

students to be tested against alternate achievement standards based on the characteristics of the school's student population and existing State guidelines for participation. Second, the LEA should ensure appropriate staff receive training to support sound IEP decisions about which students participate in an alternate assessment based on alternate achievement standards. These decisions should always be made on a case-by-case basis and should support access to the most challenging curriculum possible for the individual student. Finally, the LEA should monitor implementation of assessments based on alternate achievement standards in schools throughout the district to ensure that alternate achievement standards are being used in a manner consistent with the best instructional practices known for students with the most significant cognitive disabilities.

These regulations provide new flexibility to LEAs and schools and will increase the number of schools and LEAs that can make AYP. If an LEA manages the process well, AYP determinations should withstand appeal under the State's accountability system. If an LEA does not manage the cap well, however, and permits schools to assess an inappropriately large number of students with an alternate assessment aligned to alternate achievement standards, the LEA may significantly exceed the cap and, thus, a large number of non-proficient scores would have to be allocated among the schools that administered the alternate assessment aligned with alternate achievement standards. This would potentially create negative consequences for schools that administer the alternate assessment. States should ensure that these regulations are implemented appropriately throughout the State to ensure schools benefit from this new flexibility.

The following example illustrates how the policy works in practice. As determined by its cap, a district may count for AYP purposes no more than 100 students scoring at proficient or advanced on an alternate assessment based on alternate achievement scores. If this district has 150 students scoring at proficient or advanced on an alternate assessment based on alternate achievement scores, and has not received an exception from the State to exceed the 1.0 percent cap, it must (1) count the excess 50 scores as non-proficient, and (2) determine which proficient and advanced scores will be considered not proficient because they exceed the district's 1.0 percent cap when determining AYP for schools responsible for students who took the alternate assessment aligned with alternate achievement standards. To illustrate further, in this particular district there are four schools responsible for students who take alternate assessments aligned to alternate achievement standards.

- In school A, there are 50 proficient scores
- In school B, there are 50 proficient scores
- In school C, there are 25 proficient scores
- In school D, there are 25 proficient scores

The LEA needs to determine which 50 of the 150 "proficient" scores will be counted as "non-proficient" at schools A, B, C and/or D. This district would follow the State's

procedures for allocating the scores among its schools. One State might identify a particular method that all districts would use. Another State might permit districts to select among several methods approved by the State.

If a State requests an exception to the 1.0 percent cap, the Secretary believes that the State should be able to document that it is fully and effectively implementing the procedural safeguards set out in § 200.6(a)(2)(iii), as a means of showing that it is appropriately including students with disabilities in its assessment system. Because of these safeguards, the Secretary expects that it will be necessary to grant exceptions only for small increments above the 1.0 percent cap.

Change: Section 200.13(c)(2)(iii) has been added, requiring a State requesting an exception to the cap to document that it is fully and effectively addressing the procedural safeguards of § 200.6(a)(2)(iii). Section 200.13(c)(4)(iv) now includes a provision that requires States to apply the academic achievement level (e.g., advanced, proficient, basic) of students with the most significant cognitive disabilities consistently in calculating AYP for the State, LEA, and school. A new § 200.13(c)(4)(i)–(iii) has been added to explain that States must determine which proficient scores that exceed the cap must count as non-proficient in calculating AYP in LEAs and schools responsible for students who take an alternate assessment based on alternate achievement standards.

Comment: Several commenters expressed concern that a school with the capacity to provide effective services for students with the most significant cognitive disabilities may suffer negative consequences as a result of exceeding the 1.0 percent cap.

Discussion: The 1.0 percent cap on proficient and advanced scores based on alternate achievement standards applies specifically at the State and district levels, although scores must be treated the same for AYP purposes at the State, district and school levels. An extraordinarily effective school that draws students from across the district, or from outside the district may exceed the limit so long as the total number of proficient and advanced scores based on alternate achievement standards does not exceed the 1.0 percent cap within the district. The LEA has considerable discretion to accommodate such schools in determining how to meet the 1.0 percent cap at the LEA level. The responsibility for establishing guidelines to inform local practice and for monitoring the use of alternate achievement standards for AYP rests with the State and LEA. This responsibility is consistent with the typical organization of special education programs at the State and district levels.

Change: None.

Comment: None.

Discussion: The Secretary was concerned that these regulations may lead to confusion between the use of scores based on alternate achievement standards in AYP calculations, and reporting results to parents.

Change: The regulation clarifies in § 200.13(c)(4)(v) that regardless of how a score is used for AYP, the actual score of a child must be reported to parents.

General Comments

Comment: One commenter said that the proposed rule should be subject to negotiated rulemaking.

Discussion: The statutory requirements for negotiated rulemaking apply to regulations initially implementing the NCLB Act, not to subsequent regulatory amendments such as those contained in these regulations. The Secretary previously issued regulations for standards and assessments through a negotiated rulemaking process. (See 34 CFR part 200).

Change: None.

Comment: Several commenters recommended that the Department closely monitor the cap to ensure it is being used appropriately.

Discussion: The Secretary agrees with the importance of monitoring State and LEA implementation of these requirements as they relate to students with disabilities. The Department's Office of Special Education Programs and the Student Achievement and School Accountability Programs office in the Office of Elementary and Secondary Education will coordinate their efforts in monitoring States for these requirements, and will establish internal mechanisms to share student achievement data and other pertinent information necessary to assess States' progress in this area. In addition, the Secretary believes that it is crucial that SEAs closely monitor how districts are using the 1.0 percent cap both generally and specifically in the case of an LEA that receives an exception to the 1.0 percent cap.

Change: A new provision is added in § 200.13(c)(3)(ii) that requires States to review annually whether an LEA's exception to the 1.0 percent cap is still warranted.

Section 200.20(c)(3)

Comment: Several commenters suggested that States be able to determine which administration of an assessment counts for AYP purposes, and in cases where a particular assessment is given more than once, the best result from students should be used for determining AYP.

Discussion: States have the authority and responsibility to design assessments that measure what students should know and be able to do at a given point in their schooling. States have an expectation, as evident in the assessments, for when students should learn the content standards. Accordingly, for AYP purposes States must count the assessment results that reflect when they expect all students to have learned the content standards. In other words, the "first administration" is the first time an assessment is officially administered to measure a student's achievement of the State's content standards in the grade or subject for which the State expects the student to have achieved proficiency of those standards. Scores from this first official administration must be used for calculating AYP. Students who have scored at proficient or higher on assessments taken earlier than the first official administration, however, may "bank" those scores, and would not have to retake the test at a later date. Consider the following example: A State administers a third-grade reading test in the