alternate academic achievement standards in paragraph (d) and

modified academic achievement standards in paragraph (e) for eligible students with disabilities does not apply to academic content standards. We also have modified paragraph (a)(2) to be consistent with these changes. Section 200.1(b)(1)(i) is redundant with these changes and has been removed.

Changes: We have made the following changes in §200.1(a)(1): (1) added "content and academic achievement" before "standards"; and (2) added "which apply only to the State's academic achievement standards" at the end of the sentence in paragraph (a)(1). Consistent with these changes, we have revised paragraph (a)(2) to read, "Include the same knowledge and skills expected of all students and the same levels of achievement of all students, except as provided in paragraphs (d) and (e) of this section." We have removed §200.1(b)(1)(i).

Modified Academic Achievement Standards (§200.1(e))

Comment: Several commenters recommended that the regulations provide more detail on the essential components of the documented and validated standards-setting process required in §200.1(e)(1). These commenters stated that the process should include broad stakeholder input. One commenter requested that the regulations require a State to explain to the public how it proposes to change its content standards to coincide with modified academic achievement standards. A few commenters

requested that the regulations specify the persons who should define the standards and participate in the standards-setting process, and include information about how parents and specialists should be involved.

Discussion: We do not believe that it is necessary to include the details of a validated standards-setting process in these regulations because the field generally agrees that the process should be consistent with the standards for educational and psychological testing (1999).[1] This process relies on both empirical data and the informed judgments of persons familiar with academic content as well as with the students with disabilities to be assessed. We agree with the commenters that the development of achievement standards typically benefits from broad stakeholder involvement to ensure consensus regarding the knowledge and skills essential for all students and have clarified this in the regulations. In response to the request to define who should be involved in the standards-setting process for modified academic achievement standards, we believe that the process should include persons who are knowledgeable about the State's academic content standards and experienced in standards

[1] AERA, APA, & NCME. (1999). (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education) Joint Committee on Standards for Educational and Psychological Testing. Standards for educational and psychological testing. Washington, DC: AERA.

setting, as well as special educators who are most knowledgeable about the academic abilities and achievement of students with disabilities, and we have added clarifying language in the regulations. We decline to comment on how parents and specialists should be involved in the process. These determinations are best left to State and local officials.

With regard to the commenter who requested that the regulations require a State to explain to the public how it proposes to change its content standards to coincide with modified academic achievement standards, we note that a State that intends to develop modified academic achievement standards consistent with these regulations would not propose to change its academic content standards. As required in §200.1(e)(1), modified academic achievement standards must be aligned with the State's academic content standards.

Changes: We have removed the phrase "through a documented and validated standards-setting process" in proposed §200.1(e)(1) and have added a new §200.1(e)(1)(iv) to require that modified academic achievement standards be developed through a documented and validated standards-setting process that includes broad stakeholder input, including persons knowledgeable about the State's academic content standards and

experienced in standards setting and special educators who are most knowledgeable about children with disabilities.

Comment: A number of commenters disagreed with the requirement in §200.1(e)(1)(i) that modified academic achievement standards be aligned with the State's academic content standards for the grade in which the student is enrolled. Several commenters stated that this requirement excludes students who need to be assessed against a truly modified set of learning standards. These commenters argued that modified academic achievement standards should be for students with learning goals that are substantively different from the general education standards, but not as different as the learning goals for students with the most significant cognitive disabilities who are assessed based on alternate academic achievement standards.

Several commenters stated that modified academic achievement standards should focus on the individual needs of a student with disabilities and be aligned with standards that are appropriate for the student's instructional level, not grade level. A few commenters stated that the criteria for modified academic achievement standards are too prescriptive and that States should have the flexibility to develop modified academic achievement standards in ways that meet their needs.

Discussion: We disagree with the commenters. Modified academic achievement standards are intended for a small group of students who, by virtue of their disability, are not likely to meet grade-level academic achievement standards in the year covered by their IEPs even with appropriate instruction. These students need the benefit of access to instruction in grade-level content so that they can move closer to grade-level achievement. We believe that allowing modified academic achievement standards to focus on something other than grade-level content standards (e.g., allowing them to be based on a student's instructional level) would lower expectations and limit opportunities for these students to access grade-level content and meet grade-level achievement standards. We also believe that allowing States to develop modified academic achievement standards without placing any parameters or restrictions on their use would likely result in lowered expectations.

Changes: None.

Comment: Many commenters requested specific guidance on how a State could appropriately reduce the breadth or depth of grade-level standards, as proposed in §200.1(e)(1)(i). One commenter requested that the regulations clarify that reducing breadth or depth would permit the assessment of prerequisite

skills that are needed to master grade-level content standards.

Discussion: Modified academic achievement standards are intended to be challenging for a small group of students whose disability has thus far prevented them from attaining grade-level proficiency. However, while the modified academic achievement standards may be less demanding than grade-level academic achievement standards, these students must have access to a curriculum based on grade-level content standards so that they can move closer to grade-level achievement. This means that an alternate assessment based on modified academic achievement standards must cover the same grade-level content, but may include less difficult questions overall.

We agree that the phrase “breadth or depth” in the context of developing modified academic achievement standards is not clear and does not sufficiently convey that only the academic achievement standards for students, not the content on which they are assessed, are to be modified. In addition, the terms “breadth” and “depth” are descriptive, rather than technical, and do not have consistent meanings for the different stakeholders involved in developing and using student assessments. Therefore, we have removed the reference to reduced breadth or depth from §200.1(e)(1)(i). Section 200.1(e)(1)(i) continues to require modified academic

achievement standards to be aligned with the State's academic content standards for the grade in which the student is enrolled. We have added a new paragraph (e)(1)(ii) clarifying that modified academic achievement standards must be challenging for eligible students, but may be less difficult than grade-level academic achievement standards. Consistent with section 1111(b)(1)(D)(i) of the ESEA, we also have clarified that modified academic achievement standards must include at least three achievement levels.

Changes: The phrase "reflect reduced breadth or depth of grade level content" has been removed from §200.1(e)(1)(i). A new §200.1(e)(1)(ii) has been added specifying that modified academic achievement standards must be challenging for eligible students, but may be less difficult than grade-level academic achievement standards. We also have added a new §200.1(e)(1)(iii) to require modified academic achievement standards to include at least three achievement levels.

Comment: One commenter stated that modified academic achievement standards should be designed to allow a student, over time, to reach grade-level academic achievement standards. Many commenters stated that the regulations should include protections so that the regulations do not result in lowered expectations for students with disabilities.

Discussion: We added a number of safeguards to the safeguards that were already included in the proposed regulations to ensure that a student with disabilities who is assessed based on modified academic achievement standards has access to grade-level content so that the student has the opportunity, over time, to reach grade-level academic achievement standards. The safeguards for students that are included in these final regulations include the following: §200.1(e)(1)(i) requires that modified academic achievement standards be aligned with a State's academic content standards for the grade in which a student is enrolled; new §200.1(e)(2)(iii) requires that a student's IEP include goals that are based on the academic content standards for the grade in which the student is enrolled and be designed to monitor a student's progress in achieving the student's standards-based goals; new §200.1(f)(2)(ii) requires a State to establish and monitor implementation of clear and appropriate guidelines for an IEP Team to apply in developing and implementing the IEP of a student assessed based on modified academic achievement standards; new §200.1(f)(2)(iii) requires that a State's guidelines for IEP Teams ensure that a student who is assessed based on modified academic achievement standards has access to the curriculum, including instruction, for the grade in which the student is enrolled; and new §200.1(f)(2)(iv) requires a

State to ensure that a student who takes an alternate assessment based on modified academic achievement standards is not precluded from attempting to complete the requirements, as defined by the State, for a regular high school diploma.

Changes: None.

Comment: We received several comments regarding proposed §200.1(e)(1)(iii), which requires that modified academic achievement standards not preclude a student from earning a regular high school diploma. Several commenters stated that it would be an intrusion into State graduation standards if a State was required to diminish its standards for a regular diploma to include students who are assessed on modified academic achievement standards.

Discussion: The intent of proposed §200.1(e)(1)(iii) was not to require States to alter their graduation requirements or to provide a regular high school diploma to a student who scores proficient on an alternate assessment based on modified academic achievement standards. Rather, we wanted to ensure that a student is not automatically precluded from attempting to earn a regular high school diploma simply because the student was assessed based on modified academic achievement standards. For example, if a State requires students to pass a State graduation test in order to obtain a regular high school diploma, we did not want the fact that a student was

assessed based on modified academic achievement standards to automatically prevent the student from attempting to pass the State's graduation test.

An important requirement for modified academic achievement standards is that they be aligned with the State's grade-level academic content standards and provide access to grade-level curriculum. Therefore, we believe it is reasonable that students assessed based on modified academic achievement standards have the opportunity to attempt to earn a regular high school diploma. We recognize that proposed §200.1(e)(1)(iii) could be misconstrued and, therefore, have changed the language to make clear that States may not prevent a student from attempting to complete the requirements, as defined by the State, for a regular high school diploma simply because the student participates in an alternate assessment based on modified academic achievement standards.

Changes: Proposed §200.1(e)(1)(iii) has been removed. A new §200.1(f)(2)(iv) has been added to require a State to ensure that students who take alternate assessments based on modified academic achievement standards are not precluded from attempting to complete the requirements, as defined by the State, for a regular high school diploma.

Comment: Many commenters requested additional guidance on the development of modified academic achievement standards. A few

commenters requested guidance on addressing the technical issues regarding the development of modified academic achievement standards.

Discussion: The Department recognizes the need to provide States with additional guidance on the development and implementation of modified academic achievement standards and will provide nonregulatory guidance, along with technical assistance and support to States on modified academic achievement standards following the release of these final regulations.

Changes: None.

Criteria for Defining Eligible Students (§200.1(e)(2))

Comment: Several commenters recommended that the regulations clearly state that a student's IEP Team is responsible for determining whether the student should be assessed based on modified academic achievement standards. One commenter added that LEAs should not be able to unilaterally change an IEP Team's decision. Many commenters recommended requiring that parents be included in this decision and informed in writing of any potential consequences of such decisions. Several commenters stated that the information should be provided to parents in the parent's native language and in language that is easily understandable.

Discussion: We agree that it would be helpful to clarify that the State guidelines are for IEP Teams to use in determining which students with disabilities are eligible to be assessed based on modified academic achievement standards and have made this change in §200.1(e)(2) and (e)(2)(ii)(A). Consistent with §200.1(f)(1)(i), States have an important role in providing clear and appropriate guidelines for IEP Teams to use in determining who will be assessed based on modified academic achievement standards and in monitoring the implementation of these guidelines by IEP Teams. We also agree that an LEA cannot unilaterally change an IEP Team's decision regarding whether a child will be assessed based on modified academic achievement standards. Section 300.320(a)(6), consistent with section 614(d)(1)(A)(i)(VI) of the IDEA, already provides that it is the child's IEP Team, not the LEA, that is responsible for determining how the child will participate in State and district-wide assessments.

We do not believe it is necessary to add language to the Title I regulations ensuring that parents are included in decisions regarding whether their child will be assessed based on modified academic achievement standards. The IDEA regulations already require public agencies to include parents of children with disabilities in decisions regarding their child's special education, including how the child will

participate in State and district-wide assessments. Section 300.321(a) of the IDEA regulations requires public agencies to include parents of children with disabilities as members of the IEP Team. If a child's parent and the other members of the child's IEP Team determine that the child will take an alternate assessment based on alternate or modified academic achievement standards, §300.320(a)(6)(i), consistent with section 614(d)(1)(A)(i)(VI) of the IDEA, requires that the child's IEP include a statement of why the particular assessment is appropriate for the child.

We agree with the commenters that it is important for parents to be informed of any effects on their child's education that may result from the child participating in an alternate assessment based on modified or alternate academic achievement standards. In addition to parents, we believe it is important for all IEP Team members to have knowledge about modified or alternate academic achievement standards and any effects that may result from a child participating in such assessments. Therefore, we have added language to require States to provide IEP Teams, which include the parent, with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State or local policies on the

student’s education resulting from taking an alternate assessment based on alternate or modified academic achievement standards, such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma.

We do not believe, however, that it is necessary to require States to inform a parent in writing, in addition to the IEP process, that his or her child will not be assessed based on the same academic achievement standards as other children. Parents are integral members of the IEP Team and participate in the decision regarding the type of assessment in which their child will participate. We expect that, in the course of determining the appropriate assessment in which a student will participate, there will be a discussion of how alternate or modified academic achievement standards differ from grade-level academic achievement standards and any possible consequences of participating in alternate assessments based on those standards.

Finally, we do not believe it is necessary to add language to the Title I regulations requiring public agencies to provide explanations to parents in the parent’s native language and in language that is easily understandable, as suggested by the commenters. Section 300.322(e) of the IDEA regulations already requires public agencies to take whatever

action is necessary to ensure that parents understand the proceedings of IEP Team meetings, including arranging for an interpreter for parents with deafness or whose native language is other than English.

Changes: We have changed §200.1(e)(2) to require that the guidelines that a State establishes under §200.1(f)(1) include criteria for IEP Teams to use in determining which students with disabilities are eligible to be assessed based on modified academic achievement standards. We also have rewritten paragraph (e)(2)(ii)(A) to state that the IEP Team must be "reasonably certain" that the student will not achieve grade-level proficiency within the year covered by the student's IEP, "even if significant growth occurs."

We have added a new paragraph (f)(1)(iii) to require the State guidelines for IEP Teams to provide a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effect of State and local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma).

We also have reorganized paragraph (f) regarding State guidelines into two paragraphs: paragraph (f)(1) lists the requirements for students who are assessed based on either alternate or modified academic achievement standards; and paragraph (f)(2) lists additional requirements for students who are assessed based on modified academic achievement standards. With this reorganization, proposed §200.1(e)(3), has been redesignated as new §200.1(f)(1)(ii); proposed §200.1(e)(5) has been rewritten and redesignated as §200.1(f)(2)(v); and proposed §200.1(e)(1)(ii) has been rewritten and redesignated as §200.1(f)(2)(iii).

Comment: Several commenters stated that determining whether a student's disability has precluded the student from achieving grade-level proficiency should not be based solely on a student's performance on State assessments because State assessments may not allow the accommodations a student needs to demonstrate what the student knows and can do. The commenters recommended changing the "or" between paragraphs (e)(2)(i)(A) and (e)(2)(i)(B) in §200.1 to "and."

Discussion: We do not believe that the determination of a student's progress always must include consideration of a student's performance on State assessments and, therefore, decline to make the change requested by the commenters. Other objective assessments may be necessary, for example, for

students who are new to the State or for younger students who have not yet taken a State assessment. What is important is that the IEP Team consider multiple measurements over a period of time that are valid for the subjects being assessed, as specified in §200.1(e)(2)(ii)(B). These measures may include evidence from a State assessment or other assessments that can validly document the student's achievement.

Changes: None.

Comment: Several commenters requested a definition of "high-quality instruction," as used in proposed §200.1(e)(2)(ii)(A), stating that, without a definition, the requirement that IEP Teams consider the student's response to high-quality instruction in determining whether the student should be assessed based on modified academic achievement standards is not meaningful. One commenter stated that the proposed regulation assumes that students with disabilities receive high-quality instruction, but stated that this is not always the case.

Discussion: The purpose of §200.1(e)(2)(ii)(A) is to ensure that students are not identified for an alternate assessment based on modified academic achievement standards if they have not been receiving high-quality instruction and services. We agree that it is difficult to establish objective standards that could be used to determine whether this criterion has

been met and will, therefore, remove this requirement. However, we continue to believe that safeguards are needed to ensure that IEP Teams consider whether a student has had an opportunity to learn grade-level content before determining that the student should be assessed based on modified academic achievement standards.

Under §300.306(b) of the IDEA regulations, a student may not be determined to be eligible for special education and related services if the determinant factor is lack of appropriate instruction in reading or mathematics. Schools use current, data-based evidence to examine whether a student responds to appropriate instruction before determining that the student needs special education and related services. State and local officials are responsible for determining what constitutes appropriate instruction. (See 71 FR 46646 (Aug. 14, 2006).) State and local officials, therefore, have experience and knowledge in making judgments about the instruction that a student has received and whether it has been appropriate. Accordingly, we have changed the language in §200.1(e)(2)(ii)(A) to ensure that students are not identified for an alternate assessment based on modified academic achievement standards if they have not been receiving appropriate instruction.

Changes: We have replaced “high-quality instruction” with “appropriate instruction” in §200.1(e)(2)(ii)(A). We also have added “to date” following “progress” for clarity.

Comment: Several commenters recommended requiring instruction by highly qualified teachers, as defined in the ESEA and the IDEA, before determining that a student should be assessed based on modified academic achievement standards.

Discussion: Both the ESEA and the IDEA already require teachers to meet the highly qualified teacher standards and we do not believe it is necessary to reiterate this requirement in these regulations. Furthermore, while we expect that the vast majority of students will receive instruction from highly qualified teachers, we do not want a student who may not have received instruction from a highly qualified teacher in the past to be precluded from being assessed based on modified academic achievement standards if that alternate assessment is most appropriate for that student.

Changes: None.

Comment: One commenter asked if the number of years a student with disabilities’ performance was below grade level could be used to identify the student as eligible to be assessed based on modified academic achievement standards.

Discussion: Section 200.1(e)(2)(ii) requires a student’s IEP Team to consider the student’s progress to date in response to

appropriate instruction and to be reasonably certain that, even if significant growth occurs, the student will not achieve grade-level proficiency within the year covered by the student's IEP. Data documenting that a student has been performing below grade level for a number of years could be one factor in determining if a student should be assessed based on modified academic achievement standards.

Changes: None.

Comment: One commenter requested examples of multiple measures over time that may be used to determine a student's progress under §200.1(e)(2)(ii)(B). Another commenter asked whether States are required to use response to intervention procedures to demonstrate student progress over a period of time.

Discussion: In order to determine whether a student may be eligible for an alternate assessment based on modified academic achievement standards, an IEP Team may examine results from a variety of measures that indicate a student's progress over time. These may be either criterion-referenced tests (i.e., tests that assess skill mastery and compare a student's performance to curricular standards, such as State and district-wide tests) or norm-referenced tests (i.e., tests that compare a student's performance to that of students of the same age or grade). The format of the multiple measures

may include performance assessments (i.e., an assessment that focuses on specific objectives and enables the student to actively demonstrate knowledge and understanding, such as direct writing and math assessments); portfolio assessments (i.e., a collection of student work samples); curriculum-based measures (i.e., repeated measures from the student's curriculum that assess the specific skills being taught in the classroom and the effectiveness of instruction and instructional changes); and teacher-developed assessments (i.e., assessments developed by individual teachers for use in their own classrooms).

Section 200.1(e)(2)(ii)(B) does not require States to use response to intervention procedures; nor does it specify the procedures or measures that must be used to determine a student’s progress over time. We believe that IEP Teams should have as much flexibility as possible to use objective data to determine whether a student is eligible for an alternate assessment based on modified academic achievement standards. The purpose of §200.1(e)(2)(ii)(B) is to clarify that IEP Teams must not rely on a single measure to determine whether it is appropriate to assess a student based on modified academic achievement standards. So long as the measures are objective and valid for the subjects being

assessed, they may be used to determine whether a student is making progress.

Changes: None.

Comment: Several commenters supported the proposed requirement that a student be receiving instruction in grade-level content in order to be assessed based on modified academic achievement standards and asked what documentation would be required to ensure that students with disabilities have the opportunity to learn grade-level content. Other commenters stated that the proposed regulations did not address the broad continuum of cognitive functioning and, instead, focused on the wrong group of students. Many commenters stated that modified academic achievement standards should be for students who are closer in achievement to students with the most significant cognitive disabilities rather than students who are close to grade-level achievement.

Discussion: The requirement that a student be receiving grade-level instruction was intended to ensure that students identified to be assessed based on modified academic achievement standards have access to grade-level content. We did not want students to be assessed based on modified academic achievement standards merely because they did not have access to grade-level content or solely because their achievement was one or two grades below their enrolled grade.

However, based on the comments we received, we believe this requirement was misinterpreted to mean that only students achieving close to grade level could potentially be assessed based on modified academic achievement standards. That was not our intent. Rather, we anticipated that students assessed based on modified academic achievement standards could include students from any of the disability categories under the IDEA and represent a fairly wide spectrum of abilities. Therefore, we have removed the requirement in §200.1(e)(2)(iii) that students identified to be assessed based on modified academic achievement standards be receiving grade-level instruction.

However, we continue to believe that it is critical to ensure that students who participate in an alternate assessment based on modified academic achievement standards receive instruction in grade-level content so that they are prepared to demonstrate their mastery of grade-level content on an alternate assessment based on modified academic achievement standards and can move closer to grade-level achievement. One way to help ensure that students have access to grade-level content before they are assessed based on modified academic achievement standards, and receive instruction in grade-level content after they are assessed based on modified academic achievement standards, is to require IEP Teams to include goals that are based on grade-

level content standards in the IEPs of these students. Such an approach focuses the IEP Team and the student on grade-level content and the student's achievement level relative to those content standards. Therefore, we have added a requirement that the IEP of a student to be assessed based on modified academic achievement standards include goals that are based on the academic content standards for the grade in which the student is enrolled and that the IEP be designed to monitor a student's progress in achieving the student's standards-based goals. To further emphasize the importance of ensuring that students who participate in an alternate assessment based on modified academic achievement standards receive instruction in grade-level content, we also make clear in new §200.1(f)(2)(iii) that States must ensure that these students have access to the curriculum, including instruction, for the grade in which the student is enrolled.

Incorporating State content standards in IEP goals is not a new idea. Because the reauthorization of IDEA in 1997 required States to provide students with disabilities access to the general curriculum, the field has been working toward incorporating State standards in IEP goals. Some States already require IEP Teams to select the grade-level content standards that the student has not yet mastered and to develop goals on the basis of the skills and knowledge that the

student needs to acquire in order to meet those standards. In addition, some States have developed extensive training materials and professional development opportunities for staff to learn how to write IEP goals that are tied to State standards.[2]

We appreciate that States that have not moved in this direction may need technical assistance and support to institute this change for students who are assessed based on modified academic achievement standards. The Department's Office of Special Education Programs (OSEP) is preparing such technical assistance, which will be disseminated and available upon publication of these final regulations.

We believe that requiring IEP Teams to incorporate grade-level content standards in the IEP of a student who is assessed based on modified academic achievement standards and to monitor the student's progress in achieving the standards-based goals will focus IEP Teams on identifying the educational supports and services that the student needs to reach those standards. This will align the student's instruction with the general education curriculum and the assessment that the IEP Team determines is most appropriate for the student.

[2] Ahearn, E. (2006). Standards-based IEPs: Implementation in Selected States. National Association of State Directors of Special Education, 1800 Diagonal Road, Suite 320, Alexandria, VA 22314.

Changes: We have removed the requirement in §200.1(e)(2)(iii) that a student be receiving grade-level instruction in order to be assessed based on modified academic achievement standards, and replaced it with a requirement that, if a student identified for an alternate assessment based on modified academic achievement standards has an IEP that includes goals for a subject assessed under §200.2, those goals must be based on the content standards for the grade in which the student is enrolled. We have added "the" before "curriculum" and "including instruction," before "for the grade in which the students are enrolled" in §200.1(f)(2)(iii). For consistency with these changes, we have added this requirement as new §200.1(f)(2)(ii)(A) to the list of requirements for States to include in their guidelines for IEP Teams. We also have added §200.1(f)(2)(ii)(B) to require that a student's IEP be designed to monitor the student's progress in achieving the standards-based goals. Comment: Some commenters stated that requiring a student to be receiving instruction in grade-level content in order to be assessed based on modified academic achievement standards would encourage social promotion or retention.

Discussion: As noted above, we removed the requirement that a student be receiving instruction in grade-level content in order to be assessed based on modified academic achievement

standards because it was misinterpreted to mean that only students achieving close to grade-level could potentially be assessed based on modified academic achievement standards. However, we continue to believe that it is critical to ensure that students who participate in an alternate assessment based on modified academic achievement standards receive instruction in grade-level content. We believe that students who are not exposed to grade-level content will not learn the content, which will delay their learning and increase the likelihood of being retained or socially promoted.

Changes: None.

Comment: One commenter stated that another alternate assessment is needed for students with mild cognitive impairments. Several commenters stated that, because a student's performance would not be based on grade-level academic achievement standards, the requirements for participation in an alternate assessment based on modified academic achievement standards should be stricter to ensure that students are not inappropriately assessed.

Discussion: We do not believe that another alternate assessment is needed for students with mild cognitive disabilities. These final regulations give States the flexibility to develop and implement modified academic achievement standards in ways that fit within their existing

assessment systems, while ensuring that students with disabilities are not inappropriately assessed based on modified academic achievement standards. We believe that the criteria for modified academic achievement standards in §200.1(e), along with the safeguards provided by the requirements for State guidelines in §200.1(f), are adequate to ensure that students are not inappropriately assessed based on modified academic achievement standards. Depending on the nature of a State's grade-level and alternate academic achievement standards, a State may wish to tailor its alternate assessment based on modified academic achievement standards to a more narrowly defined group of students. We, therefore, have made clear that the criteria for students to be assessed based on modified academic achievement standards in §200.1(e)(2) are only a minimum threshold and that States may add additional criteria if they choose to do so.

Changes: We have added "Those criteria must include, but are not limited to, each of the following:" to the end of §200.1(e)(2).

Comment: Several commenters requested that the regulations clarify that an IEP Team must make a determination of eligibility for each subject assessed. Other commenters added that a student who has difficulty in only one subject area

should be allowed to take an alternate assessment in that one area and take a regular assessment in the other subject(s).

Discussion: If a State chooses to develop modified academic achievement standards, proposed §200.1(e)(4) would have required that a student be allowed to take an alternate assessment based on modified academic achievement standards in one or more subjects. Thus, a student could take an alternate assessment based on modified academic achievement standards in reading, for example, and a regular assessment in mathematics. However, we agree that the regulations should state more clearly that a student's IEP Team is responsible for making a determination for each subject assessed whether the student participates in an alternate assessment based on modified academic achievement standards. Therefore, we have added a new §200.1(f)(2)(i) clarifying that States must inform IEP Teams that a student may be assessed based on modified academic achievement standards in one or more subjects. We also have added language to new §200.1(f)(1)(i)(B) (proposed §200.1(f)(1)(ii)) and §200.1(f)(2)(v) (proposed §200.1(c)(5)) to make this clear.

Changes: We have added a new §200.1(f)(2)(i) requiring States to inform IEP Teams that a student may be assessed based on modified academic achievement standards in one or more subjects for which assessments are administered under §200.2.

We also have added “These students may be assessed based on modified academic achievement standards in one or more subjects for which assessments are administered under §200.2” at the end of new §200.1(f)(1)(i)(B) (proposed §200.1(f)(1)(ii)). With this addition, proposed §200.1(e)(4) is no longer necessary and has been removed. Finally, we have added “for each subject” following “Ensure that each IEP Team reviews annually” in new §200.1(f)(2)(v) (proposed §200.1(c)(5)).

Comment: Several commenters requested that the decision to assess a student based on modified academic achievement standards be reviewed annually.

Discussion: New §200.1(f)(2)(v) (proposed §200.1(e)(5)) already requires that the decision to assess a student based on modified academic achievement standards be reviewed annually for each subject by the student’s IEP Team to ensure that those standards remain appropriate.

Changes: None.

Comment: One commenter stated that a student should not be eligible for an alternate assessment based on modified academic achievement standards unless the student had been provided with all the appropriate accommodations for the grade-level assessment.

Discussion: We believe that a student’s IEP Team is in the best position to determine whether the student should be

assessed on the regular assessment with accommodations before participating in an alternate assessment based on modified academic achievement standards and, therefore, decline to make the requested change.

Changes: None.

State Guidelines (§200.1(f))

Comment: Several commenters recommended that the regulations require a State to provide training to IEP Teams so that the guidelines are implemented in a manner that ensures that students can progress to grade-level achievement standards. The commenters also recommended requiring a State to collect and review data from LEAs on how the guidelines are being implemented and investigate LEAs when proficiency rates are higher on alternate assessments than on the regular assessment.

Discussion: Proposed §200.1(f)(1) already requires a State that defines alternate or modified academic achievement standards to establish and ensure implementation of clear and appropriate guidelines for IEP Teams to apply in determining whether a student will be assessed based on modified or alternate academic achievement standards. Furthermore, the general supervision requirements in section 612(a)(11) of the IDEA require a State to monitor the implementation of State guidelines for the participation of students with disabilities

in State and district-wide assessments. The specific ways in which a State conducts its monitoring are best left to the State to determine based on State and local needs. Therefore, we decline to require a State to investigate when proficiency rates are higher on alternate assessments as compared with regular assessments. We also do not believe it is necessary to duplicate monitoring requirements under Title I that would generate additional and unnecessary paperwork. However, we do believe that it is important to emphasize that a State is responsible for monitoring, as well as establishing and implementing State guidelines, and have made this change in the regulations.

Changes: We have changed "establish and ensure implementation of clear and appropriate guidelines" to "establish and monitor implementation of clear and appropriate guidelines" in new §200.1(f)(1)(i) (proposed §200.1(f)(1)). We also have added a new §200.1(f)(2)(ii), which reiterates the responsibility of a State to establish and monitor implementation of clear and appropriate guidelines for IEP Teams to apply for students who are assessed based on modified academic achievement standards.

Comment: One commenter argued that a State's guidelines for IEP Teams would not have the force of law and recommended that the regulations require the State to implement requirements that are enforceable by law.

Discussion: It is unnecessary to add a regulation requiring States to implement requirements that are enforceable by law because, regardless of the legal mechanism a State uses to implement guidelines for IEP Teams, those guidelines must meet the requirements of these regulations in order for the State to be in compliance with part A of Title I and to continue to receive funds under this part.

Changes: None.

Comment: Several commenters stated that the regulations should include additional guidelines to ensure that States use similar criteria to identify students to be assessed based on modified academic achievement standards. One commenter stated that the guidelines should draw a "bright line" between students with the most significant cognitive disabilities and students assessed based on modified academic achievement standards. Specifically, the commenter recommended clarifying that students with the most significant cognitive disabilities are those who will never be able to demonstrate progress on grade-level academic achievement standards even if provided with the very best possible education and accommodations.

Discussion: Section 200.1(d), regarding alternate academic achievement standards, and §200.1(e), regarding modified academic achievement standards, leave to each State the responsibility to define the students with disabilities who

may be assessed based on alternate or modified academic achievement standards. These final regulations set certain parameters that a State must meet, but we do not believe it is the proper role of the Federal government to specifically set forth a "bright line" between the students who should participate in an alternate assessment based on alternate academic achievement standards versus an alternate assessment based on modified academic achievement standards. Moreover, such a distinction may vary from one State to the next depending on how States have organized their State content standards and established their academic achievement standards.

Changes: None.

Inclusion of All Students (§200.6)

Students Eligible Under IDEA and Section 504 (§200.6(a))

Comment: One commenter recommended that the regulations permit students with disabilities to use modifications, as well as accommodations, in State assessments. The commenter stated that an accommodation in one State (e.g., a calculator) may be considered a modification in another State and that this variation is unfair to students and schools.

Discussion: A "modification" used in an assessment is generally regarded as a change in test administration that alters what is being measured and, therefore, results in an

invalid test score. Whether a particular support, such as use of a calculator, is considered a modification or an accommodation can only be determined by considering the intended purpose and content of an assessment. States vary in terms of the purposes and content of their assessments and, therefore, may vary in terms of whether a particular support provided to a student during an assessment is considered a modification or an accommodation. States determine whether a particular testing procedure or support, such as use of a calculator, invalidates the results. States must provide evidence for the Department's peer review of Statewide assessment systems under Title I of the ESEA that their State assessments are valid and reliable for the purposes for which the assessments are used, and are consistent with relevant, nationally recognized professional and technical standards. Therefore, we decline to make the change requested by the commenter.

Changes: None.

Comment: Several commenters recommended that States develop and disseminate information on, and promote the use of, appropriate accommodations for alternate assessments based on modified and alternate academic achievement standards, in addition to assessments based on grade-level standards.

Discussion: Section 1111(b)(3)(C)(ix)(II) of the ESEA and section 612(a)(16) of the IDEA already require a State to provide appropriate accommodations for students to participate in a State's assessment system. This includes accommodations for alternate assessments. Therefore, the change recommended by the commenters is unnecessary.

Changes: None.

Comment: None.

Discussion: In reviewing the proposed regulations, we noted that §200.6(a)(1)(ii)(A) referred to "grade-level academic achievement standards." We wanted to be clear that §200.6(a)(1)(ii)(A) refers to the academic achievement standards for the grade in which the student is enrolled. Therefore, we have made this change in §200.6(a)(1)(ii)(A).

Changes: Section 200.6(a)(1)(ii)(A) has been changed by adding "for the grade in which a student is enrolled" following "academic achievement standards" and removing "grade-level" before "academic achievement standards."

Comment: One commenter recommended requiring a State to (A) develop assessments that are universally designed and valid for the widest possible range of students; (B) study the effect of accommodations on the validity of the State's assessment in order to identify which accommodations are valid

for each assessment; and (C) document the extent to which universal design principles are not used.

Discussion: We decline to make the changes requested by the commenter. The IDEA regulations already require a State (or in the case of a district-wide assessment, an LEA), to the extent feasible, to use universal design principles in developing and administering assessments. (See new §300.160(g) (proposed §300.160(f)) and section 612(a)(16)(E) of the IDEA.)

The Department's peer review of Statewide assessment systems under Title I of the ESEA requires a State to provide evidence that its State assessments are valid and reliable for the purposes for which they are used and are consistent with relevant, nationally recognized professional and technical standards. In order to ensure that assessments are valid and reliable and meet the technical quality requirements of the peer review, a State must study the effect of accommodations on the validity of the State's assessment.

We believe that implementing the commenter's recommendation to require States to document the extent to which universal design principles are not used (e.g., defining "universal design principles") would require significant resources and time and be a burden for a State to report.

Therefore, we decline to make the changes requested by the commenters.

Changes: None.

Comment: One commenter recommended changing §200.6(a)(1)(ii)(B) to require a State to ensure that related services providers, in addition to regular and special education teachers, know how to administer assessments and use appropriate accommodations.

Discussion: Section 200.6(a)(1)(ii)(B) already requires States to ensure that "other appropriate staff," in addition to regular and special education teachers, know how to administer assessments and make appropriate use of accommodations. We believe State and local authorities are in the best position to determine the other appropriate staff, which could include related services providers, who must know how to administer assessments and make use of appropriate accommodations. Therefore, we decline to make the change requested by the commenter.

Changes: None.

Comment: A few commenters recommended requiring a State to develop personnel standards and provide professional development in order to ensure that all educators are skilled in administering assessments and providing appropriate accommodations.

Discussion: Section 200.6(a)(1)(ii)(B) requires States to ensure that regular and special educators, as well as other appropriate staff, know how to administer assessments and make use of appropriate accommodations. Whether a State ensures that this occurs through developing personnel standards or professional development is best left for each State to determine.

Changes: None.

Comment: One commenter recommended changing §200.6(a)(2)(iii) to require that students with the most significant cognitive disabilities be involved in and make progress in the general curriculum, consistent with the IDEA. The commenter also recommended that the regulations be changed to require students with the most significant cognitive disabilities to be included in assessments that are aligned to the content standards for the grade in which the student is enrolled.

Discussion: Section 200.6(a)(2)(iii) already requires a State to document that students with the most significant cognitive disabilities are included in the general curriculum. Further, as the commenter notes, the IDEA requires students with disabilities to be involved in the general curriculum. Specifically, section 614(d)(1)(A)(i)(IV)(bb) of the IDEA requires each student's IEP to include a statement of the special education and related services and supplementary aids

and services to be provided to the child to be involved in and make progress in the general education curriculum. This requirement applies to all students with disabilities, including students with the most significant cognitive disabilities. Therefore, we do not believe it is necessary to repeat this requirement in §200.6(a)(2)(iii). However, in preparing these final regulations, we noted an error in current §200.6(a)(2)(iii)[3] in the NPRM. Current §200.6(a)(2)(iii) requires that, if a State permits the use of alternate assessments based on alternate academic achievement standards, the State must document that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum. In the NPRM for these final regulations on modified academic achievement standards, "maximum" was inadvertently added before "extent possible." We have corrected this error in the final regulations. It is important to correct this error because the provision could be interpreted as extending authority beyond the IDEA, which requires each student's IEP to include a statement of the special education and related services and supplementary aids and services to be provided to the child to

[3] Current §200.6(a)(2)(iii) was finalized in the December 9, 2003 regulations for students with the most significant cognitive disabilities (68 FR 68698).

be involved in and make progress in the general education curriculum.[4]

With regard to the comment that the regulations be changed to require students with the most significant cognitive disabilities to be included in assessments that are aligned to the curriculum for the grade in which the student is enrolled, the Department's non-regulatory guidance on alternate academic achievement standards for students with the most significant cognitive disabilities states that, if a State chooses to establish alternate academic achievement standards, such standards must be aligned with the State's academic content standards for the grade in which the student is enrolled (or in the case of students in un-graded classrooms, the grade level commensurate to the student's age). (See C-3 of the guidance.)[5]

Substantive changes to existing regulations cannot be made without publishing an NPRM and providing an opportunity for the public to comment on proposed regulations. The NPRM published on December 15, 2005 regarding modified academic achievement standards did not include the recommended change to the regulations governing alternate assessments based on

[4] See section 614(d)(1)(A)(i)(IV)(bb) of the IDEA.
[5] Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities (August, 2005) is available at http://www.ed.gov/policy/elsec/guid/altguidance.doc.

alternate academic achievement standards. Therefore, we cannot make the requested change in these final regulations.

Changes: We have deleted "maximum" before "extent possible" in §200.6(a)(2)(iii).

Alternate Assessments that Measure Performance based on Modified Academic Achievement Standards (§200.6)(a)(3))

Comment: Many commenters recommended requiring that an assessment based on modified academic achievement standards be referred to as an alternate assessment.

Discussion: We did not describe assessments based on modified academic achievement standards as alternate assessments in the NPRM because we wanted to distinguish such assessments from alternate assessments based on alternate academic achievement standards. However, we agree with the commenter that it would be clearer to refer to such assessments as alternate assessments and have made this change in the regulations.

Changes: Where appropriate, we have inserted "alternate" before "assessment" throughout the regulations to make clear that an assessment based on modified academic achievement standards is an alternate assessment.

Comment: Many commenters suggested that terminology be clarified to differentiate among various alternate assessments using "modified assessment" to refer to an assessment based on modified academic achievement standards and "adapted

assessment" to refer to an alternate assessment based on alternate academic achievement standards.

Discussion: Precise use of terminology to avoid confusion in the development and use of alternate assessments for students with disabilities is desirable. However, the particular terms suggested by the commenters would not likely accomplish this goal. In the measurement community "modified assessment" has a restricted meaning that is not consistent with the intent of the assessment permitted under these regulations, and we believe "adapted assessment" does not accurately convey that an alternate assessment is based on alternate academic achievement standards. Therefore, we decline to make the changes recommended by the commenters.

Changes: None.

Comment: Several commenters requested that the regulations define "aligned," as used in new §200.6(a)(3)(ii)(A) (proposed §200.6(a)(3)(i)). One commenter requested that the regulations include the criteria that will be used to determine whether there is sufficient coverage of grade-level content standards. One commenter recommended requiring alternate assessments based on modified academic achievement standards to assess the core objectives of a State's grade-level academic content standards.

Discussion: We decline to include a definition of "alignment" in these regulations because it is a term of art in the assessment field. However, the Department's standards and assessment peer review guidance for Title I includes several characteristics of alignment that are considered by peer reviewers in determining whether assessments are aligned with content standards. First, reviewers consider the range of content, meaning that all of the standards are represented in the assessment and that the assessment is as cognitively challenging as the standards (depth/difficulty). This is the single aspect of alignment that may differ between the regular grade-level assessment and an alternate assessment based on modified academic achievement standards. Second, reviewers look for evidence that the assessment represents both the content knowledge and the process skills evident in the content standards. Third, reviewers consider whether the assessment reflects the same degree and pattern of emphasis as the content standards (balance). Generally, an alternate assessment based on modified academic achievement standards should be aligned with grade-level content standards in the same manner as the regular assessment. That is, it should represent the full array of content standards, including factual knowledge and application skills, with the same pattern of emphasis that is evident in the content standards.

The Department's peer review guidance further states "[i]f a State's assessments do not adequately measure the knowledge and skills specified in the State's academic content standards, or if they measure something other than what these standards specify, it will be difficult to determine whether students have achieved the intended knowledge and skills. As a result, it will be difficult to make appropriate policy, program, and instructional decisions meant to improve students' achievement." (page 41)[6]

An alternate assessment based on modified academic achievement standards should be aligned with grade-level content standards in the same manner as the general test, with the possible exception of a reduced level of cognitive demand, sometimes referred to as depth of knowledge. This is a critical difference between an alternate assessment based on modified academic achievement standards and an alternate assessment based on alternate academic achievement standards, which is viewed as aligned with grade-level content standards even though the content has been simplified or represented as pre-requisite skills that are an essential part of the grade-level content.

[6] Standards and assessment peer review guidance: Information and examples for meeting requirements of the No Child Left Behind Act of 2001, (April 28, 2004). Available at http://www.ed.gov/policy/elsec/guid/saaprguidance.doc

The assumption underlying the requirement for alignment is that many students eligible for an alternate assessment based on modified academic achievement standards are in a regular classroom with children of the same chronological age; they are receiving instruction in the grade-level curriculum but because of their disability are not likely to meet grade-level academic achievement standards in the year covered by their IEPs. These students may need a less difficult test in order to effectively demonstrate their knowledge of the grade-level content standards.

We do not agree with the recommendation that an alternate assessment based on modified academic achievement standards be required to assess only the "core objectives" of a State's grade-level academic content standards. Modified academic achievement standards must represent the full array of content standards, including factual knowledge and application of skills, with the same pattern of emphasis that is evident in the content standards. This is so, regardless of how a State structures its academic content standards. The approach taken by a State to ensure the alignment of modified academic achievement standards to grade-level content standards will depend on how the State has structured its academic content standards. Content standards may be grade specific or may cover more than one grade if grade-level content expectations

are provided for each grade. Ultimately, a State that chooses to develop and implement modified academic achievement standards must demonstrate during the Department's peer review of State assessments that its alternate assessment based on modified academic achievement standards is aligned with challenging grade-level academic content standards in the same manner as is required for the approval of the State's regular assessment. The Department acknowledges that measuring the academic achievement of students with disabilities, particularly those who will be eligible to be assessed based on modified academic achievement standards, is an area in which there is much to learn and improve. We welcome information from States and others on ways to improve the assessment of students with disabilities. As data and research on assessments for students with disabilities improve, the Department may decide to issue additional regulations or guidance.

Changes: None.

Comment: Several commenters argued that the regulations should permit the use of out-of-level assessments. Another commenter questioned whether out-of-level assessments would be as valid as alternate assessments based on modified academic achievement standards.

Discussion: Alternate assessments based on modified academic achievement standards are intended for a small group of students who, by virtue of their disability, are not likely to meet grade-level achievement standards in the year covered by their IEPs, despite appropriate instruction. These students need the benefit of access to grade-level content so that they can move closer to grade-level achievement. Therefore, alternate assessments based on modified academic achievement standards must be aligned with grade-level content standards.

Out-of-level testing means assessing students enrolled in a specific grade with tests designed for students at lower grades. By definition, an out-of-level assessment does not cover the same content as an assessment based on grade-level content standards. Out-of-level testing is often associated with lower expectations for students with disabilities, tracking such students into lower-level curricula with limited opportunities. Therefore, an out-of-level assessment cannot be used as an alternate assessment based on modified academic achievement standards.

Changes: None.

Comment: One commenter recommended requiring an alternate assessment based on modified academic achievement standards to be distinguished from the regular assessment by more than a lower cut score or a change in administration or format.

Discussion: New §200.1(e)(1)(iv) makes clear that modified academic achievement standards must be developed through a documented and validated standards setting process that includes broad stakeholder input, and §§200.2(b) and 200.3(a)(1) make clear that an alternate assessment based on modified academic achievement standards must meet the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards. Merely changing the cut-score on a regular assessment would not be sufficient to meet these requirements.

Changes: None.

Comment: Many commenters requested additional guidance on developing an alternate assessment based on modified academic achievement standards.

Discussion: Grade-level content standards serve as the foundation of an alternate assessment based on modified academic achievement standards. Beyond this essential requirement, a State may construct a unique assessment or adapt its regular assessment. We have added this language to the regulations to make this clear. In addition, the Department will be issuing nonregulatory guidance and providing technical assistance to assist States in developing

alternate assessments based on modified academic achievement standards.

Changes: We have simplified proposed §200.6(a)(3) by deleting references to paragraphs (a)(1) and (a)(2) and including a new paragraph (a)(3)(i) to permit a State that chooses to assess students with disabilities based on modified academic achievement standards to develop a new alternate assessment or adapt an assessment based on grade-level academic achievement standards. We also have added a new paragraph (a)(3)(ii) that lists the requirements for an alternate assessment based on modified academic achievement standards. Proposed paragraphs (a)(3)(i) through (a)(3)(iv) have been redesignated as new paragraphs (a)(3)(ii)(A) through (a)(3)(ii)(D), respectively.

Reporting (§200.6(a)(4))

Comment: Several commenters recommended requiring a State to report the number and percentage of students using accommodations who take alternate assessments based on modified academic achievement standards, alternate assessments based on grade-level academic achievement standards, and alternate assessments based on alternate academic achievement standards. The commenters stated that these data are necessary to measure whether students are receiving appropriate accommodations and whether these accommodations are helping students achieve.

Discussion: Section 200.6(a)(4) already requires a State to report on the number and percentage of students with disabilities taking regular assessments; regular assessments with accommodations; alternate assessments based on grade-level academic achievement standards; alternate assessments based on modified academic achievement standards; and alternate assessments based on alternate academic achievement standards. We believe that requiring a State to report the additional data requested by the commenters would place a significant burden on the State. In addition, such data would not, by itself, provide information regarding whether students are receiving appropriate accommodations and whether those accommodations are helping students achieve. Therefore, we decline to make the change requested by the commenters.

We have, however, changed the order of the list of assessments in §200.6(a)(4) so that "alternate assessments based on the grade-level academic achievement standards" follows "regular assessments with accommodations." This will appropriately keep the three types of assessments based on grade-level academic achievement standards together in the list, to be followed by "alternate assessments based on the modified academic achievement standards," and "alternate assessments based on the alternate academic achievement standards."

Changes: We have redesignated proposed paragraph (a)(4)(iv), regarding alternate assessments based on grade-level academic achievement standards, as new paragraph (a)(4)(iii), and proposed (a)(4)(iii), regarding alternate assessments based on modified academic achievement standards, as new paragraph (a)(4)(iv).

Comment: One commenter recommended requiring the Department to provide an annual report to Congress on the implementation of the regulations regarding modified academic achievement standards. One commenter asked who receives the data required under §200.6(a)(4). Another commenter expressed concern that reporting the data in §200.6(a)(4) could violate a student's right to privacy under the Family Educational Rights and Privacy Act (FERPA) if there were small numbers of students taking any of the assessments.

Discussion: Section 200.6(a)(4) pertains to the requirements in part A of Title I for reporting data to the Secretary and ensures that the data reported in accordance with section 1111(h) of the ESEA include data on assessments based on alternate academic achievement standards and modified academic achievement standards. We have added language to §200.6(a)(4) to make this clear. These data are also reported to Congress and, therefore, we do not believe that an additional report to Congress is necessary, as suggested by one commenter. With

regard to the commenter who expressed concern with the data reporting requirements and a student's right to privacy, a State is not required to report data that would violate FERPA (20 U.S.C. 1232g).

Changes: We have added "to the Secretary" following "A State must report separately" to make clear that the assessment data referred to in §200.6(a)(4) are reported separately to the Secretary.

Comment: One commenter recommended requiring LEAs and SEAs to collect data on the disability and race of students who are assessed based on modified academic achievement standards.

Discussion: We believe that requiring LEAs and SEAs to collect data on the disability and race of students who are assessed based on modified academic achievement standards would place an unnecessary burden on SEAs and LEAs and, therefore, decline to implement the commenter's recommendation.

Changes: None.

Disaggregation of Data (§200.7)

Comment: Several commenters supported proposed §200.7(a)(2) that would prohibit a State from establishing a different minimum number (group size or "n size") of students for some subgroups, regardless of whether a State chooses to implement modified academic achievement standards. The commenters

stated that having the same group size for all subgroups would ensure transparency and greater accountability.

However, one commenter stated that the same group size across all subgroups should be required only for States that develop modified academic achievement standards. The commenter also expressed concern that requiring the same group size across all subgroups could reduce the desire by some schools and districts to accept out-of-area students due to concerns that adding more students in a subgroup would affect their accountability status.

Discussion: Prior to the implementation of the final regulations on alternate academic achievement standards for students with the most significant cognitive disabilities and the announcement of the proposed regulations on modified academic achievement standards, a State had limited flexibility in measuring the achievement of students with disabilities for AYP purposes. Because of ongoing concerns about how accurately State assessments measure the achievement of a very heterogeneous subgroup of students (many of whom were assessed with a range of accommodations to the regular assessment), some States requested permission to use a larger group size for their students with disabilities and limited English proficient subgroups. In support of their requests, States argued that a larger group size for these subgroups of

students would take into consideration the challenges of measuring their achievement.

With the implementation of these final regulations on modified academic achievement standards and the Title I regulations on assessment and accountability for recently arrived and former limited English proficient (LEP) students (71 FR 54187 (Sept. 13, 2006)), we believe that States now have sufficient flexibility to measure the achievement of students with disabilities and LEP students appropriately and, therefore, no longer need a different group size for these subgroups. In addition, all States now test in grades 3 through 8 and once in high school, as opposed to just once per grade span, thereby decreasing the sampling error associated with smaller group sizes. With these additional test scores to include in AYP determinations, the argument for a larger group size for these two subgroups is no longer statistically justified. Setting a different subgroup size also may lead to unintended consequences, such as manipulating the number of students with disabilities in a particular school to ensure that the school will not be held accountable for those students. We believe that, in order to ensure that schools are held accountable for the achievement of students with disabilities (as well as for students with limited English

proficiency), the use of differentiated subgroup sizes for purposes of measuring AYP must end.

Given the timing of these regulations, we do not expect States with differentiated subgroup sizes to make this change for the 2006-07 school year. Therefore, we have added language to make clear that this provision takes effect for AYP determinations based on assessments administered in the 2007-08 school year.

Changes: We have added "Beginning with AYP decisions that are based on the assessments administered in the 2007-08 school year," at the beginning of the sentence in §200.7(a)(2)(ii).

Comment: Some commenters recommended changing §200.7(a)(2)(ii) to require a State to set group sizes consistent with the smallest of its existing subgroups.

Discussion: States that need to adjust their group sizes in order to comply with §200.7(a)(2)(ii) must do so by amending their accountability plans with the approval of the Department. The Department will consider each State's rationale for its proposed group size (consistent across all groups). We do not believe it is appropriate to mandate a particular group size or to require a specific process by which a State establishes its group size and, therefore, decline to make the recommended change.

Changes: None.

Comment: One commenter agreed with the decision to prohibit different group sizes for subgroups, but did not agree that the group size for the school as a whole should be the same as that of each subgroup.

Discussion: Section 200.7(a)(2)(ii) was intended to require the minimum group size for a school as a whole (the ”all students” group) to be the same as that of each subgroup. Therefore, we have changed §200.7(a)(2)(ii) to make this clear.

There may be instances where the number of students in a school is less then a State’s minimum group size. A State must have a policy in place to determine AYP for every school, even in these cases. Given that requirement, a State may choose to have a minimum group size of zero for the “all students” group. However, a State may not choose a minimum group size for the “all students” group, other than zero, that is different than that of its subgroups.

Changes: Section 200.7(a)(2)(ii) has been revised by adding “or for the school as a whole” at the end of the sentence.

Adequate Yearly Progress in General (§200.13)

Comment: Many commenters stated that there is no extant research to support establishing a 2.0 percent cap on the number of proficient and advanced scores based on modified academic achievement standards that may be included in AYP

determinations. Many commenters stated that the research cited in the NPRM excludes IDEA-eligible students, is based only on reading interventions for early elementary-age students, and does not include research on math or on older students.

Some commenters stated that the 2.0 percent cap is too low. However, many commenters expressed concern that the cap is too high, stating that the 2.0 percent cap on modified academic achievement standards and the 1.0 percent cap on alternate academic achievement standards translates to 3.0 percent of all students or 30 percent of students with disabilities counted as proficient for AYP purposes on alternate assessments that are not based on grade-level academic achievement standards. A few commenters stated this is considerably higher than data reported by the National Center on Educational Outcomes (NCEO) in its report on the participation of students with disabilities in 2002-03 and the 2003 data from the State of Kansas.

Discussion: To ensure that modified academic achievement standards are used appropriately, these regulations set a cap of 2.0 percent on the proficient and advanced scores of students who are assessed based on modified academic achievement standards that may be included in AYP determinations. Together with the State guidelines required

in §200.1(f), we believe that a numeric cap of 2.0 percent will discourage schools from inappropriately holding students with disabilities to lower standards.

We acknowledge that it is difficult to determine a numerical limit on the number of proficient and advanced scores based on modified academic achievement standards to be included in AYP determinations. Unlike the 1.0 percent cap on proficient and advanced scores based on alternate academic achievement standards for students with the most significant cognitive disabilities, we cannot rely on disability incidence rates because students who would be appropriately assessed based on modified academic achievement standards are less likely to be predominately from a few disability categories, as is the case with students with the most significant cognitive disabilities. In fact, we anticipate that students who are assessed based on modified academic achievement standards will be from most, if not all, the different disability categories listed in the IDEA.

We also considered data from States, including the data from NCEO[7] and the State of Kansas[8] referred to by the

[7] Clapper, A.T., Morse, A.B., Lazarus, S.S., Thompson, S.J., & Thurlow, M.L. (2005). 2003 State policies on assessment participation and accommodations for students with disabilities (Synthesis Report 56). Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[8] Posny, A. (2004). Clash of the titans: No child left behind and students with disabilities. Paper presented at the Center on Education Policy's forum on ideas to improve the NCLB accountability provisions for

commenters, recognizing that there may be variability among States in the number of students who meet the requirements to be assessed based on modified academic achievement standards. We do not expect that every State will use the full 2.0 percent cap. Therefore, rather than relying on incidence data or data from a single State or study to establish the cap for modified academic achievement standards, we relied on multiple sources of data from research and State experiences. We believe that these multiple sources of data, when considered together, provide a sound and legitimate basis for establishing the 2.0 percent cap, while at the same time protecting students from being inappropriately assigned to take an alternate assessment based on modified academic achievement standards. Because our major concern is holding students with disabilities to high standards, we have taken a conservative approach to estimating the cap. As a matter of policy, we believe this to be the right approach.

The Department reviewed several studies that indicate 2.0 percent is an appropriate cap when States, districts, and schools work to ensure that students receive appropriate educational services and interventions. The studies cited in the preamble to the NPRM included students with disabilities,

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students with disabilities and English language learners, September 14, 2004, Washington, D.C. Available at: http://www.cep-c.org/pubs/Forum14September2004/PochowskiPaper.pdf

but excluded students with the most severe cognitive impairments.[9] For example, McMaster et al. (2005) defined a group of low-performing students who were persistent non-responders to reading interventions. The group included both students identified as students with disabilities and students not identified to receive special education services, but did not include students with the most severe cognitive disabilities. McMaster et al. reported that 22 percent of the group remained two standard deviations below average on an outcome reading assessment following reading intervention. Torgensen et al. (2001) indicated that 15 to 20 percent of students with severe reading disabilities remained below average in reading comprehension following intervention. Finally, literature reviewed and reported by Lyon et al. (in press) indicates that a 2.0 percent cap is appropriate, based on the percent of students who may not reach grade-level achievement standards within the same time frame as other students, even after receiving the best-designed instructional interventions from highly trained teachers.

[9] McMaster, K.L., Fuchs, D., Fuchs, L.S., & Compton, D.L. (2005). Responding to non-responders: An experimental field trial of identification and intervention methods. Exceptional Children, 71, 445-463; Torgensen, J.K., Alexander, A.W., Wagner, R.K., Rashotee, C.A., Voeller, K.K.S., & Conway, T. (2001). Intensive remedial instruction for children with severe reading disabilities: Immediate and long-term outcomes from two instructional approaches. Journal of Learning Disabilities, 34, 33-58; Lyon, G.R., Fletcher, J.M., Fuchs, L.S., & Chhabra, V. (in press). Learning Disabilities. In E. Mash & R. Barkley (Eds.), Treatment of Childhood Disorders (2nd ed.) New York: Guilford Press.

Ideally, we would have preferred to base the 2.0 percent cap on a greater number of studies across a greater age range and encompassing more math, as well as reading, scores. However, we believe that, given the available evidence, and our desire to protect students with disabilities from being inappropriately assessed based on modified academic achievement standards, the 2.0 percent cap is appropriate, particularly considering that the cap is not a limit on the number of students who may participate in an alternate assessment based on modified academic achievement standards, and the numerous safeguards that we included in the regulations. However, the Department also desires to maintain high standards and accountability for the achievement of all students with disabilities and, therefore, welcomes comments and data from States and others about how the regulations are working and may consider revising the regulations in the future should the comments indicate a need to do so. In addition, the Department intends to issue a report on the implementation of these regulations after two years of implementation. As data and research on assessing students with disabilities improve, the Department may decide to issue regulations or guidance on other related issues in the future.

Changes: None.

Comment: A few commenters stated that the 2.0 percent cap violates the IDEA requirement that students with disabilities receive a free appropriate public education (FAPE). The commenters acknowledged that the cap imposes a limit on the number of proficient and advanced scores that may be counted as proficient for purposes of calculating AYP and is not a limit on the number of students who may be assessed based on modified academic achievement standards. However, the commenters stated that LEAs will put pressure on IEP Teams to inappropriately include students in the regular assessment when an LEA is close to reaching the 2.0 percent cap, which would be a violation of FAPE.

Discussion: Section 200.1(f) of these final regulations requires States to establish and monitor guidelines for IEP Teams to apply in determining which students with disabilities will be assessed based on alternate and modified academic achievement standards. In addition, §300.160(c), consistent with section 612(a)(16) of the IDEA, requires a State (or in the case of a district-wide assessment, an LEA) to develop and implement alternate assessments and guidelines for the participation of students who cannot participate in the regular assessment even with accommodations. These guidelines are intended to increase the options for IEP Teams regarding appropriate assessments. The guidelines, however, cannot

guarantee that all IEP Team decisions are the most appropriate.

Under the general supervision requirements in §300.149, consistent with section 612(a)(11) of the IDEA, we anticipate that a State will exercise its authority to ensure that LEAs and IEP Teams follow the State guidelines and give thoughtful, careful consideration to the assessment that is most appropriate for an individual student so that the situation described by the commenters does not occur.

Changes: None.

Comment: One commenter recommended that the regulations allow a State to determine the number of students in an LEA who may take an alternate assessment based on alternate or modified academic achievement standards. The commenter also recommended giving a State the authority to take corrective action to prevent an LEA from exceeding the 1.0 and 2.0 percent caps.

Discussion: Permitting a State to impose numeric limits on the number of students to whom an LEA may administer alternate assessments, thereby excluding a student whose IEP Team determines that an alternate assessment is the most appropriate assessment for the student, would be inconsistent with the IDEA. Section 614(d)(1)(A)(i)(VI) of the IDEA gives a student's IEP Team the authority to determine how a student

with a disability will participate in State and district-wide assessments. IEP Team decisions should be consistent with State guidelines, including guidelines for alternate assessments based on alternate or modified academic achievement standards. Therefore, we cannot make the change requested by the commenter.

With regard to the commenter's second recommendation to give a State the authority to take corrective action to prevent an LEA from exceeding the 1.0 percent and 2.0 percent caps, under §200.13(c)(3), an LEA may exceed the 2.0 percent cap only if the number of proficient and advanced scores on the alternate assessment based on alternate academic achievement standards is less than 1.0 percent, and the number of proficient and advanced scores based on modified and alternate academic achievement standards combined does not exceed 3.0 percent of all students assessed. Likewise, a State may grant an exception to an LEA and permit the LEA to exceed the 1.0 percent cap under the conditions listed in §200.13(c)(5). If an LEA does not abide by these provisions and exceeds the 1.0 and 2.0 percent caps inappropriately, §200.13(c)(7) already requires a State to count as non-proficient the proficient and advanced scores that exceed the caps and determine which scores to count as non-proficient in

the schools and LEAs responsible for students who are assessed based on alternate or modified academic achievement standards.

Changes: None.

Comment: One commenter asked if a State would be allowed to assess students on alternate assessments based on alternate academic achievement standards if the State chose not to assess students based on modified academic achievement standards.

Discussion: The development of modified academic achievement standards and assessments based on those standards is voluntary and does not affect a State's implementation of alternate assessments based on alternate academic achievement standards. Therefore, a State that already provides an alternate assessment based on alternate academic achievement standards may choose not to provide an alternate assessment based on modified academic achievement standards.

Changes: None.

Comment: Several commenters opposed the prohibition on a State requesting an exception to the 1.0 percent cap on the number of proficient and advanced scores on alternate assessments based on alternate academic achievement standards that may be included in AYP determinations. Some commenters recommended permitting a State to exceed a combined total of 3.0 percent; other commenters supported a "dotted line"

approach that would set an absolute cap of 3.0 percent, but would permit a State to exceed the 1.0 percent cap or the 2.0 percent cap. Some commenters stated that, by not allowing exceptions, the Department was eliminating the distinction between students with the most significant cognitive disabilities and students for whom modified academic achievement standards are appropriate and asked what would happen to the scores of students in a State that had previously received an exception to exceed the 1.0 percent cap. Commenters also were concerned about rural States and the need for exceptions for very small school districts. Other commenters supported not allowing exceptions. One commenter stated that there should be a lower cap, and that exceptions should be permitted based on a lower cap.

Discussion: The final regulations on alternate academic achievement standards permitted a State to request an exception to the 1.0 percent cap to account for extraordinary circumstances in the State that warranted an exception, or for a rural State with small numbers of students. Since the final regulations were issued in December 2003, the Department has granted exception requests to four States. Two requests were for statistical reasons due to the rural nature of the State. The other two requests were for very small increments over 1.0 percent. In both of the latter cases neither State has used

the exception because less than 1.0 percent of students tested scored proficient or advanced on the alternate assessment based on alternate academic achievement standards.

Based on the requests submitted to date, we believe that there is no real need to have an exception to the 1.0 percent cap at the State level. When there are truly unique circumstances within an LEA, such as a hospital with special services, the LEA exception process should suffice. In addition, as we stated in the preamble to the proposed regulations on modified academic achievement standards, we do not believe that it is appropriate or necessary to permit more than 3.0 percent of proficient and advanced scores on alternate assessments based on alternate or modified academic achievement standards to be included in AYP determinations.

We do not agree with the commenters who proposed an absolute cap of 3.0 percent while allowing a State to exceed the 1.0 or 2.0 percent caps. Section 200.13(c)(3) permits a State's or LEA's number of proficient and advanced scores based on modified academic achievement standards to exceed the 2.0 cap only if the number of proficient and advanced scores based on alternate academic achievement standards is less than 1.0 percent. We believe that this may encourage the participation of students who are currently assessed based on alternate academic achievement standards to be assessed based

on the more challenging modified academic achievement standards. A State may not exceed the 1.0 percent cap when there are less than 2.0 percent of proficient and advanced scores on modified academic achievement standards because we do not want to create an incentive to identify more students for alternate assessments based on the less challenging alternate academic achievement standards.

Changes: None.

Comment: One commenter recommended changing §200.13(c)(5)(i)(C) to require an LEA to document that it is "fully and effectively" implementing the State's guidelines for IEP Teams before it is granted an exception to the 1.0 percent cap on proficient and advanced scores based on alternate academic achievement standards.

Discussion: Section 200.13(c)(5) permits a State to grant an exception to an LEA to exceed the 1.0 percent cap on proficient and advanced scores based on alternate academic achievement standards if the LEA demonstrates that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the combined grades assessed, and if the LEA explains why the incidence of such students exceeds 1.0 percent of all students in the combined grades assessed.

We do not believe it is necessary to add the requirement suggested by the commenter that an LEA demonstrate that it has fully and effectively implemented the State's guidelines. A State must seriously consider whether to grant an exception to an LEA to exceed the 1.0 percent cap because the State may not exceed the 1.0 percent cap. We believe that, in the course of determining whether to grant an exception to an LEA, a State will consider whether the LEA has followed the State's guidelines and appropriately identified students to participate in an alternate assessment based on alternate academic achievement standards.

Changes: None.

Making Adequate Yearly Progress (§200.20)

Comment: One commenter stated that multiple assessment administrations should be permitted for all students, not just for students with disabilities.

Discussion: Current §200.20(c)(3) applies to all students, not just students with disabilities. Therefore, the removal of current §200.20(c)(3) permits multiple test administrations for all students.

Changes: None.

Comment: Most commenters supported removing current §200.20(c)(3), which requires a State to use a student's results from the first administration of the State assessment

to determine AYP. However, a number of commenters opposed this change and requested that the regulations continue to require a State to use the results from the first administration of a test. A few commenters stated that the results from only the first administration of an assessment should be used because these scores provide a more accurate measure of school accountability. The commenters stated that accountability determinations based on the first assessment administered reflect the effectiveness of a school's core academic program, while scores from subsequent administrations improve a school's AYP and give credit for successful remediation.

One commenter expressed concern that administering an assessment multiple times compromises the reliability of accountability determinations because students learn the test. Another commenter requested additional guidance regarding how many times a State may administer an assessment and whether different forms of the assessment must be used. Some commenters suggested limiting retests to one additional test administration each year to avoid excessive testing and delays in releasing AYP data.

One commenter suggested changing the regulations to prevent retesting a student with a different type of assessment or in a different manner (e.g., with an

accommodation) for the sole purpose of obtaining a proficient score. Several commenters expressed concern that the removal of current §200.20(c)(3) would result in excessive testing. Other commenters stated that allowing a State to use the best score from multiple administrations of a test might result in teachers concentrating on test preparation instead of improving instruction.

Discussion: A State that permits multiple administrations of its assessment must ensure that the assessment continues to be reliable and valid and provide an accurate measure of school accountability.

We understand that permitting multiple administrations of an assessment may raise concerns about over-testing and focusing on test preparation, rather than instruction. However, we continue to believe that allowing a State to use the best score of multiple administrations of an assessment will motivate students, parents, schools, and States to continue working to attain grade-level achievement and thereby result in greater student success.

Changes: None.

Comment: A few commenters recommended allowing a student's IEP Team to determine the number of times the student may retake an assessment.

Discussion: The IEP Team is responsible for determining how a student will participate in State and district-wide assessments. (See §300.320(a)(6) of the IDEA regulations.) Determining the number of times a student retakes an assessment is not the role of the IEP Team. IEP Teams do not have the authority to override a State policy regarding the number of times a student may take an assessment.

Changes: None.

Including Scores of Students Previously Identified Under IDEA in AYP Calculations for the Students with Disabilities Subgroup (§200.20(f))

Comment: A number of commenters supported proposed §200.20(f)(1), which permits a State, in calculating AYP for the students with disabilities subgroup, to include, for up to two years, the scores of students who were previously identified under section 602(3) of the IDEA but who no longer receive special education services. These commenters applauded this section as acknowledging students' academic achievement and recognizing the positive impact of schools, teachers, and parents in facilitating that success.

A number of other commenters, however, disagreed. These commenters expressed concern that allowing a State to include former students with disabilities in the students with disabilities subgroup would mask the true performance of

students with disabilities and shift the focus away from improving instruction for those students. One commenter stated that including former students with disabilities in the disabilities subgroup would ensure that the disability label would continue to follow the students.

Discussion: We recognize that the students with disabilities subgroup is one whose membership can change from year to year as students who were once identified as needing services and an IEP exit the subgroup. Because these students have exited the subgroup, school assessment results for the students with disabilities subgroup would not reflect the gains the exiting students have made in academic achievement. Recognizing this situation, the final regulations allow a State to include "former students with disabilities" within the students with disabilities subgroup in making AYP determinations for up to two AYP determination cycles after they no longer receive special education services.

At the same time, however, we recognize that it is important that parents and the public have a clear picture of the academic achievement of those students with disabilities who remain identified under section 602(3) of the IDEA. Thus, the final regulations distinguish between including former students with disabilities in the subgroup for reporting

assessment data and including them in the subgroup when reporting AYP on State and LEA report cards.

Under section 1111(h)(1)(C) and section 1111(h)(2)(B) (as that section applies to an LEA and each school served by the LEA) of the ESEA, information on subgroups is reported in two distinct ways. Under section 1111(h)(1)(C)(i), (iii), (iv), (v), and (vi) and section 1111(h)(2)(B) (as that section applies to an LEA and each school served by the LEA) of the ESEA, information is reported for all students and the students in each subgroup, regardless of whether a student's achievement is used in determining if the subgroup has made AYP (i.e., reporting includes students who have not been enrolled for a full academic year, as defined by the State, and students in subgroups too small to meet the State's minimum group size for determining AYP). For reporting under these provisions, former students with disabilities may not be included in the students with disabilities subgroup because it is important that parents and the public have a clear picture of the academic achievement of students with disabilities who are currently identified under section 602(3) of the IDEA and are receiving services. On the other hand, section 1111(h)(1)(C)(ii) and section 1111(h)(2)(B) (as that section applies to an LEA and each school within the LEA) provide for a comparison between the achievement levels of subgroups and the

State's annual measurable achievement objectives for AYP in reading/language arts and mathematics (for all students and disaggregated by race/ethnicity, disability status, English proficiency, and status as economically disadvantaged). For this section of State and LEA report cards, a State and its LEAs are reporting on how students whose assessment scores were used in determining AYP (i.e., students enrolled for a full academic year) for reading/language arts and mathematics compare to the State's annual measurable objective for AYP. For reporting AYP by subgroup, former students with disabilities may be included in the students with disabilities subgroup. In this way, a school's and district's accountability status will reflect their good work in successfully enabling students with disabilities to make progress so that they no longer need special education services while providing parents and the public clear information on how the subgroup of students with disabilities who are still receiving services is performing.

We note, of course, that former students with disabilities, because they are no longer receiving services under section 602(3) of the IDEA, would not be eligible to be assessed based on either alternate or modified academic achievement standards.

With regard to the commenter who expressed concern that including the scores of former students with disabilities in the students with disabilities subgroup would ensure that the disability label would follow the student, we do not agree. Students who no longer receive special education services are not "labeled" as such. The inclusion of their scores in the students with disabilities subgroup is for AYP purposes only.

Since the publication of the NPRM on modified academic achievement standards, the Department published final regulations on the accountability for recently-arrived and former limited English proficient (LEP) students (71 FR 54187 (Sept. 13, 2006)) (referred to in this notice as the LEP regulations). The final LEP regulations permit a State, in determining AYP for the subgroup of LEP students, to include, for up to two AYP determination cycles, the scores of students who were LEP, but who no longer meet the State's definition of limited English proficiency. The final regulations regarding including the scores of former students with disabilities in AYP determinations that are a part of this notice mirror the final LEP regulations in current §200.20(f)(2). Therefore, we have incorporated the provisions from proposed §200.20(f)(1), regarding former students with disabilities, into current §200.20(f)(2). Incorporating these provisions into current §200.20(f)(2) has resulted in several changes to the structure

of current §200.20(f)(2) and the provisions in proposed §200.20(f)(1). For example, current §200.20(f)(2) has been organized into paragraphs (f)(2)(i)(A) and (f)(2)(i)(B) to include provisions regarding the scores of former LEP students and former students with disabilities in the LEP subgroup and students with disabilities subgroup, respectively. We have not detailed all these changes in the discussion that follows because, while the structure of new §200.20(f)(2) differs from proposed §200.20(f), the content regarding former students with disabilities is the same as proposed §200.20(f), with one exception, which is noted in the "Changes" section in the next comment.

Changes: We have incorporated the provisions in proposed §200.20(f) into current §200.20(f)(2). With these changes, proposed paragraphs (a)(1), (b), and (c)(1) are no longer needed and have been removed.

Comment: Several commenters noted that the proposed regulations could permit a State to include only the scores of some students who have exited the students with disabilities subgroup. The commenters recommended that the regulations be amended to clarify that the scores of all former students with disabilities must be included in determining AYP if the scores of any former students with disabilities are included. The commenters reasoned that a State should not have the option to

include only the proficient and advanced scores of former students with disabilities in order to raise the achievement level of the students with disabilities subgroup.

Discussion: We agree with the commenters. Whether to include the scores of former students with disabilities in the students with disabilities subgroup for up to two years is a discretionary decision of each State. However, if a State makes the decision to include the scores of former students with disabilities for AYP calculations, it must include the scores of all such students; it may not include just the scores of some students--for example, those who scored proficient or advanced--and exclude the scores of others. Of course, former students with disabilities must be included in each other subgroup to which they belong--e.g., economically disadvantaged, Hispanic, etc. We have changed the regulations to require a State to use the scores of all former students with disabilities for AYP calculations if the State decides to include the scores of any former student with a disability.

Changes: New §200.20(f)(2)(ii) has been changed by adding "must include the scores of all such students, but" at the end of the sentence.

Comment: One commenter recommended that proposed §200.20(f)(1) be amended to clarify that former students with disabilities also may be included in calculating the

participation rate for the students with disabilities subgroup.

Discussion: We do not believe it is appropriate to permit a State to include former students with disabilities in calculating the participation rate for the students with disabilities subgroup. Those students will be counted as participants in the "all students" group and in any other subgroup to which they belong. These final regulations permit a State to include the scores of former students with disabilities to determine AYP for the students with disabilities subgroup so that a school and LEA receive the benefits of their efforts in providing special education and related services that enabled students with disabilities to no longer need special education services. There is no similar justification for including former students with disabilities in calculating the participation rate of the students with disabilities subgroup. In fact, it is important for the public to know the participation rate of just students with disabilities because historically they have been excluded from Statewide assessments.

Changes: None.

Comment: Several commenters recommended that proposed §200.20(f)(2) be amended to require that the number of former students with disabilities whose scores are used for AYP must

also be included in the subgroup size for all purposes for which the scores are used. The commenters reasoned that the only reason to permit inclusion of the scores of former students with disabilities in determining AYP without adding those students to the number of students who make up the subgroup is to keep those students from increasing the subgroup beyond the minimum group size and thereby making it visible in AYP.

Discussion: The regulations are designed to assist schools and LEAs that have a students with disabilities subgroup of sufficient size (without including former students with disabilities) to yield statistically reliable information to demonstrate their progress with that subgroup by enabling those schools and LEAs to include the scores of former students with disabilities in AYP calculations for up to two years after the students no longer need special education services. Therefore, we decline to require a State or LEA that takes advantage of this flexibility also to include former students with disabilities in determining whether the students with disabilities subgroup meets the State's minimum group size. Nothing in these regulations would prevent a State or LEA that wishes to include former students with disabilities in the students with disabilities subgroup in determining whether a school or LEA has a sufficient number of

students to yield statistically reliable information under §200.7(a) from doing so.

Changes: None.

Definitions (§200.103)

Comment: A few commenters recommended including a definition of "universal design" in these regulations.

Discussion: We do not believe it is appropriate to include a definition of "universal design" in these regulations because it is a term of art with different meanings when applied to different products and services. As applied to assessments, universal design generally means that assessments are developed to be accessible for the widest possible range of students.

Changes: None.

Comment: A few commenters recommended defining "pupil services" to mean "related services," as defined in section 602(26) of the IDEA.

Discussion: Equating "pupil services" with "related services" would be inconsistent with the ESEA. Section 9101(36) of the ESEA already defines "pupil services" as including "related services." Therefore, we decline to make the change requested by the commenter.

Changes: None.

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

This summary includes comments made in response to the Title I NPRM published in the Federal Register on December 15, 2005 (70 FR 74624), as well as comments made in response to the proposed IDEA regulations published in the Federal Register on June 21, 2005 (70 FR 35839) to implement the IDEA as reauthorized by the Individuals with Disabilities Education Improvement Act of 2004, Public Law No. 108-446, enacted on December 3, 2004, regarding the inclusion of children with disabilities in State and district-wide assessment systems in accordance with section 612(a)(16) of the IDEA.

Participation in assessments (§300.160)

General (§300.160)

Comment: A few commenters requested that the regulations clearly state that all students must participate in a State's assessment program except for a child with a disability who is medically fragile and cannot tolerate the stress of participating in an assessment.

Discussion: We cannot make the requested change. Section 300.160(a), consistent with section 612(a)(16)(A) of the IDEA, is clear that a State must ensure that all children with disabilities are included in State and district-wide

assessment programs. Neither the IDEA nor these regulations permit categorical exceptions to this requirement.

Changes: None.

Comment: One commenter expressed concern that LEAs would have difficulty developing alternate assessments for district-wide assessments and requested assistance in identifying ways for LEAs to meet the requirements in section 612(a)(16)(A) of the IDEA.

Discussion: Section 612(a)(16)(A) of the IDEA is clear that all children must participate in State as well as district-wide assessments. This has been a requirement since the 1997 reauthorization of the IDEA. LEAs that conduct district-wide assessments must provide an alternate assessment for children who cannot participate in the district-wide assessment even with accommodations. Identifying the manner in which an LEA meets this requirement, however, is a matter that is best determined by State and local officials.

Changes: None.

Comment: One commenter recommended requiring benchmarks or short-term objectives to be developed for students with disabilities participating in alternate assessments based on modified academic achievement standards.

Discussion: Section 614(d)(1)(A)(i)(I)(cc) of the IDEA requires benchmarks or short-term objectives to be included

only in the IEPs of children with disabilities who participate in alternate assessments based on alternate academic achievement standards. Alternate assessments based on modified academic achievement standards are not alternate assessments based on alternate academic achievement standards. Therefore, we do not believe that benchmarks or short-term objectives should be required for children with disabilities who participate in alternate assessments based on modified academic achievement standards. Congress specifically limited the requirement for benchmarks and short-term objectives to the IEPs of children with the most significant cognitive disabilities who participate in alternate assessments based on alternate academic achievement standards. As the Senate Committee on Health, Education, Labor, and Pensions noted in Sen. Rep. No. 108-185 (p. 28), "Short-term objectives and benchmarks can focus too much on minor details and distract from the real purpose of special education, which is to ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities."

We believe that students participating in alternate assessments based on modified academic achievement standards will benefit more when IEP Teams focus on goals that are based on grade-level content standards, rather than on short-term

objectives or benchmarks. In the discussion of comments under §200.1(e)(2)(iii) in this notice, we explain why we are requiring that the IEPs of children taking alternate assessments based on modified academic achievement standards include goals based on the academic content standards for the grade in which the student is enrolled and that the IEP be designed to monitor the student's progress in achieving the student's standards-based goals.

Changes: None.

Accommodation Guidelines (§300.160(b))

Comment: A few commenters requested that the regulations clarify that accommodations that invalidate a score when used in an assessment may continue to be used in classroom instruction. Other commenters recommended that the regulations clarify that the accommodation guidelines are to be used by IEP Teams to recommend necessary and reasonable accommodations to enable a student to participate both in the instructional program and in the assessment.

Discussion: The requirements in §300.160(b) pertain to guidelines for the use of accommodations in assessments, and do not speak to the use of accommodations in the classroom. However, there is nothing in the IDEA or these regulations that would prohibit the use of accommodations in classroom instruction that, if used in a State assessment, would

invalidate a student's score. Likewise, there is nothing in the IDEA or these regulations that would prohibit a State from encouraging IEP Teams to use the accommodation guidelines for assessments to determine the instructional supports to be provided in the classroom. Such instructional supports are generally referred to as supplementary aids and services. Section 300.320(a)(4)(i), consistent with section 614(d)(1)(A)(i)(IV)(aa) of the IDEA, requires the IEP Team to identify the supplementary aids and services to be provided to a child to enable the child to advance appropriately toward meeting the child's annual IEP goals.

Changes: None.

Comment: One commenter recommended requiring States and LEAs to have methodologies in place to determine that the accommodations provided are valid and reliable and can be objectively determined. A few commenters recommended requiring a State to submit proposed accommodations for review and approval by a panel of peer reviewers.

Discussion: The Department's peer review of Statewide assessment systems under Title I of the ESEA already requires a State to provide evidence that the State's assessments are valid and reliable for the purposes for which the assessments are used, and are consistent with relevant, nationally recognized professional and technical standards. A State must

also provide evidence that appropriate accommodations are available to students with disabilities.

For State and LEA assessments that are not part of a State's assessment system under Title I of the ESEA, a State and its LEAs also have an obligation, under the IDEA, to ensure that children with disabilities have available the accommodations that are necessary to measure the academic achievement and functional performance of the child. In order to do this, States and LEAs need to determine, for each particular assessment, the accommodations that will not result in invalid scores and identify those accommodations in their accommodation guidelines. We have revised §300.160(b)(2)(i) to make this clear.

The IDEA does not dictate a specific process to be followed in determining allowable accommodations, and, therefore, we decline to adopt the recommendations that we do so at this time. We will continue to evaluate whether States are ensuring that accommodations that would not result in invalid scores are available and revisit this decision if the need to do so becomes apparent.

The commenters who recommended requiring a State to submit proposed accommodations for review and approval by a panel of peer reviewers seem to be proposing a review to determine the appropriateness of accommodations that would be

divorced from any review of the technical qualities of the State's assessments. Since decisions about whether a particular accommodation is or is not allowed depend on how a test is constructed and validated, we are not making the requested change. As required by §§200.2(b)(2) and 200.6(a)(1), a State already is under the obligation to ensure that its assessments under Title I of the ESEA are designed to be used by the widest possible number of students, and to ensure that accommodations are provided, when necessary, to measure the academic achievement of students with disabilities.

Changes: Section 300.160(b)(2)(i) has been changed to require a State's guidelines (or in the case of a district-wide assessment, an LEA's guidelines) to identify the accommodations for each assessment that do not invalidate the score.

Comment: One commenter noted that the regulations must continue to allow IEP Teams to select accommodations based on the needs of their students, without regard to whether the accommodation could yield a valid score.

Discussion: Several sections of the IDEA must be considered to evaluate the proper role of a State in identifying accommodations that do not invalidate the scores of children with disabilities (and result in children being counted as nonparticipants) and the responsibility of individual IEP

Teams to select accommodations for individual children. Under section 612(a)(16) of the IDEA, a State has a responsibility to ensure that all children with disabilities are included in State and district-wide assessments. Under section 614(d)(1)(A)(i)(VI) of the IDEA and §300.320(a)(6)(i) of the IDEA regulations, a child's IEP must include the individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child.

A State's role in this regard is thus twofold--it must ensure that children with disabilities are included in the assessments and that the accommodations that are offered to individual children with disabilities are ones that allow a child's academic achievement to be measured. This carries with it, we believe, a responsibility for each State to clearly identify for IEP Teams those accommodations that, if used, will not result in an invalid score, so that children with disabilities will be appropriately included in assessments. Therefore, as noted earlier, we have changed §300.160(b)(2)(i) to require State and LEA guidelines to identify the accommodations for each assessment that do not result in invalid scores. We also believe that, to meet its responsibility to ensure that children with disabilities are included in assessments, a State needs to instruct IEP Teams to select only accommodations that do not result in invalid

scores. The child's IEP Team, though, remains the primary decisionmaker for the accommodations that will be made available to the child. Therefore, we have changed §300.160(b)(2)(ii) to make clear that State and LEA guidelines must instruct IEP Teams to select only accommodations that do not result in invalid scores.

Changes: We have changed §300.160(b)(2)(ii) to require that State and LEA guidelines instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate a score.

Comment: Several commenters stated that a State's accommodation guidelines should focus on "appropriate accommodations" and not require "valid accommodations." These commenters stated that the focus should be on universally-designed assessments that allow many more accommodations, rather then denying children with disabilities the right to use the accommodations that are necessary to meet the child's needs. Another commenter recommended defining "appropriate accommodations" and "individually appropriate accommodations" as accommodations that are needed to meet a child's unique needs that maintain and preserve test validity, reliability, and technical testing standards.

Discussion: Tests administered with accommodations that do not maintain test validity are not measuring academic

achievement and functional performance. Therefore, providing these accommodations would be inconsistent with §300.320(a)(6)(i) and section 614(d)(1)(A)(i)(VI)(aa) of the IDEA, which require each IEP to include the appropriate accommodations that are necessary to measure the academic and functional performance of a child on State and district-wide assessments. With regard to the recommendation that a State focus on universally designed assessments, new §300.160(g) (proposed §300.160(f)) already incorporates the requirement in section 612(a)(16)(E) of the IDEA that a State, in the case of Statewide assessments, and an LEA, in the case of district-wide assessments, to the extent possible, use universal design in developing and implementing assessments. Moreover, §200.2(b)(2) of the Title I regulations requires a State's assessment system to "[b]e designed to be valid and accessible for use by the widest possible range of students, including students with disabilities."

It is not necessary to provide specific definitions of the terms "appropriate accommodations" and "individually appropriate accommodations" because we have revised the provisions in §300.160(b) to clarify what the accommodations guidelines need to include.

Changes: None.

Comment: One commenter requested that the regulations require a State and its LEAs to provide research-based decision-making tools for IEP Team members to determine appropriate testing accommodations. A few commenters recommended that the Department provide guidance regarding accommodations for children with disabilities and require States and LEAs to provide professional development to school personnel regarding the participation of students with disabilities in State and district-wide assessments.

Discussion: We do not believe that additional regulations are necessary to address the commenters' concerns. Section 300.160(b) already requires each State (or in the case of a district-wide assessment, an LEA) to develop guidelines for IEP Teams to use regarding the provision of appropriate accommodations. Section 200.6(a)(1)(ii)(B) of the Title I regulations also requires each State to ensure that regular and special education teachers, and other appropriate staff know how to administer assessments, including making appropriate use of accommodations for students with disabilities.

The Department has devoted considerable resources to provide technical assistance to States regarding the appropriate use of accommodations for children with disabilities. For example, the Office of Special Education

Programs supports the National Center on Educational Outcomes (See http://www.education.umn.edu/nceo/) and the Office of Elementary and Secondary Education supports a Comprehensive Center on Accountability and Assessments (See http://www.aacompcenter.org/). In addition, the Department's Institute of Education Sciences supports research to address questions of how assessments for accountability can best be designed and used to capture and represent proficiency and growth for children with disabilities (See http://ies.ed.gov/ncser/).

Changes: None.

Comment: One commenter recommended requiring a State to have in effect policies and procedures that explain how children with disabilities are included in assessments. The commenter stated that the policies and procedures related to assessments must include a clear statement that the IEP Team, including the parent, makes the decision regarding a child's participation in State and district-wide assessments; how parents will be notified when decisions regarding the child's participation in assessments will be made; and when reports will be distributed to parents and the public. A few commenters requested that the regulations require the IEP to include the accommodations to be provided to a child.

Discussion: The requirements recommended by the commenters are already addressed in these and other existing regulations. Section 300.160(a), consistent with section 612(a)(16) of the IDEA, requires each State to have in effect policies and procedures to ensure that all children with disabilities in the State are included in State and district-wide assessments, with appropriate accommodations and alternate assessments where necessary. Section 300.320(a)(6), consistent with section 614(d)(1)(A)(i)(VI) of the IDEA, requires a child's IEP Team, which includes the parent, to include in the IEP any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. If the IEP Team determines that a child will take an alternate assessment, the IEP Team must explain why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child. Section 300.322(b) requires that the notice to the parent regarding an IEP Team meeting indicate the purpose of the meeting, in addition to the time and location of the meeting. Finally, new §300.160(f) (proposed §300.160(e)) requires that reports on the performance of children with disabilities on State and district-wide assessments be available to the public

with the same frequency and in the same detail as reports on the assessment of nondisabled children.

Changes: None.

Comment: One commenter stated that the requirement for valid accommodations will lead to increased litigation because it violates section 607(a) and (b) of the IDEA.

Discussion: We disagree with the commenter. Section 607(a) of the IDEA states that the Secretary shall issue regulations only to the extent that such regulations are necessary to ensure compliance with the specific requirements of the IDEA. Section 607(b) of the IDEA provides that the Secretary cannot publish final regulations that would procedurally or substantively lessen the protections provided to children with disabilities in the regulations that were in effect on July 20, 1983, except to the extent that such regulations reflect the clear and unequivocal intent of Congress in legislation. We believe that §300.160(a) is necessary to ensure that the requirements in sections 612(a)(16) and 614(d)(1)(A)(i)(VI)(aa) of the IDEA are met, does not lessen protections for children with disabilities that were in regulations in effect in 1983 (the 1983 regulations did not address assessments), and reflects the clear and unequivocal intent of Congress. Section 614(d)(1)(A)(i)(VI)(aa) of the IDEA requires each IEP Team to include in an IEP the appropriate accommodations that

are necessary to measure the academic and functional performance of a child on State and district-wide assessments. Tests administered with accommodations that do not maintain test validity are not measuring academic achievement. Moreover, the importance of identifying valid accommodations was recognized on page 97 of the House Committee Report No. 108-77 (2003):

> ...States have an affirmative obligation to determine what types of accommodations can be made to assessments while maintaining their reliability and validity.... The Committee is intent on ensuring that each child with a disability receives appropriate accommodations, but is equally intent that these accommodations not invalidate the particular assessment.

Similarly, the Senate Committee Report No. 108-185 (2003) on page 30 acknowledges that appropriate accommodations will not affect the test's validity. Accordingly, we disagree that the validation requirement violates section 607(a) or (b) of the IDEA.

Changes: None.

Comment: One commenter requested a definition of "valid." Another commenter stated that the regulations should make clear that accommodations that alter the construct being assessed are not allowed.

Discussion: As used in §300.160(a), a "valid" accommodation is an accommodation that does not alter the construct that the test is intended to measure. Accommodations that affect test

validity do not measure a child's academic achievement. We believe the requirement for valid accommodations is sufficient to guide IEP Teams and, therefore, decline to add the suggested language to the regulation.

The Department's nonregulatory guidance on standards and assessment defines validity (See question F-4.) and further clarifies a State's responsibilities for the validity and reliability of assessments under Title I. This document can be found at http://www.ed.gov/policy/elsec/guid/saaguidance03.doc. We do not believe additional clarification is needed in these regulations.

Changes: None.

Comment: Several commenters requested that definitions of "accommodations" and "modifications" be included in these regulations because definitions of these two terms vary across States.

Discussion: The terms "accommodations" and "modifications" are terms of art and have different meanings depending on the context in which they are used. The terms are used in a number of ways, for example, to refer to changes to a test or testing environment, or to adaptations to an educational environment, the presentation of educational material, the method of response, or the educational content. We do not

believe it is appropriate to define such terms of art in these regulations. We also note that the term "modifications" is not used in the IDEA amendments of 2004 or the ESEA, as amended by NCLB.

Changes: None.

Comment: One commenter stated that special accommodations should be given for children with the most significant cognitive disabilities.

Discussion: Section 1111(b)(3)(C)(ix)(II) of the ESEA and section 612(a)(16) of the IDEA already require a State to provide appropriate accommodations for students with disabilities to participate in State assessment systems. This includes accommodations for alternate assessments.

Changes: None.

Alternate assessments (new §300.160(c)) (proposed §300.160(d))

Comment: One commenter stated that the regulations must specify that States and LEAs are required to develop two alternate assessments--one measuring the same academic achievement standards as all other students and the other based on alternate academic achievement standards for students with the most significant cognitive disabilities. A few commenters requested clarification as to whether alternate assessments are based on high academic achievement standards or alternate academic achievement standards. One commenter

stated that a State should be required to provide a definition of what constitutes an alternate assessment.

Discussion: Section 612(a)(16)(C)(i) of the IDEA is clear that a State must develop and implement alternate assessments and guidelines for children with disabilities, but does not specify whether the alternate assessments must be based on grade-level academic achievement standards, modified academic achievement standards, or alternate academic achievement standards. Modified academic achievement standards under §200.1(e) and alternate academic achievement standards under §200.1(d) are optional. However, having an alternate assessment is not optional if there are children with disabilities who cannot be appropriately assessed with the regular assessment. Therefore, if a State chooses not to develop an alternate assessment based on modified or alternate academic achievement standards, the State must have an alternate assessment based on grade-level academic achievement standards, unless all children with disabilities can be appropriately assessed using the regular assessment.

Section 612(a)(16)(A) of the IDEA and §300.160(a) of these regulations require a State to ensure that all children with disabilities are included in general State and district-wide assessments. Section 612(a)(16)(C)(i) of the IDEA and new §300.160(c) (proposed §300.160(d)) further require that a

State (or in the case of a district-wide assessment, an LEA) develop and implement alternate assessments and guidelines for children with disabilities who cannot participate in regular assessments even with accommodations. Under §§200.1(e) and 200.6(a)(3) of the Title I regulations published in this notice and new §300.160(c), a State has the option of developing alternate assessments based on modified academic achievement standards. For clarity, we have redesignated proposed §300.160(c) as new §300.160(c)(2)(ii) so that it is clear that an assessment based on modified academic achievement standards is an alternate assessment.

Because a State has options regarding the type of alternate assessments that it will provide for students with disabilities, a State would not necessarily report on the number of students who participated in each of the alternate assessments. To acknowledge this and for clarity, we have made clear in new §300.160(f)(2) through (f)(4) (proposed §300.160(e)(2) through (e)(4)) that a State must report the number of children with disabilities, if any, who are assessed, using an alternate assessment based on grade-level, modified, or alternate academic achievement standards, respectively. We also have removed the regulatory citations for the different academic achievement standards (e.g., "described in paragraph (d)(2)(i)") and added the name of the

particular achievement standard to which we are referring (e.g., “grade-level”) in new §300.160(f)(2) through (f)(4) (proposed §300.160(e)(2) through (e)(4)).

With regard to the request to clarify whether alternate assessments are based on high achievement standards or alternate academic achievement standards, this will depend on the type of alternate assessment. We believe that the regulations are clear that there are three types of alternate assessments permitted under Title I and the IDEA: alternate assessments based on grade-level academic achievement standards; alternate assessments based on modified academic achievement standards; and alternate assessments based on alternate academic achievement standards.

We do not believe it is necessary for a State to provide a definition of what constitutes an alternate assessment, as requested by one commenter. New §300.160(c)(2) (proposed §300.160(d)(2)) clearly lays out that alternate assessments under Title I of the ESEA must be aligned with a State’s challenging academic content standards and challenging academic achievement standards and, if a State has adopted modified academic achievement standards or alternate academic achievement standards, measure student achievement against those standards.

Changes: We have (1) redesignated proposed §300.160(c) as new §300.160(c)(2)(ii) and renumbered the subsequent paragraph; (2) added "if any" following "number of children with disabilities" in new paragraphs (f)(2) through (f)(4) (proposed paragraphs (e)(2) through (e)(4)); and (3) replaced the regulatory citation in new paragraphs (f)(2) through (f)(4) (proposed (e)(2) through (e)(4)) with the name of the particular academic achievement standards to which we are referring.

Comment: Several commenters recommended requiring public agencies to notify parents in writing when a child's IEP Team determines that the child will participate in an alternate assessment. A few commenters recommended requiring parents to be informed in writing of the consequences of their child taking an alternate assessment, including any effect on the child's eligibility for graduation with a regular high school diploma. The commenters stated that providing this information to parents is particularly important in a State that requires students to pass a State exam in order to receive a regular high school diploma.

Discussion: We agree that it is important for parents to be informed that their child will be assessed based on alternate or modified academic achievement standards. We also believe that it is important that parents, as well as other IEP Team

members, are informed about any effects of State or local policies on their student's education that may result from taking an alternate assessment based on alternate or modified academic achievement standards. As the commenters point out, this information is particularly important in a State where students must pass a particular assessment to be eligible to receive a regular high school diploma. Therefore, we have added a regulation requiring a State to provide IEP Teams, which include the parent, with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma). We also have required a State to ensure that parents of students selected to be assessed based on alternate or modified academic achievement standards are informed that their child's achievement will be measured based those standards. This also is consistent with §200.1(f)(1)(iii) and (iv) of the Title I regulations.

We do not believe it is necessary to add an additional requirement that such parental notification be provided in writing, as suggested by several commenters. Parents are integral members of the IEP Team and, as such, are involved in decisions about how their child will participate in the Statewide assessment system. Section 300.320(a)(6)(ii) of the IDEA regulations already provides that, if an IEP Team determines that a child will not participate in a particular regular State or district-wide assessment, the child's IEP must include a statement of why the child cannot participate in the regular assessment and how that child will be assessed. Under §300.322(f), a copy of the child's IEP must be provided to the parents.

Changes: We have added new paragraph (d) to §300.160 requiring a State to provide IEP Teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify the student for a regular high school diploma). We also have added a new paragraph (e)

requiring a State to ensure that parents of students selected to be assessed based on alternate or modified academic achievement standards are informed that their child's achievement will be measured based on alternate or modified academic achievement standards. The subsequent paragraph has been redesignated as new paragraph (f).

Reports (new §300.160(f)) (proposed §300.160(e))

Comment: One commenter strongly disagreed with reporting on the number of students with disabilities who receive accommodations. The commenter stated that, since accommodations do not change the outcome or alter the knowledge measured by the test, it is inappropriate to maintain this information.

Discussion: This is a statutory requirement and therefore cannot be deleted. Section 612(a)(16)(D)(i) of the IDEA requires a State (or in the case of a district-wide assessment, an LEA) to make available to the public information on the number of children with disabilities participating in regular assessments and the number of these children who were provided accommodations in order to participate in those assessments.

Changes: None.

Comment: A few commenters stated that accommodations that invalidate a test score should not be used and, therefore, it

is unnecessary to qualify in new §300.160(f)(1) (proposed §300.160(e)(1)) that the number of children participating in regular assessments who were provided with accommodations refers to the number of children participating in regular assessments who were provided with accommodations "that did not result in an invalid score."

Discussion: We agree that accommodations that invalidate a test score should not be used. However, given the lack of consistency in the field regarding the use of the term "accommodations," we believe it is important to be clear and to qualify in new §300.160(f)(1) (proposed §300.160(e)(1)) that reports on the assessment of children with disabilities who participate in regular assessments with accommodations include only those children who were provided with accommodations that did not result in an invalid score. For clarity, we also have reordered the sequence in which the alternate assessments are listed in new paragraph (f) (proposed paragraph (e)) to be consistent with the order in new §300.160(c)(2) (proposed §300.160(d)(2)).

Changes: We have redesignated proposed §300.160(e)(3), regarding alternate academic achievement standards, as new §300.160(f)(4) and redesignated proposed §300.160(e)(4)), regarding modified academic achievement standards, as new §300.160(f)(3).

Comment: A few commenters recommended requiring a State to report on the number of children with disabilities who participated in the regular assessment with accommodations that invalidated their test scores. One commenter recommended requiring a State to report on the number of children who received accommodations that invalidated their test scores on alternate assessments based on alternate academic achievement standards and alternate assessments based on modified academic achievement standards.

Discussion: Children taking an assessment with accommodations that invalidate their score should not be reported as participants. We specify in §300.160(b)(2)(ii) that a State must instruct IEP Teams to select only those accommodations for each assessment that do not result in invalid scores. Therefore, we decline to make the changes requested by the commenters.

Changes: None.

Comment: One commenter requested that a State be required to report on the performance of children with disabilities for each assessment, not just for regular assessments and alternate assessments.

Discussion: We agree that the regulation would be clearer if it identified separately alternate assessments based on grade-level academic achievement standards, alternate assessments

based on modified academic achievement standards, and alternate assessments based on alternate academic achievement standards. We have made this change in new §300.160(f)(5) (proposed §300.160(e)(5)). In addition, we have added the language inadvertently omitted requiring the performance results for children with disabilities to be compared to the achievement of all children, including children with disabilities, as specified in section 612(a)(16)(D)(iv) of the Act.

Changes: We have changed §300.160(f)(5) (proposed §300.160(e)(5)) to separately identify regular assessments, alternate assessments based on grade-level academic achievement standards, alternate assessments based on modified academic achievement standards, and alternate assessments based on alternate academic achievement standards. We also have added an introductory phrase requiring comparison with assessment results for all children, including children with disabilities.

Comment: One commenter recommended requiring a State to widely distribute information about the reports required in new §300.160(f) (proposed §300.160(e)) by posting the reports on Web sites, making the reports available in schools and libraries, and providing parents with notices that the information is available.

Discussion: New §300.160(f) (proposed §300.160(e)), consistent with section 612(a)(16)(D)(i) of the IDEA, requires a State (or in the case of a district-wide assessment, an LEA) to make available to the public, and report to the public, with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the information outlined in new §300.160(f) (proposed §300.160(e)) regarding the participation and performance of children with disabilities on State and district-wide assessments. The manner in which the information is provided to the public (e.g., via Web sites, parent notices) is a matter that is best left to State and local officials to determine.

Changes: None.

Universal design (new §300.160(g)) (proposed §300.160(f))

Comment: One commenter recommended requiring a State to document where universal design principles are not used.

Discussion: New 300.160(g) (proposed §300.160(f)), consistent with section 612(a)(16)(E) of the IDEA, requires a State (or in the case of a district-wide assessment, an LEA), to the extent feasible, to use universal design principles in developing and administering assessments. We believe that implementing the commenter's recommendation (e.g., documenting "universal design principles") would require significant resources and time and be a burden for a State to report.

Therefore, we decline to make the change requested by the commenter.

Changes: None.

Executive Order 12866

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

1. Costs and benefits

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

Summary of Public Comments: Several commenters suggested that the cost of implementing an alternate assessment based on modified academic achievement standards would be significant and that the Federal government should fund new assessments, including universally designed assessments. Some commenters disagreed with the figures from a study by the Government Accountability Office (GAO) cited in the NPRM, regarding the amount of funds spent on assessments in several States.

These comments were considered in conducting the analysis of the costs and benefits of the final regulations. The Department's estimates and assumptions on which they are based are described below.

Summary of Potential Costs and Benefits

These regulations provide States with additional flexibility in implementing the accountability requirements in Title I and the IDEA with respect to students with disabilities. Specifically, the final regulations permit States to develop and implement alternate assessments based on modified academic achievement standards for the group of students with disabilities, for whom, according to recent research and the experience of many States, these alternate

assessments are appropriate, and then to use their results in making AYP determinations. Implementation of these alternate assessments and standards would be a component of State and local efforts to improve educational outcomes for this group of students, consistent with the principles and objectives of NCLB.

The primary impact of the regulations is on the students with disabilities who are eligible to be assessed based on modified academic achievement standards. The regulations provide educational benefits to students by permitting States and LEAs to assess eligible students with disabilities using assessments that are appropriately challenging but better designed to measure their educational strengths and weaknesses and evaluate their achievement of grade-level content, and to provide information that would be helpful to teachers to guide instruction to meet the academic needs of these students so they can work toward grade-level achievement. Based on an actual enrollment of 26.3 million students[10] in grades 3 through 8 and 10 in school year 2004-2005, we estimate that as many as 530,000 children with disabilities could be affected by, and benefit from, this change in the assessment and accountability structure in school year 2008-2009.

[10] Common Core of Data (CCD), "State Nonfiscal Survey of Public Elementary/Secondary Education, 2004-05 v.1c, National Center for Education Statistics, U.S. Department of Education.

The potential costs to students would be the harm associated with including the “wrong” children in the group to be assessed based on modified academic achievement standards. Given the history of inappropriately low expectations for children with disabilities, the potential harm relates to finding students to be eligible for alternate assessments based on modified academic achievement standards who, in fact, with appropriate instruction and high quality special education services, might be able to achieve at the same high level as their non-disabled peers. The risk is that low expectations could impede the ability of these students to perform to their potential. The Secretary believes that the risk of including the “wrong” students in the group to be assessed based on modified academic achievement standards is not high because of the central role that IEP Teams play in determining how individual children will be assessed. Moreover, any harm would be minimal because the regulations require the assessment determinations to be made on an annual basis by the IEP Team and they also include a number of safeguards to ensure that students who are to be assessed based on modified academic achievement standards have access to grade-level content so that they can work toward grade-level achievement. The Secretary has concluded that the educational benefits of assessing a large number of students

whose disabilities have prevented them from achieving grade-level proficiency using more appropriate assessments and standards will outweigh any potential harm associated with assessing children based on modified academic achievement standards who might have been able to reach grade-level proficiency in the same time frame as other students. In addition to these benefits to children, these regulations will give teachers and schools credit for work that they do with these students to help them progress toward grade-level achievement, even if they are unable to reach grade-level proficiency.

Although States are not required to take advantage of the flexibility provided in these regulations, States may elect to do so, and, as a result, may incur additional administrative costs associated with the development of modified academic achievement standards and assessments based on those standards. However, little information is available for estimating these costs; we have used the limited information available to us to develop a rough estimate of the development costs for States that choose to take advantage of this flexibility.

This analysis is based on a 2003 report, issued by the GAO, "Title I: Characteristics of Tests Will Influence Expenses: Information Sharing May Help States Realize

Efficiencies," that examined the costs of developing assessments based on grade-level academic achievement standards and provides estimates for the ongoing development expenditures for existing assessments for 7 States.[11] We have some concerns about the accuracy of this information, its generalizibility, and its direct relevance to estimating the costs of developing alternate assessments based on modified academic achievement standards. With those caveats, we believe the report does provide some indication of the variation in costs among States in developing assessments and represents the best information available to us at this point in time.[12]

If we assume that GAO's category of ongoing development, which includes question writing and review, involves the kinds of activities that States would undertake in developing alternate assessments based on modified academic achievement standards, the GAO data can be used as a basis for projecting the possible costs of developing assessments based on modified academic achievement standards. For example, we can estimate an upper limit on the total costs of developing these alternate assessments--$169 million--by using the GAO data

[11] U.S. Government Accountability Office, Report 03-389, pg. 17.
[12] We received a comment from one State indicating that the cost of developing its assessments was approximately $250,000. However, we do not have any information about how that figure was derived and have, therefore, declined to use that estimate in this analysis.

reported for Massachusetts[13] and assuming that 52 jurisdictions would choose to develop alternate assessments based on modified academic achievement standards for each of the 17 assessments required by Title I to be administered in 2008-2009. Although this upper-bound estimate represents the best information available to us at this point in time, we believe it may significantly overstate the costs of developing these alternate assessments insofar as the estimate GAO included for Massachusetts, which was more than 2.4 times as large as the estimates included for 5 of the other States, may not be indicative of the costs of assessment development in other States using different types of questions or approaches to assessment.

In addition, this estimate does not reflect the reduced costs for the 4 States that already have alternate assessments based on modified academic achievement standards in place under the interim flexibility policy. States that adopted alternate assessments based on modified academic achievement standards under the interim flexibility policy would still be required to undergo peer review once the final regulations are in effect. However, if the peer review determines that no adjustments are needed to any of the assessments in these States, the estimated cost of producing alternate assessments

[13] GAO reported test development expenditures of $190,870 for the State of Massachusetts.

in the other 48 jurisdictions would be reduced to $155 million.

In addition, we do not know the extent to which States would elect to develop alternate assessments based on modified academic achievement standards for each grade and subject, since States that choose to take advantage of the flexibility are not required to develop modified academic achievement standards in every grade or every subject. However, in light of what we know about the performance of students with disabilities on State assessments and AYP determinations, we think it is highly unlikely that all States would elect to develop alternate assessments based on modified academic achievement standards for all of the required 17 assessments. If we assume that typically States would develop only 8 assessments (e.g., reading/language arts and mathematics assessments for grades 6, 7, 8, and a high school grade), which may be a more accurate estimate of the impact of the rule based on the available information, the total costs would be estimated to be $79 million for 52 jurisdictions and $73 million for 48 jurisdictions.

Since the regulations would not require that States adopt separate test administration or scoring procedures, we assume that no additional costs would be incurred in administering assessments based on modified academic achievement standards.

In addition, although many States choose to create new assessments or revise parts of assessments at regular intervals, this is not required by these regulations so these estimates assume that development costs are nonrecurring.

States that elect to develop modified academic achievement standards would also incur minimal costs for the development and implementation of guidelines for IEP Teams to apply in determining whether these modified academic achievement standards are appropriate for particular students with disabilities. The Department will provide non-regulatory guidance regarding alternate assessments and modified academic achievement standards that States can use in developing their IEP Team guidelines.

We assume States that elect to take advantage of this new flexibility to use modified academic achievement standards and assessments based on these standards will do so because they believe they will realize net benefits, primarily because of the benefits to students of being more appropriately assessed and, secondarily, because of the effect on AYP determinations. The benefits to States from adopting assessments based on modified academic achievement standards depend on such factors as whether the State has implemented assessments based on alternate academic achievement standards and whether the assessments are adaptable to a wide range of abilities, and

the extent to which students with disabilities are able to participate appropriately in the State's general assessments. It also will depend, in part, on the extent to which the scores for the 2.0 percent of students affected by these regulations increase enough to meet the AYP goals for schools currently in need of improvement. Testing data for the 2003-2004 school year for 33 States for the Department's "Study of State Implementation of Accountability and Teacher Quality Under NCLB," published in the "National Assessment of Title I Interim Report: Volume I; Implementation of Title I," indicates that 13.0 percent of schools missed AYP solely due to the achievement of the students with disabilities subgroup. Under Title I, LEAs are required to spend an amount equal to 20.0 percent of their Title I allocations to fund supplemental services and choice-related transportation in schools that fail to make AYP for two or more consecutive years and are identified for improvement. LEAs will have greater flexibility in the use of their Title I allocations if fewer schools miss AYP goals and are subject to consequences as a school in need of improvement.

States that decide to adopt modified academic achievement standards and implement alternate assessments based on those standards will be able to use funds from Title I, Title VI State Assessment Grants, and IDEA programs to finance those

activities. The costs of developing and implementing assessments vary considerably but are modest when compared to the amounts available under Federal programs that States can draw on for test development and implementation. The fiscal year 2007 appropriation for Title I Grants to Local Educational Agencies is approximately $12.8 billion, and States could reserve approximately 1 percent of this amount for administrative expenses, including paying the costs of developing assessments. The appropriation for IDEA Grants to States is $10.8 billion, and States could reserve more than $900 million for such activities as the development and provision of appropriate accommodations and assessments of children with disabilities under Title I. For State Assessment Grants, the appropriation is $408 million. The Department believes that the regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal sources.

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

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. These provisions require States and LEAs to take certain actions only if States choose to implement the flexibility these regulations afford. The Department believes that these activities will be financed through the appropriations for Title I and the IDEA and that the responsibilities encompassed in these laws and regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal sources.

Paperwork Reduction Act of 1995

There are several sections of the revised Title I regulations (§§200.1, 200.6, and 200.20) and one section of the revised IDEA regulations (§300.160) that require collection of information under the Paperwork Reduction Act. The following chart describes those regulatory sections, the information being collected, and the collections the Department will submit to the Office of Management and Budget for approval and public comment. Separate notices will be published in the Federal Register requesting comment on these collections.

Regulatory Section	Collection Information	Collection
§200.1(f)	Requires SEAs opting for the flexibility offered by these	Information collection 1810-0576, "Consolidated State

	regulations to develop and monitor the implementation of clear guidelines for IEP Teams to apply in determining students who will be assessed based on modified academic achievement standards.	Application.”
§200.6(a)(4) and §300.160(f)(3)	Requires SEAs to report in their annual State performance reports the total number and percentage of students tested in math and reading with alternate assessments based on modified academic achievement standards.	Information collection 1875-0240, “Annual Mandatory Collection of Elementary and Secondary Education Data for EDFacts.”
§200.20	Permits SEAs and LEAs to include the scores of former students with disabilities in the students with disabilities subgroup when reporting AYP on SEA and LEA report cards.	Information collection 1810-0581, “State Educational Agency and Local Educational Agency and School Data Collection and Reporting under ESEA, Title I, Part A.”

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.

The need for the NPRM was raised to the Department by State and LEA assessment professionals who were concerned that the assessment alternatives contemplated in the existing Title I regulations (regular assessments based on grade-level academic achievement standards and alternate assessments for students with the most significant cognitive disabilities), and reflected in the IDEA, did not recognize that there was a group of students with disabilities who were not the most significantly cognitively disabled, but who could not achieve to grade-level academic achievement standards. Based on the concerns raised, the Department convened several meetings with State and LEA officials, parents of students with disabilities, and researchers to learn more about the issues involved in assessing students with disabilities, the concerns of parents and advocates for ensuring that all students with disabilities be held to high academic achievement standards, and about how some States were designing assessments for students with disabilities. In issuing the NPRM, however, we did not believe that the proposed regulations had Federalism implications as defined in the Executive order.

We received several comments on Federalism issues. First, several commenters stated that proposed §200.1(e)(1)(iii), which would require that modified academic achievement standards not preclude a student from earning a regular high school diploma, would be an intrusion into State graduation standards if a State was required to diminish its standards for a regular diploma to include students who are assessed based on modified academic achievement standards. As we have stated elsewhere in this preamble, the intent of proposed §200.1(e)(1)(iii) was not to require States to alter their graduation requirements or to provide a regular high school diploma to a student who scores proficient on an alternate assessment based on modified academic achievement standards. Rather, we wanted to ensure that a student is not automatically precluded from attempting to earn a regular high school diploma simply because the student was assessed based on modified academic achievement standards. To clarify our intent, we have removed proposed §200.1(e)(1)(iii) and replaced it with §200.1(f)(2)(iv), which requires a State to ensure that students who take alternate assessments based on modified academic achievement standards are not precluded from attempting to complete the requirements, as defined by the State, for a regular high school diploma.

Second, a few commenters stated that the criteria we proposed for modified academic achievement standards were too prescriptive and that States should have the flexibility to develop modified academic achievement standards in ways that meet their needs. As we stated elsewhere in this preamble, we do not agree with these commenters. We believe that allowing States to develop modified academic achievement standards without placing any parameters or restrictions on their use would likely result in lowered expectations for this group of students and limit opportunities for these students to access grade-level content and meet grade-level achievement standards.

Taking into account these comments, and these final regulations, we believe that we have sufficiently addressed any Federalism concerns raised by the commenters with respect to Executive Order 13132.

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

List of Subjects

34 CFR Part 200

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

34 CFR Part 300

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

Dated:

_____
Margaret Spellings,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends parts 200 and 300 of title 34 of the Code of Federal Regulations as follows:

PART 200--TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

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

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

2. Section 200.1 is amended by:

A. Revising paragraphs (a)(1) and (a)(2).

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

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

The revisions and additions read as follows:

§200.1 State responsibilities for developing challenging academic standards.

(a) * * *

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

of this section, which apply only to the State’s academic achievement standards;

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

* * * * *

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

(i) Are aligned with the State's academic content standards for the grade in which the student is enrolled;

(ii) Are challenging for eligible students, but may be less difficult than the grade-level academic achievement standards under paragraph (c) of this section;

(iii) Include at least three achievement levels; and

(iv) Are developed through a documented and validated standards-setting process that includes broad stakeholder input, including persons knowledgeable about the State’s academic content standards and experienced in standards

setting and special educators who are most knowledgeable about students with disabilities.

(2) In the guidelines that a State establishes under paragraph (f)(1) of this section, the State must include criteria for IEP teams to use in determining which students with disabilities are eligible to be assessed based on modified academic achievement standards. Those criteria must include, but are not limited to, each of the following:

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

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

(B) Other assessments that can validly document academic achievement.

(ii)(A) The student's progress to date in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such that, even if significant growth occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student's IEP.

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

(iii) If the student's IEP includes goals for a subject assessed under §200.2, those goals must be based on the academic content standards for the grade in which the student is enrolled, consistent with paragraph (f)(2) of this section.

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

(1) For students who are assessed based on either alternate or modified academic achievement standards, the State must--

(i) Establish and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining--

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

(B) Students with disabilities who meet the criteria in paragraph (e)(2) of this section who will be assessed based on modified academic achievement standards. These students may be assessed based on modified academic achievement standards in one or more subjects for which assessments are administered under §200.2;

(ii) Inform IEP teams that students eligible to be assessed based on alternate or modified academic achievement

standards may be from any of the disability categories listed in the IDEA;

(iii) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State and local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma); and

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

(2) For students who are assessed based on modified academic achievement standards, the State must--

(i) Inform IEP teams that a student may be assessed based on modified academic achievement standards in one or more subjects for which assessments are administered under §200.2;

(ii) Establish and monitor implementation of clear and appropriate guidelines for IEP teams to apply in developing

and implementing IEPs for students who are assessed based on modified academic achievement standards. These students' IEPs must--

(A) Include IEP goals that are based on the academic content standards for the grade in which a student is enrolled; and

(B) Be designed to monitor a student's progress in achieving the student's standards-based goals;

(iii) Ensure that students who are assessed based on modified academic achievement standards have access to the curriculum, including instruction, for the grade in which the students are enrolled;

(iv) Ensure that students who take alternate assessments based on modified academic achievement standards are not precluded from attempting to complete the requirements, as defined by the State, for a regular high school diploma; and

(v) Ensure that each IEP team reviews annually for each subject, according to the criteria in paragraph (e)(2) of this section, its decision to assess a student based on modified academic achievement standards to ensure that those standards remain appropriate.

* * * * *

3. Section 200.6 is amended by:

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

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

The revisions and additions read as follows:

§200.6 Inclusion of all students.

* * * * *

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

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

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

(ii) A State must--

(A) Develop, disseminate information on, and promote the use of appropriate accommodations to increase the number of students with disabilities who are tested against academic achievement standards for the grade in which a student is enrolled; and

(B) Ensure that regular and special education teachers and other appropriate staff know how to administer assessments, including making appropriate use of accommodations, for students with disabilities and students covered under Section 504.

(2) * * *

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

(3) Alternate assessments that are based on modified academic achievement standards. (i) To assess students with disabilities based on modified academic achievement standards, a State may develop a new alternate assessment or adapt an assessment based on grade-level academic achievement standards.

(ii) An alternate assessment under paragraph (a)(3)(i) of this section must--

(A) Be aligned with the State's grade-level academic content standards;

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

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

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

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

(i) Regular assessments described in §200.2;

(ii) Regular assessments with accommodations;

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

(iv) Alternate assessments based on the modified academic achievement standards described in §200.1(e); and

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

* * * * *

4. Section 200.7 is amended by redesignating paragraph (a)(2) as (a)(2)(i) and adding a new paragraph (a)(2)(ii) to read as follows:

§200.7 Disaggregation of data.

(a) * * *

(2)(i) * * *

(ii) Beginning with AYP decisions that are based on the assessments administered in the 2007-08 school year, a State may not establish a different minimum number of students under paragraph (a)(2)(i) of this section for separate subgroups under §200.13(b)(7)(ii) or for the school as a whole.

* * * * *

5. Section 200.13 is amended by:

A. Revising paragraph (c).

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

The revisions and addition read as follows:

§200.13 Adequate yearly progress in general.

* * * * *

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

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

(i) The proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards described in §200.1(d), provided that the number of those scores at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics; and

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

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

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

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

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

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

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

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

(6) A State may not grant an exception to an LEA to exceed the 2.0 percent cap on proficient and advanced scores based on modified academic achievement standards under paragraph (c)(2)(ii) of this section, except as provided in paragraph (c)(3) of this section.

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

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

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

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

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

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

* * * * *

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

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

When May a State or LEA Exceed the 1% and 2% Caps?

	Alternate Academic Achievement Standards--1% Cap	Modified Academic Achievement Standards--2% Cap	Alternate and Modified Academic Achievement Standards--3%
State	Not permitted.	Only if State is below 1% cap, but cannot exceed 3%.	Not permitted.
LEA	Only if granted an exception by the SEA.	Only if LEA is below 1% cap, but cannot exceed 3%.	Only if granted an exception to the 1% cap by the SEA, and only by the amount of the exception.

6. Section 200.20 is amended by:

A. Revising paragraph (c)(3).

B. Revising paragraph (f)(2).

C. Adding a new paragraph (g).

The revisions and addition read as follows:

§200.20 Making adequate yearly progress.

* * * * *

(c)***

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

* * * * *

(f)***

(2)(i) In determining AYP for the subgroup of limited English proficient students and the subgroup of students with disabilities, a State may include, for up to two AYP determination cycles, the scores of--

(A) Students who were limited English proficient but who no longer meet the State's definition of limited English proficiency; and

(B) Students who were previously identified under section 602(3) of the IDEA but who no longer receive special education services.

(ii) If a State, in determining AYP for the subgroup of limited English proficient students and the subgroup of students with disabilities, includes the scores of the students described in paragraph (f)(2)(i) of this section, the

State must include the scores of all such students, but is not required to--

(A) Include those students in the limited English proficient subgroup or in the students with disabilities subgroup in determining if the number of limited English proficient students or students with disabilities, respectively, is sufficient to yield statistically reliable information under §200.7(a); or

(B) With respect to students who are no longer limited English proficient--

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

(2) Provide English language services to those students.

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

(A) A State may include the scores of former limited English proficient students and former students with disabilities as part of the limited English proficient and students with disabilities subgroups, respectively, for the purpose of reporting AYP at the State level under section 1111(h)(1)(C)(ii) of the Act;

(B) An LEA may include the scores of former limited English proficient students and former students with disabilities as part of the limited English proficient and

students with disabilities subgroups, respectively, for the purpose of reporting AYP at the LEA and school levels under section 1111(h)(2)(B) of the Act; but

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

(g) Transition provision regarding modified academic achievement standards. The Secretary may provide a State that is moving expeditiously to adopt and administer alternate assessments based on modified academic achievement standards flexibility in accounting for the achievement of students with disabilities in AYP determinations that are based on assessments administered in 2007-08 and 2008-09. To be eligible for this flexibility, a State must meet criteria, as the Secretary determines appropriate, for each year for which the flexibility is available.

7. Section 200.103 is amended by adding a new paragraph (c) to read as follows:

§200.103 Definitions.

* * * * *

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

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

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

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

9. A new §300.160 is added to read as follows:

§300.160 Participation in assessments.

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

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

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

(i) Identify only those accommodations for each assessment that do not invalidate the score; and

(ii) Instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate the score.

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

(2) For assessing the academic progress of students with disabilities under Title I of the ESEA, the alternate assessments and guidelines in paragraph (c)(1) of this section must provide for alternate assessments that--

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

(ii) If the State has adopted modified academic achievement standards permitted in 34 CFR §200.1(e), measure the achievement of children with disabilities meeting the State’s criteria under §200.1(e)(2) against those standards; and

(iii) If the State has adopted alternate academic achievement standards permitted in 34 CFR §200.1(d), measure

the achievement of children with the most significant cognitive disabilities against those standards.

(d) Explanation to IEP Teams. A State (or in the case of a district-wide assessment, an LEA) must provide IEP Teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma).

(e) Inform parents. A State (or in the case of a district-wide assessment, an LEA) must ensure that parents of students selected to be assessed based on alternate or modified academic achievement standards are informed that their child's achievement will be measured based on alternate or modified academic achievement standards.

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

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

(2) The number of children with disabilities, if any, participating in alternate assessments based on grade-level academic achievement standards.

(3) The number of children with disabilities, if any, participating in alternate assessments based on modified academic achievement standards.

(4) The number of children with disabilities, if any, participating in alternate assessments based on alternate academic achievement standards.

(5) Compared with the achievement of all children, including children with disabilities, the performance results of children with disabilities on regular assessments, alternate assessments based on grade-level academic achievement standards, alternate assessments based on modified academic achievement standards, and alternate assessments based on alternate academic achievement standards if--

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

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

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

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