

**DEPARTMENT OF EDUCATION****34 CFR Part 200****RIN 1810-AB32****[Docket ID ED-2016-OESE-0053]****Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments****AGENCY:** Office of Elementary and Secondary Education, Department of Education.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend the regulations governing programs administered under title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The proposed regulations would implement recent changes to the assessment requirements of title I of the ESEA made by the Every Student Succeeds Act (ESSA). Unless otherwise specified, references to the ESEA mean the ESEA, as amended by the ESSA.

**DATES:** We must receive your comments on or before September 9, 2016.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under “How to use *Regulations.gov*.”

- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these proposed regulations, address them to Jessica McKinney, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W107, Washington, DC 20202.

*Privacy Note:* The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Jessica McKinney, U.S. Department of

Education, 400 Maryland Avenue SW., Room 3W107, Washington, DC 20202. Telephone: (202) 401-1960 or by email: [jessica.mckinney@ed.gov](mailto:jessica.mckinney@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

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

*Purpose of This Regulatory Action:* On December 10, 2015, President Barack Obama signed the ESSA into law. The ESSA reauthorizes the ESEA, which provides Federal funds to improve elementary and secondary education in the Nation's public schools. The ESSA builds on the ESEA's legacy as a civil rights law and seeks to ensure every child, regardless of race, socioeconomic status, disability, English proficiency, background, or residence, has an equal opportunity to obtain a high-quality education. Though the reauthorization made significant changes to the ESEA for the first time since the ESEA was reauthorized through the No Child Left Behind Act of 2001 (NCLB), including significant changes to title I, it made limited changes to the assessment provisions of part A of title I. In particular, the ESSA added new exceptions to allow a State to approve its local educational agencies (LEAs) to administer a locally selected, nationally recognized high school academic assessment and, in line with President Obama's Testing Action Plan to reduce the burden of unnecessary testing, to allow a State to avoid double-testing eighth graders taking advanced mathematics coursework. The ESSA also imposed a cap to limit to 1.0 percent of the total student population the number of students with the most significant cognitive disabilities to whom the State may administer an alternate assessment aligned with alternate academic achievement standards in each assessed subject area. The ESSA included special considerations for computer-adaptive assessments. Finally, the ESSA amended the provisions of the ESEA related to assessing English learners in their native language.

We propose to amend §§ 200.2–200.6 and §§ 200.8–200.9 of title 34 of the Code of Federal Regulations (CFR) in order to implement these statutory changes, as well as other key statutory provisions, including those related to the assessment of English learners. We are proposing these regulations to provide clarity and support to State educational agencies (SEAs), LEAs, and

schools as they implement the ESEA requirements regarding statewide assessment systems, and to ensure that key requirements in title I of the ESEA are implemented in a manner consistent with the purposes of the law—to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps. Consistent with section 1601(b) of the ESEA, the proposed regulations were subject to a negotiated rulemaking process.

*Summary of the Major Provisions of This Regulatory Action:* As discussed in greater depth in the Significant Proposed Regulations section of this document, the proposed regulations would:

- Update requirements for statewide assessment systems under section 1111(b)(2) of the ESEA, including requirements regarding the validity, reliability, and accessibility of assessments required under title I, part A and provisions regarding computer-adaptive assessments.
- Establish requirements for a State to review and approve assessments if the State permits LEAs to administer a locally selected, nationally recognized high school academic assessment in each of reading/language arts, mathematics, or science consistent with section 1111(b)(2)(H) of the ESEA.
- Establish requirements under section 1111(b)(2)(C) of the ESEA for a State that administers an end-of-course mathematics assessment to exempt an eighth-grade student from the mathematics assessment typically administered in eighth grade if the student instead takes the end-of-course mathematics assessment the State administers to high school students.
- Establish requirements for alternate assessments aligned with alternate academic achievement standards under section 1111(b)(2)(D) of the ESEA for students with the most significant cognitive disabilities, including the requirement to cap the number of students who take such assessments at 1.0 percent of all students assessed in each subject area in the State and the requirements a State would need to meet if it requests a waiver from the Secretary to exceed such cap.
- Establish requirements for native language assessments under section 1111(b)(2)(F) of the ESEA, including requirements for a State to determine when languages other than English are present to a significant extent and to make every effort to provide assessments in such languages and update other requirements related to English learners.

- Establish requirements for computer-adaptive assessments consistent with 1111(b)(2)(J) of the ESEA, including by clarifying the requirement that a State that uses such assessments must report on student academic achievement in the same way it would for any other annual statewide assessment used to meet the requirements of title I, part A of the ESEA.

Please refer to the *Significant Proposed Regulations* section of this preamble for a detailed discussion of the major provisions contained in the proposed regulations.

**Costs and Benefits:** The Department believes that the benefits of this regulatory action would outweigh any associated costs to States and LEAs, which would be financed with Federal education funds. These benefits would include the administration of assessments that produce valid and reliable information on the achievement of all students, including English learners and students with disabilities. States can then use this information to effectively measure school performance and identify underperforming schools; LEAs and schools can use it to inform and improve classroom instruction and student supports; and parents and other stakeholders can use it to hold schools accountable for progress, ultimately leading to improved academic outcomes and the closing of achievement gaps, consistent with the purpose of title I of the ESEA. In addition, the regulations provide clarity for how States can avoid double testing and reduce time spent on potentially redundant testing. Please refer to the *Regulatory Impact Analysis* section of this document for a more detailed discussion of costs and benefits. Consistent with Executive Order 12866, the Secretary has determined that this action is significant and, thus, is subject to review by the Office of Management and Budget under the Executive order.

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

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any

further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing *Regulations.gov*. You may also inspect the comments in person in 3W107, 400 Maryland Ave. SW., Washington, DC, between 9:00 a.m. and 4:30 p.m. Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record:** On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

## Background

### Public Participation

On December 22, 2015, the Department published a request for information in the **Federal Register** soliciting advice and recommendations from the public on the implementation of title I of the ESEA. We received 369 comments. We also held two public meetings with stakeholders—one on January 11, 2016, in Washington, DC and one on January 19, 2016, in Los Angeles, California—at which we heard from over 100 speakers regarding the development of regulations, guidance, and technical assistance related to the implementation of title I. In addition, Department staff have held more than 100 meetings with education stakeholders and leaders across the country to hear about areas of interest and concern regarding implementation of the new law.

### Negotiated Rulemaking

Section 1601(b) of the ESEA requires the Secretary, before publishing proposed regulations for programs authorized by title I of the ESEA, to obtain advice and recommendations from stakeholders involved in the implementation of title I programs. ESEA further requires that if, after obtaining advice and recommendations from individuals and representatives of groups involved in, or affected by, the

proposed regulations, the Secretary wants to propose regulations related to standards and assessments under section 1111(b)(1)–(2) of the ESEA, as well as the requirement under section 1118(b) that funds under part A be used to supplement, and not supplant, State and local funds, the Department must go through the negotiated rulemaking process.

If the negotiated rulemaking committee reaches consensus on the proposed regulations that go through the negotiated rulemaking process, then the proposed regulations that the Department publishes must conform to such consensus agreements unless the Secretary reopens the process. Further information on the negotiated rulemaking process may be found at: <http://www2.ed.gov/policy/elsec/leg/essa/index.html>.

On February 4, 2016, the Department published a notice in the **Federal Register** (81 FR 5969) announcing its intent to establish a negotiated rulemaking committee to develop proposed regulations to implement the changes made to the ESEA by the ESSA. Specifically, we announced our intent to establish a negotiating committee to:

(1) Prepare proposed regulations that would update existing assessment regulations to reflect changes to section 1111(b) of the ESEA, including:

(i) Locally selected, nationally recognized high school academic assessments, under section 1111(b)(2)(H);

(ii) The exception for advanced mathematics assessments in eighth grade, under section 1111(b)(2)(C);

(iii) Inclusion of students with disabilities in academic assessments, including alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities, subject to a cap of 1.0 percent of all students in a State assessed in a subject;

(iv) Inclusion of English learners in academic assessments and English language proficiency assessments; and

(v) Computer-adaptive assessments.

(2) Prepare proposed regulations related to the requirement under section 1118(b) of the ESEA that title I, part A funds be used to supplement, and not supplant, State and local funds, specifically:

(i) Regarding the methodology an LEA uses to allocate State and local funds to each title I school to ensure compliance with the supplement not supplant requirement; and

(ii) The timeline for compliance.

The negotiating committee met in three sessions to develop proposed regulations: Session 1, March 21–23,

2016; session 2, April 6–8, 2016; and session 3, April 18–19, 2016. This notice of proposed rulemaking (NPRM) proposes regulations on assessments that were agreed upon by the negotiating committee.

The negotiating committee included the following members:

Tony Evers and Marcus Cheeks, representing State administrators and State boards of education.

Alvin Wilbanks, Derrick Chau, and Thomas Ahart (alternate), representing local administrators and local boards of education.

Aaron Payment and Leslie Harper (alternate), representing tribal leadership.

Lisa Mack and Rita Pin-Ahrens, representing parents and students, including historically underserved students.

Audrey Jackson, Ryan Ruelas, and Mary Cathryn Ricker (alternate), representing teachers.

Lara Evangelista and Aqueelha James, representing principals.

Eric Parker and Richard Pohlman (alternate), representing other school leaders, including charter school leaders.

Lynn Goss and Regina Goings (alternate), representing paraprofessionals.

Delia Pompa, Ron Hager, Liz King (alternate), and Janel George (alternate), representing the civil rights community, including representatives of students with disabilities, English learners, and other historically underserved students.

Kerri Briggs, representing the business community.

Patrick Rooney and Ary Amerikaner (alternate), representing the U.S. Department of Education.

The negotiating committee's protocols provided that it would operate by consensus, which meant unanimous agreement—that is, with no dissent by any voting member. Under the protocols, if the negotiating committee reached final consensus on regulatory language for either assessments under section 1111(b)(2) of the ESEA, or the requirement under section 1118(b) that funds under title I, part A be used to supplement, and not supplant, or both, the Department would use the consensus language in the proposed regulations.

The negotiating committee reached consensus on all of the proposed regulations related to assessments under section 1111(b)(2) of the ESEA.

### Significant Proposed Regulations

The Secretary proposes new regulations in 34 CFR part 200 to implement programs under title I, part

A of the ESEA. We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory changes that are technical or otherwise minor in effect, including the changes to §§ 200.4, 200.8, and 200.9, where only technical edits are proposed to ensure regulations conform to the ESEA, as amended by the ESSA.

### Section 200.2 State Responsibilities for Assessment

*Statute:* Under section 1111(b)(2) of the ESEA, each State must implement a set of high-quality, yearly student academic assessments in, at a minimum, reading/language arts, mathematics, and science. Those assessments must meet a number of requirements. In particular, they must—

- Be the same academic assessments used to measure the academic achievement of all public elementary and secondary school students in the State;
- Be aligned with the challenging State academic standards and provide coherent and timely information about student attainment of those standards at a student's grade level;
- Be used for purposes for which the assessments are valid and reliable;
- Be consistent with relevant, nationally recognized professional and technical testing standards;
- Objectively measure academic achievement, knowledge, and skills without evaluating personal or family beliefs and attitudes;
- Be of adequate technical quality for each purpose required under the ESEA;
- Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding, which may include measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks;
- Be administered to and include all public elementary and secondary school students in the State, including English learners and students with disabilities;
- At a State's discretion, be administered through a single summative assessment or through multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement and, at the State's discretion, growth;
- Produce individual student interpretive, descriptive, and diagnostic reports regarding achievement on the

assessments that allow parents, teachers, principals, and other school leaders to understand and address the specific academic needs of students;

- In keeping with the requirements for State report cards in section 1111(h), enable results to be disaggregated within each State, LEA, and school by each major racial and ethnic group; economically disadvantaged students compared to students who are not economically disadvantaged; children with disabilities compared to children without disabilities; English proficiency status; gender; migrant status; homeless children and youth; status as a child in foster care; and status as a student with a parent who is a member of the Armed Forces on active duty;

- Enable itemized score analyses to be produced and reported to LEAs and schools;

- Be developed, to the extent practicable, using the principles of universal design for learning; and

- At a State's discretion, be developed and administered as computer-adaptive assessments.

*Current Regulations:* Current § 200.2 governing State assessment systems reflects provisions of section 1111(b)(3) of the ESEA as in effect prior to the ESSA (that is, under the NCLB). In large part, those provisions remain the same in section 1111(b)(2)(B) of the ESEA, as amended by the ESSA. Accordingly, proposed § 200.2 would retain the current regulations except where amendments are needed to reflect statutory changes made by the ESSA.

*Proposed Regulations:* The proposed regulations would update the current regulations to incorporate new statutory provisions and clarify the basic responsibilities a State has in developing and administering academic assessments. Where updates are not needed, previously existing regulatory text would remain, such as in § 200.2(a), which identifies the required subject areas in which a State must administer yearly student academic assessments.

The proposed regulations in § 200.2(b)(1)(i) would clarify exceptions to the statutory requirement that assessments be the same assessments used for all students to account for new statutory provisions on: (1) Locally selected, nationally recognized high school academic assessments; (2) an exception for eighth-grade students taking advanced mathematics courses; (3) alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities; and (4) States that receive demonstration authority for an innovative assessment system under section 1204 of the ESEA.

Proposed § 200.2(b)(2)(ii) would also incorporate a new statutory requirement that assessments be developed, to the extent practicable, using the principles of “universal design for learning,” including the definition of this term consistent with the statutory instruction to use the definition provided in the Higher Education Act of 1965, as amended. Further, the proposed regulations in § 200.2(b)(3) would incorporate key relevant portions of current § 200.3, such as the requirement that assessments measure the depth and breadth of the challenging State academic content standards.

Proposed § 200.2(b)(3)(ii)(B)(1) would also include a new statutory clarification that general assessments must be aligned with challenging State academic standards that are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant career and technical education standards. Consistent with the statute, proposed § 200.2(b)(3)(ii)(B)(2) would require alternate assessments aligned with alternate academic achievement standards to be developed in a way that reflects professional judgment as to the highest possible standards achievable by students with the most significant cognitive disabilities to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or competitive, integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act.

The proposed regulations in § 200.2(b)(4)(i) would require fairness, in addition to validity and reliability, as a key technical expectation. Additionally, consistent with the updated statute, proposed § 200.2(b)(5)(ii) would require that a State make technical information available to the public, including on the State's Web site.

The proposed regulations in §§ 200.2(b)(7), (10) would specify that a State may, at its discretion, measure student growth; use portfolios, projects, or extended performance tasks as part of its assessment system; administer multiple interim or modular assessments through the course of the school year; or offer a single summative assessment statewide.

As under current regulations, the proposed regulations in § 200.2(b)(11) would require that an assessment system be able to disaggregate information by all subgroups of students that are required to be reported under other provisions of the ESEA. In

addition to the subgroups required under the ESEA, as amended by NCLB, the proposed regulations in § 200.2(b)(11)(vii)–(ix) would require that a State's assessment system be able to disaggregate achievement data for subgroups that the ESEA, as amended by the ESSA, requires a State to include on its annual State report card under section 1111(h) of the ESEA: Homeless children and youth as defined by the McKinney-Vento Homeless Assistance Act; status as a child in foster care as defined in regulations of the U.S. Department of Health and Human Services (HHS); and status as a student with a parent who is a member of the Armed Forces on active duty. Further, the proposed regulations would require State assessment systems to be able to disaggregate information for students with a parent serving in the National Guard, even though such information is not required to be reported under section 1111(h).

Proposed § 200.2(c) addresses new statutory language regarding computer-adaptive assessments. Specifically, proposed § 200.2(c)(1) would clarify that, although such assessments may include items above or below a student's grade level, the assessment must result in a proficiency determination for the grade in which the student is enrolled.

The proposed regulations would further specify in § 200.2(d) which assessments are subject to assessment peer review under section 1111(a)(4) of the ESEA. Finally, proposed § 200.2(e) would require that information provided to parents under section 1111(b)(2) of the ESEA be conveyed in a manner parents can understand, including by providing written translations for parents who are not proficient in English wherever possible; by providing oral translations if written translations are not available; and by providing such information in a format accessible to a parent who is an individual with a disability, consistent with title II of the Americans with Disabilities Act (ADA).

*Reasons:* Except as explained below, the proposed regulations in § 200.2 are included to align the regulations with the updated statute and with other applicable laws and regulations.

Section 1111(b)(1)(E)(i)(V) of the ESEA requires that alternate academic achievement standards for students with the most significant cognitive disabilities be aligned to ensure that a student who meets those standards is on track to pursue postsecondary education or employment, consistent with the specific purposes of Public Law 93–112, as in effect on July 22, 2014. Public Law

93–112, as in effect on July 22, 2014, is the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, which, at the request of the negotiators, proposed § 200.2(b)(3)(2)(B)(2) would reference directly for clarity. To make the reference to the Rehabilitation Act more relevant to educational assessment, the proposed regulations would clarify that alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities must be aligned to ensure that a student who meets those standards is on track to pursue postsecondary education or competitive, integrated employment. The negotiating committee discussed the importance of including competitive, integrated employment rather than any type of employment to prevent former practices including the tracking of students with the most significant cognitive disabilities into sheltered workshop employment settings that provide less than minimum wage, and to emphasize that standards for such students must aim for either postsecondary education or competitive, integrated employment alongside individuals without disabilities.

In 2014, the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education released a revised and updated version of their professional and technical standards for educational and psychological testing. The updated professional and technical standards emphasize fairness, in addition to validity and reliability. To reflect these standards, and in response to extensive discussion by the negotiating committee in support of explicit references to fairness for all students, we propose to add fairness as a key element in § 200.2(b)(4)(i).

The ESEA also delineates the State option to measure student growth in section 1111(b)(2)(B)(vi). While the statute and regulations continue to require reporting about student achievement relevant to State expectations for the grade in which a student is enrolled, the proposed regulations include updates in § 200.2(b)(7)(i) because a State may also provide additional information to better articulate student knowledge and skill at all achievement levels. The negotiators agreed that the statute requires a State to report on grade-level proficiency regardless of whether a State chooses to include student growth measures and regardless of whether the assessment is paper-based or computer-administered.

The requirement to ensure that a State's assessment system can disaggregate data on homeless children or youths, children in foster care, and children with parents in the Armed Forces on active duty would be added to § 200.2(b)(11)(vii)–(ix) because section 1111(h)(1)(C)(ii) requires that a State report achievement results separately on such students on its State report card. In addition, the proposed regulations would include children with a parent who serves on full-time National Guard duty. The negotiators supported including disaggregation of data for children with a parent who serves on full-time National Guard duty because they believed the education of those children could be disrupted by their parent's service to the same extent as children with a parent on active duty in the Armed Forces. Under this proposed requirement, the assessment system would be required to be able to disaggregate data on these children, but it would not create a new Federal reporting requirement; a State, however, at its discretion, would have the ability to report the achievement of these children separately. The proposed regulations would also incorporate existing statutory or regulatory definitions of subgroups of students on which a State is required to disaggregate achievement data, including by incorporating the definition of "foster care" from an HHS Social Security Act regulation for consistency with the agency charged with administering foster care provisions.

Section 1111(b)(2)(J) of the ESEA gives a State discretion to use computer-adaptive tests as part of its statewide assessment system. While computer-adaptive tests offer potential advantages for targeting student achievement levels using fewer assessment items and may thus reduce time spent on testing, proposed § 200.2(c) would clarify that, no matter what, such tests must produce results regarding student achievement for the grade in which the student is enrolled. This is essential to ensure that all students, even students for whom a computer-adaptive assessment provides important information about achievement below grade level, receive high-quality instruction at the grade in which they are enrolled and are held to the same grade-level standards. The negotiators discussed this issue as it relates to measuring student growth and agreed that the opportunity to use assessment items above or below a student's grade level to increase the precision of growth measurements must not interfere with obtaining accurate information about student performance

compared to grade-level expectations that students, parents, educators, policymakers, stakeholders, and the public need in order to make decisions to better support students.

Proposed § 200.2(d) would identify the assessments that are subject to assessment peer review under section 1111(a)(4) of the ESEA, consistent with the recommendation of committee members for greater clarity on this issue. Specifically, the following assessments or documentation are subject to assessment peer review: A State's general assessments in each required grade level in reading/language arts, mathematics, and science; any locally selected, nationally recognized high school academic assessment a State wishes to approve for an LEA to use consistent with § 200.3; a State's technical review of local assessments if an SEA demonstrates that no State official, agency, or entity has the authority under State law to adopt academic content standards, student academic achievement standards, and academic assessments, consistent with § 200.4; any assessment administered in high school to the students for whom the exemption from the eighth-grade grade mathematics assessment under § 200.5(b) applies (that is, the more advanced mathematics assessment such a student takes in high school since in eighth grade the student took the assessment typically administered to high school students in the State); alternate assessments aligned to alternate academic achievement standards consistent with § 200.6(c); assessments administered in a student's native language consistent with § 200.6(f)(1); English language proficiency assessments consistent with § 200.6(f)(3); and assessments in a Native American language consistent with § 200.6(g). A State's academic assessment system has long been subject to peer review, since it is a part of the State's title I plan, and section 1111(a)(4) requires peer review of title I State plans. Proposed § 200.2(d) would maintain the existing requirements while, as agreed to by negotiators, improving clarity regarding which assessments would be subject to peer review. In addition, now that English language proficiency is required to be used for school accountability purposes under section 1111(c) of the ESEA, the negotiating committee agreed that it was important to include English language proficiency assessments in peer review to ensure high technical quality of all assessments used for accountability purposes.

Proposed § 200.2(e) would articulate the manner in which parents must

receive information under section 1111(b)(2) of the ESEA, to ensure that all parents, including parents who are English learners or individuals with disabilities, would be able to access and understand the information provided to them about their children's performance on required assessments. Proposed § 200.2(e)(1) would repeat relevant statutory language. Proposed § 200.2(e)(2) would restate the longstanding Department interpretation about how the ESEA statutory language "to the extent practicable" applies to written and oral translations, an approach consistent with the Department's interpretation of Title VI of the Civil Rights Act of 1964. Proposed § 200.2(e)(3) would also reiterate existing obligations to parents with disabilities under the ADA. Some negotiators initially proposed including "guardians" whenever the proposed regulation refers to "parents"; however, the negotiating committee ultimately agreed that was unnecessary as the ESEA defines "parent" in section 8101(38) to include "a legal guardian or other person standing in loco parentis (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare)." Parents and guardians with disabilities or limited English proficiency have the right to request notification in accessible formats. We also encourage States and LEAs to proactively make all information and notices they provide to parents and families accessible, helping to ensure that parents are not routinely requesting States to make this information available in alternative formats. For example, one way to ensure accessibility would be to provide orally interpreted and translated notifications and to follow the requirements of Section 508 of the Rehabilitation Act.

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

*Statute:* Under section 1111(b)(2)(H) of the ESEA, a State may permit an LEA to administer a locally selected, nationally recognized high school academic assessment in lieu of the high school academic assessment the State typically administers in reading/language arts, mathematics, or science. If a State chooses to offer this option, it must establish technical criteria to determine if the locally selected, nationally recognized high school academic assessment an LEA wishes to use meets specific requirements. More specifically, the assessment must:

- Be aligned with the State's academic content standards, address the

depth and breadth of those standards, and be equivalent in its content coverage, difficulty, and quality to the statewide assessment;

- Provide comparable, valid, and reliable data on academic achievement compared to the respective statewide assessment for all students and each subgroup of students, expressed in terms consistent with the State's academic achievement standards among all LEAs in the State;

- Meet the requirements in section 1111(b)(2)(B) of the ESEA regarding statewide assessments, except the requirements in section 1111(b)(2)(B)(i) that statewide assessments be the same academic assessments used to measure the achievement of all students and be administered to all students in the State; and

- Provide unbiased, rational, and consistent differentiation between schools within the State for accountability purposes.

A State must review an LEA's locally selected, nationally recognized high school academic assessment to determine if it meets or exceeds the criteria the State has established, submit evidence supporting this determination to the Department for peer review under section 1111(a)(4) of the ESEA, and, following successful completion of peer review, approve the assessment. An LEA that wishes to select a nationally recognized high school academic assessment must notify the parents of high school students in the LEA of its request for approval to use such assessment and, upon approval and in each subsequent year, notify them that the LEA will be using a different assessment from the statewide assessment.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 200.3 would clarify the locally selected, nationally recognized high school academic assessment option under section 1111(b)(2)(H) of the ESEA in several respects. First, proposed § 200.3(a)(1) would make clear that a State has discretion over whether to permit its LEAs to select and administer a nationally recognized high school academic assessment in lieu of the statewide assessment. Second, under proposed § 200.3(a)(2), an LEA would be required to administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA, except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate academic achievement standards. Third, proposed § 200.3(b)(2)(i) would require a State to

ensure that the use of appropriate accommodations, as determined by the appropriate school-based team for a given student consistent with State policy, does not deny a student with a disability or an English learner the opportunity to participate in the assessment, or any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners. Fourth, proposed § 200.3(c)(2)(i) would require an LEA that is approved to implement a nationally recognized high school academic assessment to update its local plan under section 1112 or section 8305 of the ESEA, including by describing how the request was developed consistent with all requirements for consultation under section 1112 and tribal consultation under section 8538 of the ESEA. Fifth, to ensure smooth implementation with respect to charter schools, proposed § 200.3(c)(1)(ii) would require an LEA that includes any public charter schools and wishes to implement a nationally recognized high school academic assessment to provide an opportunity for meaningful consultation to all public charter schools whose students would be included in such assessment. If a public charter school is an LEA under State law, proposed § 200.3(c)(2)(ii) would require that public charter school to provide an assurance that the use of the assessment is consistent with State charter school law and that the LEA consulted with its authorized public chartering agency. Finally, proposed § 200.3(d) would define "nationally recognized high school academic assessment" to mean an assessment of high school students' knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into credit-bearing courses in postsecondary education or training programs.

*Reasons:* The option for an LEA to select, and for a State to approve, the use of a nationally recognized high school academic assessment in place of the statewide academic assessment for purposes of accountability is a new authority provided in the ESEA. Implementing this new authority will require careful coordination across local, State, and Federal agencies and attention to technical requirements, including accessibility and accommodations for students with disabilities and English learners. Accordingly, proposed § 200.3 would specify the requirements and

responsibilities related to this new authority.

Such assessments would be used for purposes of the statewide accountability system under section 1111(c) of the ESEA, including the requirements that a State must meet regarding annual meaningful differentiation and identification of low-performing schools for intervention. During negotiations, the negotiating committee agreed that proposed § 200.3(a) would clarify that a State has discretion to decide whether to offer its LEAs the opportunity to request to use a locally selected, nationally recognized high school academic assessment. In addition, in order to maintain meaningful within-district comparisons of student achievement, an LEA would be required to select and use a single nationally recognized academic assessment for all high school students in the LEA, except those students with the most significant cognitive disabilities who take an alternate assessment aligned with alternate academic achievement standards. Several negotiators recommended greater flexibility at the local level regarding the number of nationally recognized high school academic assessments that might be administered, including by proposing that an LEA have authority to offer more than one locally selected, nationally recognized high school academic assessment, or that an LEA have authority to phase in the use of such assessments over time. Ultimately, the negotiators reached consensus on the value of preserving within-district direct comparability of results, particularly for reporting on LEA report cards, for transparency, and for school accountability determinations.

The proposed regulations in § 200.3(b) would incorporate statutory requirements for State approval, including the State-established technical criteria. These State-level quality criteria are essential to maintaining a rational and coherent statewide assessment system that fairly measures student achievement for the purpose of reporting on school performance and identifying those schools in need of the greatest support. In addition, proposed § 200.3(b)(2)(i) would clarify that any test an LEA uses for accountability must offer all State-determined appropriate accommodations, including by ensuring that the tests—and any benefits to students from taking such tests, such as valid college-reportable scores—are available to all students, including students with disabilities and English learners. Committee members agreed on the importance of spelling out State

responsibilities, particularly the requirement that a student who receives appropriate accommodations, as determined by the student's IEP team, consistent with State accommodation guidelines for accommodations that do not invalidate test scores, receive all benefits that taking such tests for the purpose of meeting the title I assessment requirements offer other students.

Proposed § 200.3(b)(2)(ii) would clarify the requirement that a State submit, for peer review and approval by the Department, any locally selected, nationally recognized high school academic assessment an LEA wishes to administer. As the proposed regulations would simply incorporate and restate the statutory process for ensuring a locally selected, nationally recognized assessment is approved through peer review, the negotiating committee approved it without extensive debate.

The proposed regulations in § 200.3(c) would offer additional detail regarding the process by which an LEA would apply to a State to use a locally selected, nationally recognized high school academic assessment. Proposed § 200.3(c)(1)(i) would specify that an LEA must inform parents and solicit their input prior to requesting approval from the State so that such input may inform the LEA's request and the State's consideration of the LEA application. Proposed § 200.3(c)(1)(ii) would clarify how public charter schools are included in an LEA's consideration of whether to submit such a request, and proposed § 200.3(c)(2)(ii) would explain how a public charter school that is an LEA must consult its authorized public chartering agency. A negotiator proposed these provisions to ensure that the assessments applicable to charter schools, whether those schools are part of an LEA or are an LEA in their own right, are consistent with existing chartering agreements and State charter school law. Additionally, proposed § 200.3(c)(2)(i) would address the need to update an LEA's title I plan to include, among other things, a description of how the request was developed consistent with the consultation requirements under sections 1112 and 8538 of the ESEA when making a request. To effectively implement such a change in assessments, it will be critical to consider, as a community, all of the implications of the use of an assessment other than the statewide academic assessment.

Proposed § 200.3(c)(4)(i) would require an LEA to indicate annually to the State whether it will continue to use a previously approved, locally selected, nationally recognized high school

academic assessment. This requirement is needed to ensure that a State is able to administer assessments to all students, including in the event that an LEA elects to again use the statewide academic assessment after administering a locally selected, nationally recognized high school academic assessment.

Proposed § 200.3(d) would define the term "nationally recognized high school academic assessment." The committee discussed this definition extensively, and numerous versions were considered, most of which were aimed at broadening the definition to accommodate a wider range of assessments. Although there are many assessments in use in multiple States, the statute specifies that assessments eligible for selection by an LEA in lieu of the statewide assessment must be "nationally recognized." The negotiators discussed and ultimately agreed that a reasonable indicator of whether an assessment is nationally recognized is whether multiple institutions of higher education or postsecondary training programs consider the results of such assessments for entrance or placement into credit-bearing courses. In addition, we believe that such use of the assessment further indicates that the assessment is high-quality and provides important information about student readiness for postsecondary education and training.

#### Section 200.5 Assessment Administration

##### *Frequency*

*Statute:* Under section 1111(b)(2)(B)(v) of the ESEA, a State must administer assessments annually as follows: For reading/language arts and mathematics assessments, the State must administer them in each of grades 3 through 8 and at least once in grades 9 through 12; for science assessments, the State must administer them not less than one time in grades 3 through 5, grades 6 through 9, and grades 10 through 12.

*Current Regulations:* Current § 200.5 describes the frequency with which reading/language arts, mathematics, and science assessments must be administered under the ESEA, as amended by NCLB.

*Proposed Regulations:* Proposed § 200.5(a) would describe the frequency with which reading/language arts, mathematics, and science assessments must be administered under section 1111(b)(2)(B)(v). It would also make clear that a State must administer its assessments annually in the specified grade spans.

*Reasons:* Proposed § 200.5(a) would reflect and clarify statutory changes in the frequency for administering State assessments, particularly in high school where reading/language arts and mathematics assessments may now be administered once in grades 9–12, instead of grades 10–12. It also would make clear that the required assessments must be administered annually according to the frequency prescribed in the statute. The negotiating committee briefly discussed these changes and agreed to these updates.

##### *Middle School Mathematics Exception*

*Statute:* Under section 1111(b)(2)(C) of the ESEA, a State may exempt an eighth-grade student from the mathematics assessment the State typically administers in eighth grade if the student instead takes an end-of-course test the State typically administers in high school. The student's performance on the high school assessment must be used in the year in which the student takes the assessment for purposes of measuring academic achievement and calculating participation rate under section 1111(c)(4). In high school, the student must take a mathematics assessment that is an end-of-course assessment or another assessment that is more advanced than the assessment the student took in eighth grade, and the student's results must be used to measure academic achievement and calculate participation rate for his or her high school.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 200.5(b) would clarify the eighth-grade mathematics exception in section 1111(b)(2)(C) in several respects. First, proposed § 200.5(b) would make clear that only a State that administers an end-of-course mathematics assessment to meet the high school assessment requirement may offer the exception to eighth-grade students, consistent with section 1111(b)(2)(C)(i). The exception would not apply in a State that administers a general mathematics assessment in, for example, eleventh grade. Second, proposed § 200.5(b)(3)(i) would permit a student who received the exception in eighth grade to take in high school either a State-administered end-of-course mathematics assessment or a nationally recognized high school academic assessment in mathematics, as defined in proposed § 200.3(d), that is more advanced than the assessment the student took in eighth grade. The more advanced high school assessment would need to be submitted for peer review under section 1111(a)(4) of the ESEA, as



required under proposed § 200.2(d). Finally, proposed § 200.5(b)(4) would require the State to describe in its title I State plan, with regard to this exception, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school.

*Reasons:* The negotiating committee discussed the eighth-grade mathematics exception at length, acknowledging early in the process that the statute limits this exception to those States that administer high school end-of-course tests. The negotiators supported providing advanced mathematics coursework in middle school and easing the burden of testing by relieving a student who takes a high school-level mathematics course in eighth grade from also having to take the State's general eighth-grade mathematics assessment, but also proposed several safeguards for inclusion in proposed § 200.5(b).

In requiring the more advanced end-of-course high school mathematics assessment either to be State-administered or nationally recognized, as defined in proposed § 200.3, proposed § 200.5(b)(3)(i) would clarify that the assessment may not be one developed by a teacher to measure knowledge of his or her specific course content.

Also, proposed § 200.5(b)(4) would require the State to describe in its title I State plan its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school. This provision is meant to give all students, regardless of the school they attend, a fair and equitable opportunity to access advanced mathematics in middle school. The negotiating committee discussed this provision extensively, with some members objecting to it as unnecessarily burdensome and others supporting even greater efforts to ensure equal access to advanced mathematics in middle school. Ultimately, the negotiators agreed that the proposed language was a reasonable compromise, particularly since it would apply only to the limited number of States that choose to implement the eighth-grade mathematics exception. Such States could address the provision, for example, by providing accelerated preparation in elementary school to take advanced mathematics coursework in eighth grade or through distance learning for students whose middle school does not offer an advanced mathematics course.

## Section 200.6 Inclusion of All Students

### *Students With Disabilities in General*

*Statute:* Under section 1111(b)(2)(B)(i) and (b)(2)(B)(vii)(I)–(II) of the ESEA, a State must include in its assessment system all public elementary and secondary school students, including students with disabilities. The statute clarifies that those students include children with disabilities under the Individuals with Disabilities Education Act (IDEA) and students with a disability who are provided accommodations under other acts. Section 1111(b)(2)(D) authorizes a State to adopt alternate assessments aligned with the State's alternate academic achievement standards for students with the most significant cognitive disabilities. Otherwise, under section 1111(b)(2)(B)(ii), students with disabilities, like students who do not have a disability, must be assessed based on academic achievement standards for the grade in which a student is enrolled. All students with disabilities, including those with the most significant cognitive disabilities, as established under section 1111(b)(1)(E)(i)(I), must be administered an assessment aligned with the State's challenging academic content standards for the grade in which they are enrolled.

*Current Regulations:* Current § 200.6(a) requires a State to provide for the participation of all students, including students with disabilities, as defined under section 602(3) of the IDEA, and for each student covered by section 504 of the Rehabilitation Act of 1973 (section 504), in a State's academic assessment system.

*Proposed Regulations:* The proposed regulations would update this section to reflect the new statutory inclusion of "other acts" as it relates to students with disabilities. First, the proposed regulations would require the inclusion of all students, including students with disabilities, in the State assessments. Proposed § 200.6(a)(1) would delineate students who are identified as children with disabilities under section 602(3) of the IDEA; the subset of such students who are students with the most significant cognitive disabilities; and students with disabilities covered under other acts, including section 504 and title II of the ADA. Proposed § 200.6(a)(2)(i) would specify that all students with disabilities, except those students with the most significant cognitive disabilities, must be assessed using the general academic assessment aligned with the challenging State academic standards for the grade in which the student is enrolled. Further,

under proposed § 200.6(a)(2)(ii), students with the most significant cognitive disabilities may be assessed using either the general assessment or an alternate assessment aligned with the challenging State academic content standards for the grade in which the student is enrolled and with alternate academic achievement standards, if the State has adopted such alternate academic achievement standards.

*Reasons:* The proposed regulations would reinforce the State's statutory obligation to include all students in statewide academic assessments used for accountability purposes under the ESEA. The negotiating committee discussed this section at length, rejecting proposals to either define "students with disabilities" to include students in each of the categories listed in proposed § 200.6(a)(1)(i)–(iii) or to refer to students eligible for accommodations. Ultimately, to improve clarity and avoid creating any confusion in the field about student access to accommodations, the negotiators agreed that the proposed regulations in § 200.6(a)(1) would identify groups of students with disabilities—that is, those defined under the IDEA; those who may need alternate assessments aligned with alternate academic achievement standards; and those who may need appropriate accommodations outside of the IDEA. The proposed regulations would also clarify that English learners with disabilities must receive support and appropriate accommodations relative both to their disabilities and to their status as English learners.

### *Appropriate Accommodations and Definitions Related to Students With Disabilities*

*Statute:* Section 1111(b)(2)(B)(vii) of the ESEA requires that a State's assessment system provide for the participation of all students and requires appropriate accommodations, such as interoperability with, and ability to use, assistive technology, for children with disabilities, as defined in section 602(3) of the IDEA, including children with the most significant cognitive disabilities, and students with a disability who are provided accommodations under other acts.

*Current Regulations:* Current § 200.6(a)(1) requires a State's academic assessment system to provide appropriate accommodations, as determined by a student's individualized education program (IEP) team or placement team, that are necessary for a student with a disability, as defined under section 602(3) of the IDEA, or for a student covered under



section 504, to take the State's assessment. For most students with disabilities under IDEA and students covered under section 504, appropriate accommodations are those necessary to measure the academic achievement of a student relative to the State's academic content and academic achievement standards for the grade in which the student is enrolled. For students with the most significant cognitive disabilities who take an alternate assessment aligned with alternate academic achievement standards, appropriate accommodations are those necessary to measure a student's academic achievement based on those alternate academic achievement standards aligned with content standards for the grade in which the student is enrolled.

**Proposed Regulations:** Proposed § 200.6(b)(1) would require that a State's academic assessment system provide appropriate accommodations for each student with a disability. Proposed § 200.6(b)(1) would include, as an example of such accommodations, interoperability with, and the ability to use, "assistive technology devices," as that term would be defined in proposed § 200.6(e). The proposed regulations would clarify that use of assistive technology devices must be consistent with nationally recognized accessibility standards. Although assistive technology devices are one kind of accommodation, other accommodations are also available and may be appropriate. The determination of which accommodations would be appropriate for a student must be made individually by a student's IEP team, placement team, or other team the LEA designates to make these decisions. Proposed § 200.6(b)(1) would identify the teams responsible for making accommodations determinations for the students with disabilities identified in proposed § 200.6(a). Proposed § 200.6(b)(2)(i) would require a State to disseminate information about the use of appropriate accommodations. Further, proposed § 200.6(b)(2)(ii) would require that a State ensure that educators, including paraprofessionals, specialized instructional support personnel, and other appropriate staff, receive training to administer assessments, and know how to make use of appropriate accommodations for all students with disabilities.

Proposed § 200.6(b)(3) would specify that a State must ensure that a student with a disability who uses appropriate accommodations on the assessments a State or LEA uses to meet the requirements of title I, part A of the ESEA has the same opportunity to

participate in, and is not denied any of the benefits of, the assessment as compared with a student who does not have a disability, including such benefits as valid college-reportable scores.

**Reasons:** The proposed regulations would incorporate statutory changes and provide details with regard to appropriate accommodations for students with disabilities. Because the statute provides the example of interoperability with, and ability to use, assistive technology devices on State assessments, the Department proposed to the committee to incorporate this language in proposed § 200.6(b)(1). The Department also proposed, and negotiators agreed, to include in proposed § 200.6(e) the definition of "assistive technology devices" from 34 CFR 300.5, which would improve clarity and consistency throughout Departmental regulations. Further, to help States, districts, and schools understand how to implement the statutory reference to students with disabilities covered under "other acts" (i.e., other than IDEA), proposed § 200.6(b)(1) would identify the individuals or teams responsible for making accommodations determinations under IDEA, section, and title II of the ADA. The negotiators discussed this section in detail, with a few negotiators stressing the differences between those individuals or teams that diagnose disabilities and individuals or teams that identify accommodations needed for individual students. The negotiating committee agreed that adding specificity around the language "other acts" with regard to the teams responsible for making determinations is important to ensure that State, local, and school leaders know how to implement the statute.

Appropriate accommodations, consistent with IDEA regulations at 34 CFR 300.160(b), are necessary to measure the academic achievement and functional performance of students with disabilities relative to the challenging State academic standards or alternate academic achievement standards. Proposed § 200.6(b)(2) would require a State to disseminate information about the use of appropriate accommodations to provide parents and educators with adequate information for making such determinations. Because educators in many roles administer assessments and accommodations for assessments, proposed § 200.6(b)(2)(ii) would detail the full range of staff who may need training to ensure they know how to administer assessments and make use of appropriate accommodations in order to best support all students. The

negotiating committee agreed on the need for training all staff who will administer assessments, with negotiators particularly emphasizing the importance of including a requirement for training for educators in the proposed regulations.

As some assessments that some States use to meet the requirements of title I, part A offer benefits to students beyond complying with Federal and State requirements, such as valid college-reportable scores on examinations commonly used for college entrance or placement, proposed § 200.6(b)(3) would require a State to ensure that a student with a disability who uses appropriate accommodations as determined by the relevant individual or team consistent with State accommodations guidelines has the same opportunity to participate in, and receive benefits from, the assessment as a student who does not have a disability. To this end, if students who do not have disabilities are able to use scores on such assessments for the purposes of college entrance or placement, students with disabilities who use appropriate accommodations as determined by their IEP, placement, or other team, must receive the same benefit, including a score that is not flagged with respect to validity or the use of accommodations. This is critical to guarantee that use of such assessments is in accordance with civil rights protections. The negotiators discussed this issue at length, with members of numerous constituencies strongly concerned that assessments currently in use do not always offer all the same benefits for students who take them with appropriate accommodations, including the specific benefit of college score reporting. These committee members also cited the additional burden sometimes placed on families of such students when they must either pay for a second test without accommodations for the purpose of college applications or provide additional, burdensome justifications to an assessment provider through a system outside the regular IEP process in order to access their regular accommodations designated by the IEP team, or both. The negotiating committee felt strongly that, when such an assessment is used as a statewide or district-wide assessment to meet the requirements of title I, part A, students with disabilities must not encounter barriers that their nondisabled peers do not face. Therefore, proposed § 200.6(b)(3) would require that a student with a disability receive appropriate accommodations, as

determined by the relevant team articulated in § 200.6(b)(1)(i), (ii), or (iii), so that the student with a disability can participate in the assessment, and receive the same benefits from the assessment that non-disabled students receive.

*Alternate Assessments Aligned With Alternate Academic Achievement Standards for Students With the Most Significant Cognitive Disabilities*

**Statute:** Section 1111(b)(2)(D) of the ESEA authorizes a State that adopts alternate academic achievement standards for students with the most significant cognitive disabilities to administer alternate assessments aligned with the State's academic content standards for the grade in which a student is enrolled and aligned with the State's alternate academic achievement standards. Section 1111(b)(2)(D)(i)(I), however, caps at the State level the number of students with the most significant cognitive disabilities who may be assessed with an alternate assessment aligned with alternate academic achievement standards. For each subject for which assessments are administered, the total number of students in the State as a whole assessed in that subject using an alternate assessment aligned with alternate academic achievement standards may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject. Section 1111(b)(2)(D)(ii)(II) further provides that nothing in section 1111(b)(2)(D) may be construed as authorizing either the Secretary or a State to impose a cap on an individual LEA with respect to the percentage of students with the most significant cognitive disabilities that the LEA assesses with an alternate assessment aligned with alternate academic achievement standards. However, an LEA that exceeds the State's cap must submit information to the State justifying the need to exceed the cap. Under section 1111(b)(2)(D)(ii)(III), the State must provide appropriate oversight of an LEA that exceeds the State's cap. Section 1111(b)(2)(D)(ii)(IV) makes clear that the State cap is subject to the Secretary's waiver authority in section 8401 of the ESEA.

**Current Regulations:** Current § 200.6(a)(2) governs the use of alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities whom a child's IEP team determines cannot participate in the State assessments, even with appropriate accommodations. Section 200.6(a)(2)(iii) requires a State that

permits alternate assessments that yield results based on alternate academic achievement standards to document that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum.

Current § 200.6(a)(4) requires a State to report separately to the Secretary the number and percentage of students with disabilities taking general assessments, general assessments with accommodations, alternate assessments based on the grade-level academic achievement standards, and alternate assessments based on the alternate academic achievement standards.

While the current regulations do not limit the number of students who may take an alternate assessment based on alternate academic achievement standards, § 200.13 does cap the number of proficient and advanced scores of students with the most significant cognitive disabilities based on alternate academic achievement standards that may be included in calculating adequate yearly progress (AYP) for LEAs and the State for accountability purposes at 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics. Under § 200.13(c)(4) of the current regulations, a State may not request a waiver from the Secretary for permission to exceed the 1.0 percent cap. However, under § 200.13(c)(5), a State may grant an exception to an LEA, permitting it to exceed the 1.0 percent cap, if the LEA: (1) Demonstrates that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the combined grades assessed, (2) explains why the incidence of such students exceeds 1.0 percent of all students assessed, and (3) documents that it is implementing the State's guidelines under § 200.1(f).

**Proposed Regulations:** Proposed § 200.6(c) would incorporate new statutory requirements regarding alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities, including the cap of 1.0 percent of students assessed in a subject in a school year at the State level, as well as clarify other statutory provisions.

The proposed regulations in § 200.6(c)(1) would articulate that, at the State's discretion, such assessments may measure student growth against the alternate academic achievement standards if done in a valid and reliable way. While the cap of 1.0 percent of students assessed in a subject in a school year applies only at the State level, an LEA that assesses more than

1.0 percent of students in a subject in a school year would be required to submit a justification to the State so that the State would be able to provide appropriate oversight and support. The State would also be required to make the LEA's justification available to the public so long as doing so does not reveal any personally identifiable student information.

Proposed § 200.6(c)(4) would detail information a State would be expected to submit if it determines it will need to request a waiver of the State-level cap of 1.0 percent of students taking an alternate assessment aligned with alternate academic achievement standards. The proposed regulations would require that such a waiver request be limited to one year and submitted at least 90 days before the start of the State's first testing window. Under the proposed regulations, the State's waiver request would be required to include—

- Certain State-level data, including the number and percentage of students in each subgroup identified in section 1111(c)(2) of the ESEA (except the children with disabilities subgroup) taking such alternate assessments and data demonstrating that the State measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup

- Specific assurances from the State that it has verified certain information with respect to each LEA that the State anticipates will assess more than 1.0 percent of students in any subject and any other LEA that the State determines will significantly contribute to the State's exceeding the State cap of 1.0 percent statewide; and

- A State plan and timeline to improve implementation of its guidelines for IEP teams under proposed § 200.6(d) regarding appropriate use of such alternate assessments, as well as additional steps the State will take to support LEAs and to address any disproportionality in the number and percentage of students taking such alternate assessments as identified in the State-level data.

If a State requests to extend a waiver for an additional year, having already received a previous waiver, the State also would be required to demonstrate substantial progress towards achieving each component of the prior year's plan.

Proposed § 200.6(c)(5) would require a State to report, as it had to previously, the number and percentage of children with disabilities who take general assessments, general assessments with accommodations, and alternate

assessments aligned with alternate academic achievement standards.

Proposed § 200.6(c)(7) would address the use of computer-adaptive alternate assessments aligned with alternate academic achievement standards, which must be aligned with the challenging State academic content standards for the grade in which a student is enrolled, as must all alternate assessments aligned with alternate academic achievement standards. Computer-adaptive alternate assessments must also meet all other requirements expected of such alternate assessments that are not computer adaptive.

*Reasons:* Although the current regulations cap for accountability purposes the number of proficient and advanced scores of students with the most significant cognitive disabilities who are assessed with an alternate assessment aligned with alternate academic achievement standards, the ESEA specifically limits participation in such alternate assessments to 1.0 percent of students assessed in a subject at the State level. Establishing waiver criteria will help ensure that the 1.0 percent statutory cap on participation in alternate assessments aligned with alternate academic achievement standards is upheld with fidelity in order to ensure that only students with the most significant cognitive disabilities are assessed using such assessments.

Accordingly, to clarify expectations regarding waivers of the 1.0 percent State-level cap and ensure that waivers are granted only when appropriately justified, proposed § 200.6(c)(4) would require that a State's waiver request include: (1) State-level data; (2) assurances from the State that it has verified that each relevant LEA (a) followed the State's guidelines regarding the appropriate use of alternate assessments aligned with alternate academic achievement standards, (b) will not significantly increase the extent to which the LEA assesses students using an alternate assessment aligned with alternate academic achievement standards without a justification demonstrating a higher prevalence of enrolled students with the most significant cognitive disabilities, and (c) will address any disproportionality in the number and percentage of economically disadvantaged students, students from major racial and ethnic groups, or English learners who are assessed using alternate assessments aligned with alternate academic achievement standards; (3) a plan and timeline by which the State will meet the cap of 1.0 percent of students taking the alternate

assessment aligned with alternate academic achievement standards in a subject area; and (4) additional information on State progress if the State is requesting to extend a waiver. As a whole, these elements would provide a comprehensive picture of the State's efforts to address and correct its assessment of more than 1.0 percent of students on an alternate assessment aligned with alternate academic achievement standards. Reasons for each category of requirements are further explained below.

The proposed regulations would require that a State's waiver request provide State-level data on the number and percentage of students in each subgroup defined in section 1111(c)(2), other than children with disabilities, who took the alternate assessment aligned with alternate academic achievement standards, as well as data showing that the State measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup. These data requirements are essential to provide greater transparency about which students in a State have been assessed, and which students are assessed with an alternate assessment. These data will allow the Department to take such information into account when deciding whether a State's request for a waiver is appropriately justified.

A State would also be required to include in its request for a waiver an assurance that the State has verified certain information with each LEA that the State anticipates will assess more than 1.0 percent of assessed students in any subject with an alternate assessment aligned with alternate academic achievement standards and any LEA that the State determines will significantly contribute to the State's exceeding the cap. By requiring an SEA to verify certain information with these LEAs, the proposed regulations would help ensure the State has LEA support in its efforts to come into compliance with the 1.0 percent cap by denoting each relevant LEA's commitment to appropriately implement State guidelines. The negotiators debated whether this verification should be limited to LEAs that exceed the cap and agreed that, while those LEAs should be included, there may also be LEAs that do not exceed the cap but do contribute to the State exceeding the cap because of large numbers of students taking an alternate assessment aligned with alternate academic achievement standards. The negotiators agreed that a State should verify certain information from such LEAs as well as those that exceed the cap.

The negotiators agreed that a State's waiver request should further include a plan and timeline by which the State will ensure that alternate assessments aligned with alternate academic achievement standards are administered to no more than 1.0 percent of assessed students in a subject in the State. Negotiators agreed that, if a State requests a waiver for more than one year, the State should be required to demonstrate substantial progress toward achieving each component of the prior year's plan and timeline. Establishing these expectations would ensure that only students with the most significant cognitive disabilities are assessed with the alternate assessment aligned with alternate academic achievement standards and improve both the Department's and States' ability to implement the statutory 1.0 percent State cap.

The negotiating committee devoted substantial time to considering each of the waiver criteria provisions. Some negotiators initially objected to several of the criteria, though the same negotiators conceded that clarity in advance regarding expectations for approval of waivers would be beneficial to States. Other negotiators initially advocated for more rigorous protections to ensure that States assess only those students with the most significant cognitive disabilities using an alternate assessment aligned with alternate academic achievement standards. The negotiators discussed this issue in conjunction with State guidelines and upon satisfactory resolution of how the regulations should address such guidelines, the negotiators were able to agree on the proposed waiver requirements by striking a balance between ensuring that only those students for whom an alternate assessment aligned with alternate academic achievement standards is determined appropriate take such a test while also allowing for State flexibility, particularly in those States that are meeting the requirement to test no more than 1.0 percent of students in the State in a subject using such an assessment. For additional information, see proposed § 200.6(d), discussed below, which addresses the State guideline requirement. In applying for a waiver, a State that exceeds the 1.0 percent cap must review and, as needed, revise its definition of "students with the most significant cognitive disabilities" (the guidelines for which are discussed in more detail below). The negotiators discussed this issue in conjunction with State guidelines and came to satisfactory resolution of how the regulations should

address such guidelines, including the interaction between proposed waiver requirements and such guidelines.

The proposed regulations would also incorporate statutory requirements for alternate assessments and maintain previous reporting requirements, adjusted to reflect only the use of alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.

Finally, the regulations would clarify the statutory provisions on the use of computer-adaptive alternate assessments in order to align expectations across non-adaptive and adaptive formats and ensure that reported scores reflect a student's progress against grade level academic content standards and aligned alternate academic achievement standards. The negotiating committee discussed and approved all references to computer-adaptive assessments, whether regarding general assessments, alternate assessments aligned with alternate academic achievement standards, or English language proficiency assessments, at the same time to ensure references to computer-adaptive assessments were consistent with each other and the statute.

#### *State Guidelines*

*Statute:* Section 1111(b)(2)(D) of the ESEA requires a State to implement safeguards to ensure that alternate assessments aligned with alternate academic achievement standards are administered judiciously. The State's guidelines required under section 612(a)(16)(C) of the IDEA must assist a child's IEP team to determine when it will be necessary for a child with the most significant cognitive disabilities to participate in an alternate assessment aligned with alternate academic achievement standards. The State must also inform parents of a student who takes an alternate assessment aligned with alternate academic achievement standards that their child's academic achievement will be measured based on those standards and how participation in an alternate assessment may delay or otherwise affect the child's completion of the requirements for a regular high school diploma. The State must also promote the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum. The State must describe in its State title I plan the steps the State has taken to incorporate universal design for learning, to the extent feasible, in designing alternate assessments and describe how general and special education teachers know

how to administer alternate assessments and make appropriate use of accommodations. The State must promote using appropriate accommodations to increase the number of students with significant cognitive disabilities participating in grade-level instruction and may not preclude a student with the most significant cognitive disabilities from attempting to complete the requirements for a regular high school diploma.

*Current Regulations:* Current § 200.1(f) requires a State that adopts alternate academic achievement standards for students with the most significant cognitive disabilities to adopt guidelines for the use of alternate assessments aligned with those standards. The State must:

- Establish and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards;

- Inform IEP teams that students eligible to be assessed based on alternate academic achievement standards may be from any of the disability categories listed in the IDEA;

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

- Ensure that parents of students selected to be assessed based on alternate academic achievement standards under the State's guidelines are informed that their child's achievement will be measured based on alternate academic achievement standards.

Additionally, under current § 200.6(a)(1)(ii), a State must 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 they are enrolled, and ensure that regular and special education teachers know how to administer assessments, including making use of appropriate accommodations.

*Proposed Regulations:* Proposed § 200.6(d) would incorporate

requirements from current § 200.1(f) and the ESEA regarding State guidelines. Specifically, proposed § 200.6(d)(1) would require a State to adopt guidelines for IEP teams to use when determining, on a case-by-case basis, which students with the most significant cognitive disabilities should take an alternate assessment aligned with alternate academic achievement standards. Such guidelines would include a State definition of "students with the most significant cognitive disabilities," that would address factors related to cognitive functioning and adaptive behavior. Under proposed § 200.6(d)(1)(i)–(ii), a student's designation as a student with the most significant cognitive disabilities may not be related to the presence or absence of a particular disability, previous low academic achievement, need for accommodations, or status as an English learner. Under proposed § 200.6(d)(1)(iii), the definition must also consider that such students are those requiring extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled.

Under proposed § 200.6(d)(2), the guidelines must also provide IEP teams with a clear explanation of the implications of a student's participation in an alternate assessment aligned with alternate academic achievement standards, including the effect on a student's opportunity to complete the requirements for a regular high school diploma and to complete those requirements on time, which must also be communicated to parents of students selected for such alternate assessments. Moreover, under proposed § 200.6(d)(4), a State may not establish guidelines in such a manner as to preclude students who take such alternate assessments from attempting to complete the requirements for a regular high school diploma. Finally, under proposed § 200.6(d)(7), the guidelines must emphasize that students with significant cognitive disabilities who do not meet the State's definition of "students with the most significant cognitive disabilities" must receive instruction for the grade in which the student is enrolled and be assessed against the challenging State academic achievement standards for the grade in which the student is enrolled.

*Reasons:* The proposed regulations would incorporate relevant information previously found in § 200.1(f) because it relates primarily to administering assessments and not to challenging State academic standards. The negotiators

agreed that referencing these topics in this section, rather than in § 200.1, would make the regulations more coherent.

Some negotiators argued strongly for defining the term “students with the most significant cognitive disabilities” in the proposed regulation to ensure that a State incorporates particular factors recognized in the field with respect to the characteristics of such students and to facilitate compliance with the State-level 1.0 percent cap on participation in alternate assessments aligned with alternate academic achievement standards. Ultimately, the negotiating committee agreed, instead of including a definition of this term, to add references to key aspects a State must consider in crafting its own definition to the requirements for State guidelines in proposed § 200.6(d)(1).

The determination that a student will take an alternate assessment aligned with alternate academic achievement standards could affect the student's opportunity to complete the requirements for a regular high school diploma or the time such student would need to complete high school. Accordingly, the Department believes it is important that parents and IEP team members are aware of the potential consequences of such an assignment. Many negotiators expressed strong support for ensuring that State guidelines maximize IEP and parent information about the impact a student's assignment to an alternate assessment aligned with alternate academic achievement standards could have. The proposed regulations in § 200.6(d)(2)–(3) would require State guidelines to provide such information to all relevant parties, and to do so in a manner consistent with the requirement in proposed § 200.2(e) to provide information to parents in a format accessible to them and, to the extent practicable, in writing in a language they can understand, with oral translations in all other cases. These guardrails provided committee members sufficient confidence that the regulation would lead to strong implementation of the statutory cap, even for those who previously favored defining “students with the most significant cognitive disabilities” in the proposed regulations.

#### *English Learners*

*Statute:* Section 1111(b)(2)(B)(vii)(III) of the ESEA requires a State's assessment system to provide for the participation of all students, including English learners. English learners must be assessed in a valid and reliable manner and provided appropriate

accommodations including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what those students know and can do in academic content areas until they have achieved English proficiency. Section 1111(b)(2)(F) requires a State to identify in its title I State plan the languages other than English that are present to a significant extent in the student population of the State and indicate the languages for which annual academic assessments are not available and are needed. Notwithstanding this provision, a State must assess an English learner on the State's reading/language arts assessment in English after the student has attended public schools in the United States (except for schools in Puerto Rico) for three or more consecutive years. On a case-by-case basis, an LEA may assess a student's knowledge in reading/language arts in a language or form other than English for two additional years if the student has not yet reached a level of English proficiency sufficient to yield valid and reliable information on what the student knows and can do on tests written in English.

*Current Regulations:* Current § 200.6(b)(1) requires each State to include limited English proficient students in a valid and reliable manner in their academic assessment systems. Specifically, under current § 200.6(b)(1)(i), a State must provide limited English proficient students with reasonable accommodations and, to the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what such students know and can do. Current § 200.6(b)(1)(ii) requires each State, in its title I State plan, to identify languages other than English that are present in the student population served by the SEA and to indicate the languages for which academic assessments are not available and are needed. For each language for which assessments are needed, a State must make every effort to develop such assessment and may request assistance from the Secretary in identifying linguistically accessible academic assessments that are needed.

Additionally, current § 200.6(b)(2) requires a State to assess limited English proficient students' achievement in English in reading/language arts if those students have been in public schools in the United States (except schools in Puerto Rico) for three or more consecutive years, and clarifies that this requirement does not exempt the State from assessing limited English proficient students for three years. Under the current regulations, an LEA

may continue, for no more than two years, to assess a limited English proficient student in reading/language arts in the student's native language if the LEA determines, on a case-by-case basis, that the student has not reached a sufficient level of English language proficiency to yield valid and reliable information on reading/language arts assessments written in English.

*Proposed Regulations:* The proposed regulations in § 200.6(f)(1)(i) would carry over the requirements from current § 200.6(b)(1)(i), because the ESEA maintains the requirement that English learners be assessed in a valid and reliable manner that includes reasonable accommodations. Proposed § 200.6(f)(1)(i)(A) would clarify that English learners who are also identified as students with disabilities under proposed § 200.6(a) must be provided accommodations as necessary based on both their status as English learners and their status as students with disabilities.

Proposed § 200.6(f)(1)(ii)(A) would require a State to ensure that the use of appropriate accommodations does not deny an English learner the opportunity to participate in the assessment, or any of the benefits from participation in the assessment, that are afforded to students who are not English learners, including that English learners who employ appropriate accommodations, consistent with State accommodations guidelines, can also use the results of such assessments for the purpose of entrance into to postsecondary education or training programs or for placement into credit-bearing courses in such programs.

The requirements in proposed § 200.6(f)(1)(ii)(B)–(E) would clarify a State's responsibility to provide for the assessment of English learners in the language most likely to yield accurate data on what those students know and can do in academic content areas, to the extent practicable. Specifically, a State would be required to provide in its title I State plan a definition for “languages that are present to a significant extent in the participating student population” and identify which languages other than English are included in this definition. In determining which languages are present to a significant extent, a State must ensure that its definition encompasses at least the most populous language other than English spoken in the participating student population, and consider languages spoken by distinct English learner populations (including those who are migratory, immigrants, or Native Americans), as well as languages that are spoken by significant numbers of English learners in certain LEAs or in certain grade levels.

The State must then identify in its title I State plan whether assessments are available in any languages other than English and, if so, for which grades and content areas. For the languages determined to be present to a significant extent by the State, the State must also indicate in which languages academic assessments are not currently available but are needed. For each of those languages, a State would be required to describe how it will make every effort to develop assessments in languages other than English by, at a minimum, providing a plan and timeline, describing the process it used to gather public input and consult with key stakeholders, and, if needed, providing an explanation for why it was unable to develop assessments in the languages that are present to a significant extent.

*Reasons:* The ESEA requires the provision of appropriate accommodations for English learners, including assessments in languages other than English if needed and practicable, in order to ensure that English learners are fairly and accurately assessed. The proposed regulations echo these statutory requirements. Additionally, negotiators agreed it is important to clarify that English learners who are also students with disabilities must be provided accommodations for both English learner status and status as a student with a disability because this population has unique needs that are sometimes overlooked.

The statutory provisions pertaining to assessments in languages other than English remain very similar to the requirements of the ESEA, as amended by the NCLB. However, section 1111(b)(2)(F) now requires that States make every effort to develop assessments in languages “present to a significant extent in the participating student population”; given this new language in the ESEA, as amended by the ESSA, the proposed regulations provide relevant clarification. The proposed regulations would provide criteria to guide States in determining which languages other than English are present to a significant extent so that States can ensure that all English learners are included in the assessment system in a valid and reliable manner and to facilitate States’ ability to make every effort to develop needed assessments. Rather than specify a particular definition for languages “present to a significant extent in the participating student population,” the negotiating committee recommended higher-level criteria that a State must follow in establishing its definition of this term. These criteria, laid out in

proposed § 200.6(f)(1)(iv), would reflect a minimum expectation for a State to meet the statutory requirements in this area, as well as critical considerations raised by negotiators (for example, considering languages that are spoken by significant portions of students in particular LEAs).

In recent years, a number of States have developed or provided content assessments in the native languages of English learners. For example, in the past, Washington state provided translated versions of math and science assessments for all grades in Chinese, Korean, Russian, Somali, Spanish, and Vietnamese; Michigan provided math and science assessments for all grades in Spanish and Arabic. In school year 2013–2014, 13 States offered reading/language arts, mathematics, or science assessments in languages other than English. Two consortia of States, the Partnership for Assessment of Readiness for College and Careers (PARCC) and the Smarter Balanced Assessment Consortium (Smarter Balanced), offered native language options during their first year of administration in school year 2014–2015. Twenty-one States, the District of Columbia, the U.S. Virgin Islands, and the Department of Defense Education Activity (DoDEA) are in one of these assessment consortia. Smarter Balanced offers a full “stacked” Spanish translation of its math assessments (*i.e.*, the complete Spanish and English versions are both provided to the student), pop-up glossaries in the 10 most common languages across the States in the consortium, and word-to-word dictionaries in other languages. PARCC provides a Spanish translation of its math assessments at the discretion of a State and offers translated directions and parent reports in the most common languages, with word-to-word dictionaries available for other languages.

Each State must define languages “present to a significant extent,” identify those languages, and make every effort to develop or offer assessments in those languages (including creating a plan and timeline for developing assessments in such languages, gathering public input, and consulting with key stakeholders). If there is a significant reason preventing a State from completing the development of these assessments, proposed § 200.6(f)(ii)(E)(3) would allow a State to provide an explanation of these overriding factors. Overall, negotiators wanted to ensure that English learners are included in academic assessments in a valid and reliable manner, including that States provide assessments in languages other

than English when needed to gather accurate data on the knowledge and skills of English learners in academic content areas. Given that not all States have yet been able to develop assessments in languages other than English, negotiators agreed that providing clarity about what steps a State must take to demonstrate it has met the statutory requirements and leaving open flexibility if a State faces significant obstacles in developing such assessments would be helpful for the State and, ultimately, for students themselves.

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

*Statute:* Section 1111(b)(2)(B)(ix) of the ESEA specifically excludes students in Puerto Rico from the requirement to measure knowledge of reading/language arts in English after three or more consecutive years of enrollment in schools in the United States because the language of instruction in Puerto Rico is Spanish.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 200.6(f)(2)(i) would provide an additional exemption to the requirement that students must be assessed in reading/language arts using assessments written in English after three years of attending schools in the United States (or five years, as determined by an LEA on a case-by-case basis) for students in Native American language programs or schools, pursuant to certain requirements laid out in proposed § 200.6(g).

Under the proposed regulations, this exemption would be available only for students enrolled in schools or programs that provide instruction primarily in a Native American language. Further, students enrolled in these Native American language schools or programs may be excluded from being assessed using a reading/language arts assessment written in English only if the State: Provides an assessment of reading/language arts in that Native American language that meets the requirements of proposed § 200.2 and has been subject to the Department’s assessment peer review; continues to assess the English language proficiency of all English learners enrolled in such schools or programs using the State’s annual English language proficiency assessment; and ensures that students in such schools or programs are assessed in reading/language arts, using assessments written in English, by no later than the end of the eighth grade.

Finally, proposed § 200.6(h) would incorporate the definition of “Native

American” from section 8101(34) of the ESEA.

*Reasons:* The Federal government has a trust responsibility to American Indian tribes. As part of this responsibility, Congress has emphasized the importance of preserving and revitalizing Native American languages in many Federal laws, including the ESEA, which contains support for schools and programs that use Native American languages as the primary language of instruction. Specifically, the following sections of the ESEA are relevant to this issue:

- Section 6133, which authorizes a new discretionary grant program for Native American and Alaska Native language immersion schools and programs to maintain, protect, and promote the rights and freedom of Native Americans and Alaska Natives to use, practice, maintain, and revitalize their languages;
- Section 3127, which addresses programs for Native American children studying Native American languages;
- Section 6111, which states that a purpose of Indian education is to meet the unique cultural, language, and educational needs of such students;
- Section 6205, which authorizes grants to entities operating Native Hawaiian programs of instruction in the Native Hawaiian language and establishes a priority for use of the Hawaiian language in instruction; and
- Section 6304, which authorizes use of grant funds for instructional programs that make use of Alaska Native languages and native language immersion programs or schools.

In addition, the Native American Languages Act of 1990 (NALA) requires all Federal agencies to encourage and support the use of Native American languages as a medium of instruction and states that it is the policy of the United States to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages. Moreover, Executive Order 13592, “Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities,” sets forth the Administration’s policy, including “to help ensure that American Indian/Alaska Native students have an opportunity to learn their Native languages.” These declarations of Federal policy are supported by growing recognition of the importance of Native language preservation in facilitating educational success for Native American students. In a 2007 study by Teachers of English to Students of Other

Languages (TESOL),<sup>1</sup> the majority of Native American youth surveyed stated that they value their Native American language, view it as integral to their sense of self, want to learn it, and view it as a means of facilitating their success in school and life.

As a result, the negotiating committee recommended including the proposed exemption, which would be available only for students enrolled in schools or programs that provide instruction primarily in a Native American language (*i.e.*, 50 percent or more of instructional time), including students identified as English learners and students without such designation. The additional requirements for this exemption are designed to ensure high-quality programs and outcomes for students. For students in a Native American language program who are also English learners, the LEA would still be required to administer the annual English language proficiency assessment as required under section 1111(b)(2)(G) and to provide English language services pursuant to civil rights obligations. The requirement to use an assessment of reading/language arts in English no later than the eighth grade is intended to ensure that students are able to succeed in high school and postsecondary institutions in which the language of instruction is English. There are many different models of Native American language programs. Some start as immersion in the Native American language and gradually transition to more English throughout elementary school, whereas others adopt a bilingual approach across the grades. States or districts would have the flexibility under this exemption to decide in which grade to begin administering the reading/language arts assessment in English, so long as students begin taking such assessments in English no later than the eighth grade.

Importantly, this exemption in proposed § 200.6(g) reflects the input of negotiators, especially tribal leader negotiators on the negotiating committee. The tribal leader negotiators emphasized the Federal government’s responsibility to help revitalize Native American languages in light of the history of Federal eradication of those languages, including through boarding schools where students were stripped of their tribal identities and languages. They also emphasized the Federal commitment to preserve Native

American languages as found in the NALA as well as the ESEA. They articulated how the provision of reading/language arts assessments in Native American languages is critical for promoting high-quality instruction in Native American languages, which in turn facilitates improved educational outcomes for Native American students in these schools and programs, as well as helping to ensure the survival of Native American languages for future generations.

The definition of “Native American” in proposed § 200.6(h) would incorporate the definition of this term in section 8101(34) of the ESEA. Under that definition, “Native American” and “Native American language” have the same meaning as in section 103 of the NALA. Under NALA, “Native American” means an Indian (as defined in 20 U.S.C. 7491(3), which is now section 6151 of the ESEA, but was unchanged substantively by the ESSA), Native Hawaiian, or Native American Pacific Islander. The definition of “Indian” in section 6151 of the ESEA, includes Alaska Natives, as well as members of any federally recognized or State-recognized tribes. Because it is difficult to ascertain the full definition from section 8101(34) of the ESEA alone, we propose to provide the full definition in this section for the convenience of the public.

#### *Assessing English Language Proficiency*

*Statute:* Under section 1111(b)(2)(G) and sections 3111(b)(2)(E)(i), 3113(b)(6)(A), 3115(g)(2)(A), 3116(b)(2)(A), and 3121(a)(3) of the ESEA, a State must develop and administer a statewide annual assessment of English language proficiency to all English learners in schools served by the SEA. The English language proficiency assessment must be aligned with the State’s English language proficiency standards under section 1111(b)(1)(F), which must be derived from the four domains of speaking, listening, reading, and writing, address the different proficiency levels of English learners, and be aligned with the challenging State academic standards. Under section 1111(b)(2)(J)(ii)(II), if a State develops a computer-adaptive English language proficiency assessment, the State must ensure that the assessment measures a student’s language proficiency, which may include growth toward proficiency, in order to measure the student’s acquisition of English. If a State assesses students with the most significant cognitive disabilities with an alternate assessment aligned with alternate academic achievement standards, the

<sup>1</sup> Romero-Little, Mary Eunice, Teresa L. McCarty, Larisa Warhol, and Oiedia Zepeda. 2007. “Language Policies in Practice: Preliminary Findings from a Large-Scale Study of Native American Language Shift.” *TESOL Quarterly* 41:3, 607–618.



State must have an alternate English language proficiency assessment for those students who are English learners in accordance with section 612(a)(16) of the IDEA.

**Current Regulations:** Current § 200.6(b)(3) requires each State to require each LEA to assess annually the English language proficiency, including reading, writing, speaking, and listening skills, of all students with limited English proficiency in schools in the LEA.

**Proposed Regulations:** Proposed § 200.6(f)(3)(i) would require each State to develop a uniform statewide assessment of English language proficiency (including skills in the four recognized domains of language) and require that its LEAs annually assess the English language proficiency of all English learners served using this statewide English language proficiency assessment.

Proposed § 200.6(f)(3)(ii) would require that a State's annual English language proficiency assessment provide coherent and timely information about each English learner's attainment of the State's English language proficiency standards, including information to be provided to parents consistent with the requirements of proposed § 200.2(e). Further, the proposed regulations would require that a State's English language proficiency assessment meet certain requirements for validity and reliability under proposed § 200.2(b)(2)–(4) and be submitted for Federal peer review under section 1111(a)(4).

If a State develops a computer-adaptive English language proficiency assessment, it would be required to ensure that the assessment measures a student's English language proficiency (which may include growth toward proficiency) and meets all other requirements for English language proficiency assessments in general.

For English learners who are also students with disabilities under proposed § 200.6(a), proposed § 200.6(f)(3)(iv) would provide that a State must provide appropriate accommodations on the English language proficiency assessment and, for English learners who are also students with the most significant cognitive disabilities covered under proposed § 200.6(a)(1)(ii) who cannot participate in the English language proficiency assessment even with accommodations, a State must provide for an alternate English language proficiency assessment.

**Reasons:** The proposed regulations pertaining to a State's English language proficiency assessment under section

1111(b)(2)(G) of the ESEA would largely reflect statutory updates (*e.g.*, the addition of computer-adaptive English language proficiency assessments) and provide clarification, as needed, to the statutory language.

First, the proposed regulations would require uniform English language proficiency tests across the State. The ESEA refers in several places, including in section 3102(b)(1)(E)(i) and section 3102(b)(3)(A)(ii), to the annual English language proficiency assessment as the “State's English language proficiency assessment,” though section 1111(b)(2)(G) does not expressly refer to this assessment as a statewide assessment. Currently, however, all States do use a uniform statewide assessment of English language proficiency. To ensure consistency with current practice, promote technical validity, quality, and comparability of English language proficiency assessment results across LEAs, and clarify an area of statutory ambiguity, proposed § 200.6(f)(3)(i)(A) would make it clear that the annual English language proficiency assessment must be a uniform statewide assessment. Negotiators agreed without extensive debate that using a single statewide English language proficiency assessment is necessary to promote quality, consistency, and comparability.

Due to the increased importance of the English language proficiency assessment, especially with the inclusion of progress toward achieving English language proficiency in the accountability system under section 1111(c) of the ESEA, negotiators also emphasized that these assessments should be submitted for Federal peer review and held to the same requirements for validity and reliability as academic content assessments under proposed § 200.2(b)(2), (4), and (6). Additionally, negotiators considered it important to require that information be provided to parents about student attainment of a State's English language proficiency standards, as measured by the annual English language proficiency assessment, in a language and form that they can understand in order to ensure parents have all needed information to support their children and to advocate for their children's educational opportunities and appropriate English language services.

The proposed regulation also addresses the inclusion of English learners who are also students with disabilities in the annual English language proficiency assessment. Proposed § 200.6(f)(3)(iv) would clarify that States must provide appropriate accommodations for English learners

who are also students with disabilities as needed to measure their English language proficiency on the annual English language proficiency assessment, which is required by other provisions of the ESEA, as well as by the IDEA and other Federal statutes.

Finally, proposed § 200.6(f)(3)(v) would require that, if an English learner with the most significant cognitive disabilities cannot participate in the annual English language proficiency assessment even with accommodations, a State must provide for an alternate English language proficiency assessment for such a student. This is required by section 612 of the IDEA, as amended by the ESSA, and was noted in the Department's non-regulatory guidance from 2014<sup>2</sup> and 2015.<sup>3</sup>

#### *Recently Arrived English Learners*

**Statute:** With respect to a recently arrived English learner who has been enrolled in a school in one of the 50 States or the District of Columbia for less than 12 months, a State may, under section 1111(b)(3) of the ESEA, exclude the student from one administration of the State's reading/language arts assessment.

**Current Regulations:** Current § 200.6(b)(4) governs the limited exemption for recently arrived limited English proficient students in State assessment systems. Under the current regulations, a State may exempt a recently arrived limited English proficient student from one administration of the State's reading/language arts assessment. Section 200.6(b)(4)(iv) defines a “recently arrived limited English proficient student” as a student with limited proficiency in English who has attended schools in the United States (*i.e.*, schools in the 50 States and the District of Columbia) for less than 12 months.

Under the current regulations, if a State does not assess a recently arrived English proficient student on the State's reading/language arts assessment, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the

<sup>2</sup> U.S. Department of Education. 2014. Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives. Available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf>.

<sup>3</sup> U.S. Department of Education. 2015. Addendum to Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives. Available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/addendum-q-and-a-on-elp-swd.pdf>.

State's reading/language arts assessment in a native language. Section 200.6(b)(4)(i)(C) requires a State and its LEAs to report on State and district report cards the number of limited English language proficient students who are not assessed on the State's reading language arts assessment.

Additionally, the current regulations reiterate that the exemption for recently arrived limited English proficient students does not relieve an LEA of its responsibility to provide such students with appropriate instruction to assist them in gaining English language proficiency as well as content knowledge in reading/language arts and math, or from its responsibility to assess the student's English language proficiency or mathematics achievement.

**Proposed Regulations:** Proposed § 200.6(f)(4) would update the current regulations to reflect a statutory change in the ESEA pertaining to the definition of a "recently arrived English learner." Pursuant to the statute, the proposed regulations would define a "recently arrived English learner" as an English learner who has been enrolled in schools in the United States for less than 12 months. We would also clarify in proposed § 200.6(f)(4)(iii) that, though recently arrived English learners may be exempted from one administration of the reading/language arts assessment, these students must be assessed in mathematics and science consistent with the frequency described in proposed § 200.5(a). The remaining proposed regulations in § 200.6(f)(4) would carry over the current regulations, with only minor changes to reflect technical updates from the statute (e.g., updated statutory citations).

**Reasons:** While the ESEA made changes to the inclusion of recently arrived English learners in accountability, it made no changes to the provisions pertaining to the inclusion of recently arrived English learners in a State's academic content assessments; that is, recently arrived English learners may still be exempted from one, and only one, administration of the reading/language arts assessment during a student's first 12 months in schools in the United States. Thus, the proposed regulations only reflect minor technical changes in this area and one area of additional clarification. Proposed § 200.6(f)(4)(iii) would clarify that recently arrived English learners must be assessed in science (as well as mathematics, which is already reflected in current § 200.6(b)(4)(iii)), according to the frequency described in proposed § 200.5(a), to reiterate for States that this

exception only applies to reading/language arts. Additionally, the definition of a "recently arrived English learner" in proposed § 200.6(f)(5)(i) reflects the statutory change that now defines recently arrived English learners as those who have been enrolled in schools in the United States for less than 12 months, rather than those who have attended schools in the United States for less than 12 months.

#### *Highly Mobile Students*

**Statute:** Section 1111(b)(2)(B)(vii) of the ESEA requires a State's assessment system to provide for the participation of all students, including students who are highly mobile and who may not attend the same school or LEA for a full academic year.

**Current Regulations:** Current § 200.6(c) reiterates that a State must include migratory and other mobile students in its academic assessment system even if those students are not included for accountability purposes. Additionally, § 200.6(d) reinforces that a State must include students experiencing homelessness in its academic assessment, reporting, and accountability systems, but clarifies that States need not disaggregate academic assessment data on students experiencing homelessness separately.

**Proposed Regulations:** Proposed § 200.6(i) would clarify that a State must include all students, including highly mobile student populations, in its assessment system, including migratory children, homeless children or youth, children in foster care, and students with a parent who is a member of the Armed Forces on active duty. Proposed § 200.2(b)(11) would include the definitions associated with these student populations.

**Reasons:** Proposed § 200.6(i), which addresses highly mobile students, would build on current regulations and continue to reiterate that a State must include migratory children and homeless children and youth in the State's assessment system. Since the ESEA brings to the forefront additional highly mobile student populations (specifically, children in foster care and military-connected students), the proposed regulations would broaden the current regulations to emphasize these vulnerable student populations as well. Given the transience and mobility associated with these populations, and research showing that highly mobile students are more likely than their peers to experience negative educational outcomes,<sup>4</sup> we consider it crucial to

reaffirm the requirement that a State must include all such students in the assessment system and in the subgroups of students included in the accountability system under section 1111(c)(2) of the ESEA.

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

##### *Regulatory Impact Analysis*

Under Executive Order 12866, the Office of Management and Budget (OMB) 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 stated in the Executive order.

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

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

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

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things

residential mobility on the academic achievement of urban elementary and middle school students." *Educational Researcher* 41(9), 385–392; and Rumberger, R. & Larson, K. 1998. Student mobility and the increased risk of high school dropout. *American Journal of Education* 107(1), 1–35.

<sup>4</sup> See, for example, Voight, A., Shinn, M. & Nation, M. 2012. "The longitudinal effects of

and to the extent practicable—the costs of cumulative regulations;

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

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

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

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

We have assessed the potential costs and benefits of this regulatory action. The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined as necessary for effective and efficient administration of the assessment provisions in part A of title I of the ESEA. Elsewhere in this section under *Paperwork Reduction Act of 1995*, we identify and explain burdens specifically associated with information collection requirements.

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

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

#### *Discussion of Costs and Benefits*

The Department believes that this regulatory action would generally not impose significant new costs on States or their LEAs. This action would implement and clarify the changes to the assessment provisions in part A of title I of the ESEA made by the ESSA, which as discussed elsewhere in this notice are limited in scope. The costs to States and LEAs for complying with these changes would similarly be limited, and would be financed with

Federal education funds, including funds available under Grants for State Assessments and Related Activities.

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

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

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

Proposed § 200.3(b) would implement the new provision in section 1111(b)(2)(H) of the ESEA under which a State may permit an LEA to administer a State-approved nationally recognized high school academic assessment in reading/language arts, mathematics, or science in lieu of the high school assessment the State typically administers in that subject. If a State seeks to approve a nationally recognized high school academic assessment for use by one or more of its LEAs, proposed § 200.3(b)(1) would require, consistent with the statute, that the State establish technical criteria to determine whether the assessment meets specific requirements for

technical quality and comparability. In establishing these criteria, we expect States to rely in large part on existing Department assessment peer review guidance and other assessment technical quality resources.

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

#### *Native Language Assessments*

Proposed § 200.6(f)(1) would implement the new provision in section 1111(b)(2)(F) of the ESEA requiring a State to make every effort to develop, for English learners, annual academic assessments in languages other than English that are present to a significant extent in the participating student population. In doing so, proposed § 200.6(f)(1) would require a State, in its title I State plan, to define “languages other than English that are present to a significant extent in the participating student population,” ensure that its definition includes at least the most populous language other than English spoken by the participating student population, describe how it will make every effort to develop assessments consistent with its definition where such assessments are not available and are needed, and explain, if applicable, why it is unable to complete the development of those assessments despite making every effort. Although a State may incur costs in complying with the requirement to make every effort to develop these assessments consistent with its definition, we do not believe these costs would be significant, in part because under section 1111(b)(2)(F)(ii) a State may request assistance from the Secretary in identifying appropriate linguistically accessible academic assessment measures. We believe the costs of complying with this requirement are outweighed by its potential benefits to SEAs and their LEAs, which would include fairer and more accurate assessments of the achievement of English learners.

### *Clarity of the Regulations*

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

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

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A “section” is preceded by the symbol “§” and a numbered heading; for example, § 200.2.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

### *Regulatory Flexibility Act Certification*

The Secretary proposes to certify that these proposed requirements would not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration’s Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive ESEA funds qualify as small entities under this definition, the requirements proposed in this document would not have a significant economic impact on these small LEAs because the costs of implementing these requirements would be covered by funding received by States under Federal education programs including Grants for State Assessments and Related Activities. The Department believes the benefits provided under this proposed regulatory action outweigh the burdens on these small LEAs of complying with the proposed requirements. In particular, the

proposed requirements would help ensure that assessments administered in these LEAs produce valid and reliable information on the achievement of all students, including students with disabilities and English learners, that can be used to inform and improve classroom instruction and student supports, ultimately leading to improved student academic outcomes. The Secretary invites comments from small LEAs as to whether they believe the requirements proposed in this document would have a significant economic impact on them and, if so, requests evidence to support that belief.

### *Paperwork Reduction Act of 1995*

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

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

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations, we will display the control number assigned by OMB to any information collection requirements proposed in this NPRM and adopted in the final regulations.

The proposed regulations would affect a currently approved information collection, 1810–0576. Under 1810–0576, the Department is approved to collect information from States, including assessment information. On May 31, 2016, the Department published in the **Federal Register** a notice of proposed rulemaking (81 FR 34539), which identified proposed

changes to information collection 1810–0576. These proposed regulations would result in additional changes to the existing information collection, described below.

Proposed § 200.2(d) would require States to submit evidence regarding their general assessments, alternate assessments, and English language proficiency assessments for the Department’s peer review process, and proposed § 200.2(b)(5)(ii) would require that States make evidence of technical quality publicly available. Proposed § 200.3(b)(2)(ii) would require a State that allows an LEA to administer a locally selected, nationally recognized high school academic assessment in place of the State assessment to submit the selected assessment for the Department’s peer review process. We anticipate that 52 States will spend 200 hours preparing and submitting evidence regarding their content assessments, alternate assessments, and English language proficiency assessments for peer review, and that 20 States will spend an additional 100 hours preparing and submitting evidence relating to locally selected, nationally recognized high school academic assessments. Accordingly, we anticipate the total burden over the three-year period for which we seek information collection approval to be 12,400 hours for all respondents, resulting in an increased annual burden of 4,133 hours.

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

Proposed § 200.6(b)(2)(i) would require all States to develop, disseminate information to schools and parents, and promote the use of appropriate accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments. We anticipate that 52 States will spend 60 hours developing and disseminating this information annually, resulting in an annual burden increase of 3,120 hours.

Proposed § 200.6(c)(3)(iv) would require all States to make publicly available information submitted by an LEA justifying the need of the LEA to exceed the cap on the number of students with the most significant

cognitive disabilities who may be assessed in a subject using an alternate assessment aligned with alternate academic achievement standards. We anticipate that 52 States will spend 20 hours annually making this information available, resulting in an annual burden increase of 1,040 hours.

Proposed § 200.6(c)(4) would allow a State that anticipates that it will exceed the cap for assessing students with the most significant cognitive disabilities with an alternate assessment aligned with alternate academic achievement standards to request a waiver for the relevant subject for one year. We anticipate that 15 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 600 hours.

Proposed § 200.6(c)(5) would require each State to report annually to the

Secretary data relating to the assessment of children with disabilities. We anticipate that 52 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 2,080 hours.

Proposed § 200.6(d)(3) would establish requirements for each State that adopts alternate academic achievement standards for students with the most significant cognitive disabilities. Such a State would be required to ensure that parents of students with the most significant cognitive disabilities assessed using an alternate assessment aligned with alternate academic achievement standards are informed that their child's achievement will be measured based on alternate academic achievement standards, and informed how participation in such assessment may

delay or otherwise affect the student from completing the requirements for a regular high school diploma. We anticipate that 52 States will spend 100 hours annually ensuring that relevant parents receive this information, resulting in an annual burden increase of 5,200 hours.

Proposed § 200.8(a)(2) would require a State to provide to parents, teachers, and principals individual student interpretive, descriptive, and diagnostic reports, including information regarding academic achievement on academic assessments. Proposed § 200.8(b)(1) would require a State to produce and report to LEAs and schools itemized score analyses. We anticipate that 52 States will spend 1,500 hours annually providing this information, resulting in a total burden increase of 78,000 hours.

#### COLLECTION OF INFORMATION FROM SEAS—ASSESSMENTS AND NOTIFICATION

Regulatory section	Information collection	OMB Control number and estimated change in burden
§ 200.2(b), § 200.2(d), § 200.3(b)(2)(ii).	States would be required to submit evidence for the Department's peer review process, and to make this evidence available to the public.	OMB 1810–0576. The burden would increase by 4,133 hours.
§ 200.5(b)(4) .....	States would be required to describe in the title I State plan strategies to provide all students with the opportunity to take advanced mathematics coursework in middle school.	OMB 1810–0576. No change in burden, as this burden is already considered in the burden of preparing a title I State plan.
§ 200.6(b)(2)(i) .....	States would be required to disseminate information regarding the use of appropriate accommodations to schools and parents.	OMB 1810–0576. The burden would increase by 3,120 hours.
§ 200.6(c)(3)(iv) .....	Certain States would be required to make publicly available LEA-submitted information about the need to exceed the cap for assessing students with the most significant cognitive disabilities with an alternate assessment aligned with alternate academic achievement standards.	OMB 1810–0576. The burden would increase by 1,040 hours.
§ 200.6(c)(4) .....	Certain States would request a waiver from the Secretary, to exceed the cap for assessing students with the most significant cognitive disabilities with an alternate assessment aligned with alternate academic achievement standards.	OMB 1810–0576. The burden would increase by 600 hours.
§ 200.6(c)(5) .....	States would be required to report to the Secretary data relating to the assessment of children with disabilities.	OMB 1810–0576. We anticipate the burden would increase by 2,080 hours.
§ 200.6(d)(3) .....	States that adopt alternate achievement standards for students with the most significant cognitive disabilities would be required to ensure certain parents are provided with information.	OMB 1810–0576. The burden would increase by 5,200 hours.
§ 200.8(a)(2), § 200.8(b)(1) .....	States would be required to provide student assessment reports to States, teachers, and principals, as well as itemized score analyses for LEAs and schools.	OMB 1810–0576. The burden would increase by 78,000 hours.

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

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

three-year period for which we seek approval, an LEA will be required to conduct these notifications four times.

Accordingly, we anticipate the total burden over the three-year period for which we seek information collection approval to be 102,000 hours, resulting in an increased annual burden of 34,000 hours.

## COLLECTION OF INFORMATION FROM LEAS—PARENTAL NOTIFICATION

Regulatory section	Information collection	OMB Control number and estimated change in burden
§ 200.3(c)(1)(i), § 200.3(c)(3), § 200.3(c)(4).	Certain LEAs would be required to notify parents of high school students about selected assessments.	OMB 1810–0576. The burden would increase by 34,000 hours.

We have prepared an Information Collection Request (ICR) for these collections. If you want to review and comment on the ICR, please follow the instructions listed under the **ADDRESSES** section of this notice. Please note the Office of Information and Regulatory Affairs (OMB) and the Department review all comments on an ICR that are posted at [www.regulations.gov](http://www.regulations.gov). In preparing your comments, you may want to review the ICR in [www.regulations.gov](http://www.regulations.gov) or in [www.reginfo.gov](http://www.reginfo.gov). The comment period will run concurrently with the comment period of the NPRM. We consider your comments on these collections of information in—

- Deciding whether the collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond.

This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

OMB is required to make a decision concerning the collections of information contained in these regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments by August 10, 2016. This does not affect the deadline for your comments to us on the proposed regulations.

**ADDRESSES:** Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) by selecting Docket ID ED–2016–OESE–0053 or via postal mail commercial delivery or hand delivery. Please specify the Docket ID number and indicate “Information Collection Comments” on the top of your comments if your comments relate to the information collection for these

proposed regulations. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., Mailstop L–OM–2–2E319LBJ, Room 2E115, Washington, DC 20202–4537. Comments submitted by fax or email and those submitted after the comment period will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** Electronic mail [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov). Please do not send comments here.

#### *Intergovernmental Review*

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

#### *Assessment of Educational Impact*

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Numbers: 84.010 Title I Grants to Local Educational Agencies; and 84.369 Grants for State Assessments and Related Activities)

#### **List of Subjects in 34 CFR Part 200**

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

Dated: July 1, 2016.

**John B. King, Jr.,**

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary of Education proposes to amend part 200 of title 34 of the Code of Federal Regulations as follows:

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

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

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

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

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

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

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

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

(b) The assessments required under this section must—

(1)(i) Except as provided in §§ 200.3, 200.5(b), and 200.6(c) and section 1204 of the Act, be the same assessments used to measure the achievement of all students; and

(ii) Be administered to all students consistent with § 200.5(a);

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

(ii) Be developed, to the extent practicable, using the principles of universal design for learning. For the purposes of this section, “universal design for learning” means a scientifically valid framework for guiding educational practice that—

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

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

(3)(i)(A) Be aligned with the challenging State academic standards; and

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

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

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

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

(2) With respect to alternate assessments for students with the most significant cognitive disabilities, measure student performance based on alternate academic achievement standards defined by the State consistent with section 1111(b)(1)(E) of the Act that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or competitive, integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014; and

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

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

(5) Be supported by evidence that—

(i) The assessments are of adequate technical quality—

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

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

(ii) Is made available to the public, including on the State’s Web site;

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

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding of challenging content, as defined by the State. These measures may—

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

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

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

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

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

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

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

(i) A single summative assessment; or

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

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

(i) Gender;

(ii) Each major racial and ethnic group;

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

(iv) Status as a migratory child as defined in section 1309(3) of title I, part C of the Act;

(v) Children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) as compared to all other students;

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

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

(viii) Status as a child in foster care.

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

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

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

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

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

(i) Must measure a student’s academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and

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

(2) If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student’s academic proficiency for the grade in which the



student is enrolled must be reported on all reports required by § 200.8 and section 1111(h) of the Act.

(d) A State must submit evidence for peer review under section 1111(a)(4) of the Act that its assessments under this section and §§ 200.3, 200.4, 200.5(b), 200.6(c), 200.6(f)(1) and (3), and 200.6(g) meet all applicable requirements.

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

(1) Be in an understandable and uniform format;

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

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

(Authority: 10 U.S.C. 101(a)(4), (d)(1), and (d)(5); 20 U.S.C. 1003(24), 6311(a)(4), 6311(b)(2), and 6399(3); 42 U.S.C. 11434a, 12102; and 45 CFR 1355(a))

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

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

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

(2) An LEA must administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements in § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate academic achievement standards, consistent with § 200.6(c).

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

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

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

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

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

(A) The coverage of academic content;

(B) The difficulty of the assessment;

(C) The overall quality of the assessment; and

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

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

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

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

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

(C) Provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system under section 1111(c) of the Act;

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

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

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

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

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

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

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

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

(A) That the LEA intends to request approval from the State to use a locally

selected, nationally recognized high school academic assessment in place of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable;

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

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

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

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

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

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

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

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

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

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

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

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

(Authority: 20 U.S.C. 6311(b)(2)(H), 6312(a), 7483, 7918; 29 U.S.C. 794; 42 U.S.C. 2000d-1, 12132)

■ 4. Section 200.4 is amended:

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

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

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

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

The revision reads as follows:

**§ 200.4 State law exception.**

\* \* \* \* \*

(Authority: 20 U.S.C. 6311(b)(2)(E))

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

**§ 200.5 Assessment administration.**

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

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

(A) In each of grades 3 through 8; and  
(B) At least once in grades 9 through 12.

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

(A) Grades 3 through 5;  
(B) Grades 6 through 9; and  
(C) Grades 10 through 12.

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

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

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

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

(3) In high school—

(i) The student takes a State-administered end-of-course assessment

or nationally recognized high school academic assessment as defined in § 200.3(d) in mathematics that—

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

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

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

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

(Authority: 20 U.S.C. 6311(b)(2)(B)(v) and (b)(2)(C))

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

**§ 200.6 Inclusion of all students.**

A State's academic assessment system required under § 200.2 must provide for the participation of all students in the grades assessed under § 200.5(a) in accordance with this section.

(a) *Students with disabilities in general.* (1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (f)(3)(iv) of this section. For purposes of this section, students with disabilities, collectively, are—

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

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

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

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

(B) Title II of the ADA.

(2)(i) A student with a disability under paragraph (a)(1)(i) or (iii) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, a student with the most significant cognitive disabilities under paragraph

(a)(1)(ii) of this section may be assessed with—

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

(B) An alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

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

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

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

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

(2) A State must—

(i) Develop, disseminate information to, at a minimum, schools and parents, and promote the use of appropriate accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments consistent with paragraph (a)(2) of this section; and

(ii) Ensure that general and special education teachers, paraprofessionals, specialized instructional support personnel, and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including, as necessary, alternate assessments under paragraphs (c) and (f)(3)(v) of this section, and know how to make use of appropriate accommodations during assessment for all students with disabilities.

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

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

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

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* (1) If a

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

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

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

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

(2) For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment aligned with alternate academic achievement standards under paragraph (c)(1) of this section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

(3) A State must—

(i) Not prohibit an LEA from assessing more than 1.0 percent of its assessed students in a given subject with an alternate assessment aligned with alternate academic achievement standards;

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

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

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

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

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

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

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

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

(iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards, and any other LEA that the State determines will significantly contribute to the State's exceeding the cap under paragraph (c)(2) of this section—

(A) Followed each of the State's guidelines under paragraph (d) of this section, including criteria in paragraph (d)(1)(i) through (iii) except paragraph (d)(6);

(B) Will not significantly increase, from the prior year, the extent to which the LEA assessed more than 1.0 percent of students in any subject for which assessments were administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards unless the LEA has demonstrated to the State a higher prevalence of students with the most significant cognitive disabilities than were enrolled in assessed grades in the prior year; and

(C) Will address any disproportionality in the number and percentage of students in any particular subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

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

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more

than 1.0 percent of its assessed students in a subject in a school year using an alternate assessment aligned with alternate academic achievement standards, and any other LEA that the State determines will significantly contribute to the State's exceeding the cap under paragraph (c)(2) of this section, to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

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

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

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

(i) General assessments described in § 200.2;

(ii) General assessments with accommodations; and

(iii) Alternate assessments aligned with alternate academic achievement standards under this paragraph (c).

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

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

(i) Assess a student's academic achievement based on the challenging

State academic content standards for the grade in which the student is enrolled;

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

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

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

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

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

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

(iii) Students with the most significant cognitive disabilities require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in

such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

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

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

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum;

(6) Ensure that it describes in its State plan the steps it has taken to incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers; and

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

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

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

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

(f) *English learners.* A State must include English learners in its academic

assessments required under § 200.2 as follows:

(1) *In general.* (i) Consistent with § 200.2 and paragraph (f)(2) and (f)(4) of this section, a State must assess English learners in a valid and reliable manner that includes—

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

(B) To the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in academic content areas until the students have achieved English language proficiency.

(ii) To meet the requirements under paragraph (f)(1)(i) of this section, the State must, in its State plan—

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

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

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

(B) Provide its definition for “languages other than English that are present to a significant extent in the participating student population,” consistent with paragraph (f)(1)(iv) of this section, and identify the specific languages that meet that definition;

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

(D) Indicate the languages other than English that are present to a significant extent in the participating student population, as defined by the State, for which yearly student academic assessments are not available and are needed; and

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

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

(2) A description of the process the State used to gather meaningful input on assessments in languages other than English, collect and respond to public comment, and consult with educators,

parents and families of English learners, and other stakeholders; and

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

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

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

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

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

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

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

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

(iii) The requirements in paragraph (f)(2)(i) and (ii) of this section do not permit an exemption from participating in the State assessment system for English learners.

(3) *Assessing English proficiency.* (i) Each State must—

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

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

(ii) The assessment under paragraph (3)(i) of this section must be—

(A) Aligned with the State's English language proficiency standards under section 1111(b)(1)(F) of the Act and provide coherent and timely information about each student's attainment of those standards, including information provided to parents consistent with § 200.2(e); and

(B) Developed and used consistent with the requirements of § 200.2(b)(2), (b)(4), and (b)(5).

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

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

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

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

(v) A State must provide for an alternate English language proficiency assessment for each English learner covered under paragraph (a)(1)(ii) of this section who cannot participate in the assessment under paragraph (f)(3)(i) of this section even with appropriate accommodations.

(4) *Recently arrived English learners.*

(i)(A) A State may exempt a recently arrived English learner, as defined in paragraph (f)(5)(i) of this section, from one administration of the State's reading/language arts assessment under § 200.2.

(B) If the State does not assess a recently arrived English learner on the State's reading/language arts assessment, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language consistent with paragraph (f)(2)(i) of this section.

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

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

(ii) A State must assess the English language proficiency of a recently arrived English learner pursuant to paragraph (f)(3) of this section.

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

(5) *Definitions related to English learners.* (i) A “recently arrived English learner” is an English learner who has been enrolled in schools in the United States for less than twelve months.

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

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

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

(ii) The State submits the assessment of reading/language arts in the Native American language for peer review as part of its State assessment system, consistent with § 200.2(d); and

(iii) For an English learner, as defined in section 8101(2)(C)(ii) of the Act, the State continues to assess the English language proficiency of such English learner, using the annual English language proficiency assessment required under § 200.6(f)(3), and provides appropriate services to enable him or her to attain proficiency in English.

(2) Notwithstanding § 200.6(f)(2), the State must assess under § 200.5(a)(1)(i)(A), using assessments written in English by no later than the

end of the eighth grade, the achievement of each student enrolled in such a school or program in meeting the challenging State academic standards in reading/language arts.

(h) *Definition.* For the purpose of this section, “Native American” means “Indian” as defined in section 6151 of the Act, which includes Alaska Native and members of federally recognized or state-recognized tribes; Native Hawaiian; and Native American Pacific Islander.

(i) *Highly mobile students.* The State must include in its assessment system the following highly mobile student populations as defined in § 200.2(b)(11):

(1) Students with status as a migratory child.

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

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

(4) Students with status as a student with a parent who is a member of the armed forces on active duty.

(Authority: 20 U.S.C. 1400 *et seq.* and 6311(b)(2); 25 U.S.C. 2902; 29 U.S.C. 794; 42 U.S.C. 2000d–1, 11434a, and 12132; 34 CFR 300.5)

■ 7. Section 200.8 is amended:

■ a. In paragraph (a)(2)(i), by adding the word “and” following the semicolon.

■ b. In paragraph (a)(2)(ii), by removing the words “including an alternative format (e.g., Braille or large print) upon request; and” and adding in their place the words “consistent with § 200.2.”

■ c. By removing paragraph (a)(2)(iii).

■ d. In paragraph (b)(1), by removing the term “§ 200.2(b)(4)” and adding in its place the term “§ 200.2(b)(13)”.

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

The revision reads as follows:

**§ 200.8 Assessment reports.**

\* \* \* \* \*

(Authority: 20 U.S.C. 6311(b)(2)(B)(x) and (xii))

■ 8. Section 200.9 is amended:

■ a. By revising paragraph (a).

■ b. In paragraph (b), by removing the term “section 6113(a)(2)” and adding in its place the term “section 1002(b)”.

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

The revisions read as follows:

**§ 200.9 Deferral of assessments.**

(a) A State may defer the start or suspend the administration of the assessments required under § 200.2 for one year for each year for which the amount appropriated for State assessment grants under section 1002(b) of the Act is less than \$369,100,000.

\* \* \* \* \*

(Authority: 20 U.S.C. 6302(b), 6311(b)(2)(I), 6363(a))

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