

percentage of proficient assessment scores based on alternate achievement standards that may be included in the calculation of AYP. Some commenters said the cap was too high; others said the cap was too low; some said the 1.0 percent cap was appropriate; and still others said there should be no cap at all.

*Discussion:* The 1.0 percent cap does not restrict the number of students who may participate in an alternate assessment. It does limit the number of proficient and advanced scores based on alternate achievement standards that may be used in the calculation of AYP. A limit is required in order to ensure a thoughtful application of alternate achievement standards and to protect IEP teams from pressure to assign low-performing students to assessments and curricula that are inappropriately restricted in scope, thus limiting educational opportunity for these students.

These regulations maintain the 1.0 percent cap that was included in the proposed regulation. Specifically, § 200.13(c)(1) permits States to use results from assessments aligned to alternate achievement standards for students with the most significant cognitive disabilities in calculating AYP. A State may include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at the 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 represent approximately 9 percent of students with disabilities, but the actual percent varies across States. Section 200.13(c)(2) permits States to request a slightly higher cap if the State is able to meet the criteria and documentation requirements set forth in this section.

In the discussion of the March 20, 2003, proposed rule, we noted that the 1.0 percent cap was based on current prevalence rates of students with the most significant cognitive disabilities, allowing for reasonable local variation in prevalence. In addition, we cited converging scientific evidence from multiple sources that indicated that the prevalence rates of students with the most significant cognitive disabilities were somewhat less than 1.0 percent. We also noted that these numbers are generally seen as reflecting national rates, and, as a number of commenters on the August 6, 2002, NPRM pointed out, may not account for more localized differences, caused by a number of factors. Factors beyond the control of a school, school district, or even a State may cause the number of students with the most significant cognitive disabilities to exceed a national average percentage of the total student population at the grades assessed. For example, in small schools, a single student may be more than that limit would allow. Moreover, certain schools, districts, or States may have disproportionate numbers of students with the most significant cognitive disabilities because of proximity to special facilities or services.

State data reported to the Department under IDEA also support the 1.0 percent cap. Of the 38 States for which sufficient data are available, 21 States reported 5.0 percent or less of students with disabilities who participated in the State assessment program took an alternate assessment. (Five percent of students with disabilities is roughly equivalent to 0.5 percent of all students.) In 14 other States, between 5.0 and 10.0 percent of students with disabilities participated in State assessment programs through an alternate assessment (Analysis of 2000–2001 Biennial Performance Reports, National Center for Educational Outcomes). In these States, students with disabilities comprise approximately 8.0 to 12.0 percent of the total student population (IDEA Annual Report to Congress, 2001).

The 1.0 percent cap is the limit on the number of proficient or advanced scores based on alternate achievement standards that may count as proficient or advanced for accountability purposes at the LEA and SEA levels. Consequently, in cases where the number of students taking an alternate assessment based on alternate achievement standards exceeds 1.0 percent, it may not be necessary to apply for a higher cap. For example, if 1.0 percent equals 200 students and 400 students are assessed with an alternate assessment based on alternate achievement standards, but only half of the students assessed are “proficient,” the LEA would not exceed the cap.

In summary, the Secretary believes that the 1.0 percent cap is consistent with disability incidence rates and the States’ use of alternate assessments. It provides sufficient flexibility for States to measure the achievement of students with the most significant cognitive disabilities for accountability purposes, while meeting the spirit and intent of the law that all students be held to high standards.

*Change:* None.

*Comment:* None.

*Discussion:* If a State chooses not to use alternate achievement standards, it must still incorporate the assessment scores of all students with disabilities in AYP determinations, including those with the most significant cognitive disabilities.

*Change:* Section 200.13(c)(1)(i) has been added to clarify this requirement.

*Comment:* A number of commenters raised questions about how the 1.0 percent cap would work in practice and how it would be applied at the LEA and State levels. In particular, there were questions about what effect this limitation would have on schools and their AYP calculations.

*Discussion:* The cap applies at the State and LEA levels, but not at individual schools, and is based on the number of students enrolled in the grade(s) tested. Some districts may deliver special services for students with the most significant cognitive disabilities in one or a few schools. Additionally, the enrollment patterns of students across districts may not result in an even distribution of students with the most significant cognitive disabilities among schools, even if there are not special centers for these students. In these cases, a limitation on the number of students who may score

proficient on alternate assessments based on alternate achievement standards may prove unworkable at a school level and not be in the best interests of those students.

The actual enrollment of students who are appropriately assessed with the alternate assessment based on alternate achievement standards may not be evenly distributed across a district. One school may have 2.0 percent of its students score proficient or better on an alternate assessment based on alternate achievement standards, while another school may not have even a single student assessed using alternate achievement standards. The flexibility offered by the Secretary in these regulations is meant to accommodate such distributions. Working through the IEP development process, the district should determine how best to ensure that students with the most significant cognitive disabilities participate in the general curriculum, are assessed appropriately, and, quite importantly, are provided with an education in the least restrictive environment.

All scores based on alternate achievement standards must be included in school, LEA, and State AYP calculations. An individual student’s results from such assessments are counted in all appropriate subgroups. Consequently, in those circumstances when a district has more than 1.0 percent of its students score proficient or advanced on an alternate assessment based on alternate achievement standards, the State must determine which proficient scores are counted as non-proficient at schools in the district responsible for students who took an alternate assessment based on alternate achievement standards. This ensures that schools do not have an incentive to inappropriately increase the number of students assessed with an assessment based on alternate achievement standards. To implement this process, each student’s score used for calculating AYP must remain the same at each level of the educational system—school, district, and State, and for each group and subgroup of which the student is a member for which AYP is calculated. However, regardless of how an individual student’s score is treated in AYP calculations, the parent must be informed of the actual academic achievement level earned by the student.

The LEA is responsible for managing this process at the local level in three ways. First, the LEA must provide information to school personnel and IEP teams about the state assessment, the use of accommodations, and assessment against alternate achievement standards. State guidelines for use of alternate achievement standards should be communicated to local schools early in the school year to ensure consistency between instruction and assessment and to prevent confusion at the time of test administration. A reasonable expectation is that, in most cases, about 9 percent of the students receiving special education services would be tested against alternate achievement standards, unless a school provides special services to students with the most significant disabilities or is particularly small. An LEA may choose to provide individual schools with preliminary estimates of the number of