

those students with the most significant cognitive disabilities taking an alternate assessment measured against alternate achievement standards as defined in § 200.1(d).

Section 200.13 Adequate Yearly Progress in General

Statute: Under section 1111(b)(2)(B), each State must define what constitutes AYP of the State, and of all public elementary and secondary schools and LEAs in the State, toward enabling all students to meet the State's student academic achievement standards. This definition must apply the same high standards of academic achievement to all public elementary and secondary school students in the State, be statistically valid and reliable, and measure progress based primarily on the State's academic assessments.

To make AYP, a school must: meet or exceed the State's annual measurable objectives with respect to all students and students in each subgroup; test at least 95 percent of all students and of the students in each subgroup enrolled in the school; and make progress on the other academic indicators determined by the State.

Current Regulations: The current regulations governing AYP implement the statutory provisions in section 1111 of the ESEA. They require that each State demonstrate what constitutes AYP of the State and of all public schools and LEAs in the State, in a manner that applies the same high standards of achievement to all public school students; is statistically valid and reliable; results in continuous and substantial academic improvement for all students; measures the progress of all public schools, LEAs and the State based primarily on the State's academic assessment system; measures progress separately for reading/language arts and for mathematics; is the same for all public schools and LEAs in the State; and applies the same annual measurable objectives for all students and for all identified subgroups as defined in § 200.13(b)(7)(ii).

Proposed Regulations: The proposed regulations specify the acceptable use of alternate achievement standards identified in § 200.1(d) for students with the most significant cognitive disabilities. Specifically, proposed § 200.13(c)(1) would permit States to use those standards for students with the most significant cognitive disabilities in calculating AYP for schools, provided that the percentage of students with the most significant cognitive disabilities at the LEA and State levels, separately, does not exceed 1.0 percent of all students in the grades

assessed. Nationally, 1.0 percent of students in the grades assessed represents approximately nine percent of students with disabilities, but the actual percent varies across States. The 1.0 percent limitation applies only at the LEA and State levels. Proposed § 200.13(c)(2) allows States to request from the Secretary—and LEAs to request from the State—an exception to the 1.0 percent limitation. This request for an exception by the State or LEA must document that the incidence of students with the most significant cognitive disabilities in the State or LEA exceeds that limit and that circumstances exist that could explain the higher percentages such as a school, community or health program that has drawn families of students with the most significant cognitive disabilities into the area or a very small overall population in which case a very few students with the most significant cognitive disabilities could cause the State or LEA to exceed the 1.0 percent limitation.

Students included under § 200.13(c) who take an alternate assessment that measures alternate achievement standards would be counted as “participating” in the State's assessment system and thus would be included in determining whether 95 percent of students with disabilities enrolled in a school at the time of testing are, in fact, assessed.

Reasons: Under the Title I accountability system, alternate assessments based on alternate achievement standards are an appropriate way to measure the progress of only that very limited portion of students with the most significant cognitive disabilities. Moreover, holding schools accountable for students with the most significant cognitive disabilities achieving grade-level academic achievement standards may subvert the intended benefits of NCLB for these students and have undesired effects on the services they are provided.

Based on current prevalence rates of students with the most significant cognitive disabilities, and allowing for reasonable local variation in prevalence, proposed § 200.13(c)(2) would set the number of students with disabilities who may be included in accountability measures using alternate achievement standards at not more than 1.0 percent of all students assessed in a State or LEA. For accountability purposes, the performance of all other students with disabilities (including any other students with disabilities who take an alternate assessment) must be assessed against the academic achievement

standards established under § 200.1(c). This is not a limit on the number or type of students with disabilities who can take an alternate assessment.

Section 200.13 of the NPRM, published in the **Federal Register** (67 FR 50986) on August 6, 2002, proposed allowing the use of alternate achievement standards for students with the most significant cognitive disabilities for determining AYP of States and LEAs, provided that use did not exceed 0.5 percent of all students. Many comments regarding this proposal misinterpreted it to mean that the number of students with disabilities who could take an alternate assessment was being limited; rather, it proposed the flexibility of allowing the use of alternate achievement standards to determine proficiency for calculating AYP for a limited group of students with disabilities. Numerous commenters expressed concern that the 0.5 percent limit on assessments using alternate standards in the calculation of AYP ignored the incidence rate of students with the most significant cognitive disabilities, which they estimated at 2 to 5 percent. Recommended alternatives included elimination of the limit, a phase-in of the 0.5 percent limit, higher limits, permitting States to set their own limits, or using such limits for reporting purposes only and not in the calculation of AYP.

Several commenters expressed the view that the 0.5 percent limit was “especially unreasonable” for small rural districts, where a very small number of students with the most significant cognitive disabilities might cause the LEA to exceed the limit. Others wrote that the provision would be unfair to districts with large populations of students with disabilities and to schools with programs specifically designed to serve students with disabilities. Many commenters perceived the proposed limit to be in conflict with the requirement of the IDEA that all students with disabilities must be offered an alternate assessment when the regular assessment does not adequately measure their achievement.

Finally, two commenters expressed support for the 0.5 percent limit on assessments using alternate achievement standards in the calculation of AYP, while one supported the Secretary's effort to establish a realistic limit as an important step in preventing inappropriate use of alternate assessments to “hide” low-performing students in general.

The 0.5 percent of total population figure was derived based on converging scientific evidence from multiple