

achievement standards, and alternate assessments based on alternate achievement standards. These regulations also require the State to promote the use of appropriate accommodations, provide appropriate guidance to IEP teams, and provide training for teachers and other staff in the administration of assessments to children with the most significant cognitive disabilities. These requirements will encourage States to decrease or eliminate out-of-level testing and other changes in the test that invalidate test results.

Whereas the NPRM proposed requiring reporting on the number and percentage of students with disabilities taking various types of assessments at the school and district levels, these regulations only require reports about the types of assessments used for students with disabilities at the State level. States also must document that students with the most significant cognitive disabilities are, to the extent possible, included in the general curriculum and participating in assessments aligned with content standards. The Department's Office of Special Education Programs, in its regular monitoring, may examine this documentation and the Office of Elementary and Secondary Education may review data during its peer review process for standards and assessments.

In addition, States using alternate achievement standards must promote the use of appropriate accommodations in order to increase the numbers of students with disabilities who can be tested against grade-level academic achievement standards. These regulations promote the use of appropriate testing practices through the dissemination of information about accommodations for regular assessments and ensure that relevant staff know how to administer assessments to students with disabilities.

Section 200.13 of the NPRM proposed providing that the Secretary could permit a State—and a State could permit an LEA—to exceed the 1.0 percent cap on the number of proficient and advanced scores based on alternative achievement standards that can be included in AYP calculations if the State or LEA, as applicable, establishes that the incidence of students with the most significant cognitive disabilities exceeds the limit and if the agency documents circumstances that explain the higher percentage. These regulations retain these provisions but add further requirements to ensure (1) that students who should be assessed against grade-level standards with appropriate accommodations are not being assessed

against alternate achievement standards, and (2) that the alternate achievement standards embody challenging academic expectations appropriate for those students who are assessed against them.

Section 200.13(c)(3) of the NPRM proposed requiring a State, in calculating AYP for the State and each LEA, to apply grade-level academic content and achievement standards to assessment results of any students taking alternate assessments that exceeded the percentage limitations. To make the intent of this provision clearer, we are revising § 200.13(c)(4) of these regulations. First, § 200.13(c)(4)(i) clarifies that a State must include the scores of all students with the most significant cognitive disabilities who have been in the LEA or State for a full academic year in calculating AYP. It may not exclude the scores of students who exceed the percentage limitations in § 200.13(c)(1) through (3). Second, § 200.13(c)(4)(ii) requires the State to count as non-proficient, the scores of any such students who exceed the percentage limitations in calculating AYP. In other words, the State must count the scores of these students as not proficient, even if some or all of the students achieved proficiency on the alternate achievement standards. Non-proficient scores are any scores below proficient, as determined by the State accountability plan.

Because the scores of all students must be included, if an LEA or State educational agency (SEA) exceeds their cap, § 200.13(c)(4)(iii) requires the State to determine which proficient scores are counted as non-proficient in the LEAs and schools responsible for students who took alternate assessments aligned to alternate achievement standards. The State has flexibility in determining how to do this.

Section 200.13(c)(4)(iv) through (v) has been added. Section 200.13(c)(4)(iv) clarifies that, in calculating AYP, a State must be consistent in its use of the scores of students with the most significant cognitive disabilities. For example, if there are such students in an LEA who score at the proficient level on the State's alternate assessment but who exceed the 1.0 percent cap, and the State has not granted the LEA an exception, the State may not count those students as proficient in determining AYP at the school, LEA, or State level. Moreover, the State must also count their scores as not proficient in the other subgroups to which they belong. Section 200.13(c)(4)(v), however, emphasizes that the State must ensure that parents are informed of the actual achievement level that a student with the most significant cognitive disabilities attains,

even if that student's score is determined to be in the group above the 1.0 percent cap and counted as non-proficient for purposes of calculating AYP.

Multiple Test Administration

The March 20, 2003, NPRM also requested additional comments on § 200.20(c)(3) of the title I regulations published in the **Federal Register** on December 2, 2002. Section 200.20(c)(3) provides that, if a student takes a State assessment for a particular subject or grade level more than once, the State must use the student's results from the first administration to determine AYP. We are not changing § 200.20(c)(3). Through the approval of State accountability systems this year, we have been able to work with States to clarify the intent of these regulations and to implement these requirements in a manner consistent with their test administration policies. We believe these regulations offer more flexibility than commenters understood at the time of the March 20, 2003, NPRM, and that it is not necessary to change § 200.20(c)(3).

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, approximately 100 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix at the end of these regulations.

Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with these regulations are those we have determined to be necessary for administering the requirements of the statute effectively and efficiently.

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

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

Regulatory Flexibility Act

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