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DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810-AB16

Docket ID ED-2012-OESE-0018

Title I--Improving the Academic Achievement of the Disadvantaged

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations governing Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (the "Title I regulations"), to no longer authorize a State, in satisfying ESEA accountability requirements, to define modified academic achievement standards and develop alternate assessments based on those modified academic achievement standards. These proposed amendments would permit, as a transitional measure and for a limited period of time, States that administered alternate assessments based on modified academic achievement standards in the 2012-13 school year to continue to administer alternate assessments based on modified academic achievement standards and include the results in adequate yearly

progress (AYP) calculations, subject to limitations on the number of proficient scores that may be counted for AYP purposes. These proposed amendments also would apply to accountability determinations made by eligible States that receive "ESEA flexibility" and have requested a waiver of making AYP determinations.

DATES: We must receive your comments on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. 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 This Site."

- Postal Mail, Commercial Delivery, or Hand Delivery. If you mail or deliver your comments about these proposed regulations, address them to Monique M. Chism, Director,

Student Achievement and School Accountability Programs,  
Office of Elementary and Secondary Education, U.S.  
Department of Education, 400 Maryland Avenue, SW., room  
3W224, Washington, DC 20202-6132.

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: Monique M. Chism, U.S.  
Department of Education, 400 Maryland Avenue, SW., room  
3W224, Washington, DC 20202-6132. Telephone: (202) 260-  
0826.

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:

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 3W226 at 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 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

These proposed regulations would amend the Title I regulations that are designed to help disadvantaged children meet high academic standards. Specifically, the proposed amendments to current §§200.1 and 200.6 would no longer authorize a State to define modified academic achievement standards for certain students with disabilities, develop and administer alternate assessments based on those standards, and, subject to limitations on the number of proficient scores that may be counted for AYP purposes under current §200.13(c), use the scores from those alternate assessments in AYP calculations.

In April 2007, the Department amended the Title I regulations to permit States to define modified academic achievement standards for certain students with disabilities, specifically those whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level proficiency in the same time frame as other students. The Department also amended the Title I regulations to permit States to develop alternate assessments based on those modified academic achievement standards and administer them

to eligible students with disabilities (72 FR 17748).

As explained in the preamble to the final regulations published in the Federal Register on April 9, 2007 (72 FR 17748), the Department acknowledged the possibility that neither a general assessment nor an alternate assessment based on alternate academic achievement standards would provide an accurate assessment of what these students know and can do. This position was based on information received from some States, as well as research available at the time, which indicated that general grade-level assessments may be too difficult for this small group of students with disabilities, while alternate assessments based on alternate academic achievement standards may be too easy. Thus, in the interest of ensuring that States could meaningfully assess these students' achievement across the full range of content and provide teachers and parents with information that would help these students progress toward grade-level achievement, the Department issued regulations to permit States to define modified academic achievement standards and develop and administer alternate assessments based on those standards.

Since the Department amended the Title I regulations in April 2007, many States have been working collaboratively to develop and implement general

assessments aligned with college- and career-ready standards that will be more accessible to students with disabilities than those in place at the time States began developing alternate assessments based on modified academic achievement standards. These new general assessments will facilitate the valid, reliable, and fair assessment of most students with disabilities, including those for whom alternate assessments based on modified academic achievement standards were intended.

As described later in this notice, research has shown that low-achieving students with disabilities make academic progress when provided with appropriate supports and instruction. More accessible general assessments, in combination with such supports and instruction for students with disabilities, can promote high expectations for all students, including students with disabilities, by encouraging teaching and learning to the academic achievement standards measured by the general assessments.

For these reasons, these proposed regulations anticipate that alternate assessments based on modified academic achievement standards will no longer be needed as States develop more accessible general assessments that can also be used for those students with disabilities for whom alternate assessments based on modified academic

achievement standards currently are being administered. Accordingly, States would be able to refocus their assessment efforts and resources on the development of more accessible general assessments. For students with the most significant cognitive disabilities, States will continue to have the authority under §§200.1(d) and 200.6(a)(2)(ii)(B) to define alternate academic achievement standards, administer alternate assessments based on those alternate academic achievement standards, and, subject to limitations on the number of proficient scores that may be counted for AYP purposes, include the results in AYP calculations.

To allow for a smooth transition to more accessible general assessment systems, including systems with assessments aligned with college- and career-ready standards, these proposed regulations would allow States, under certain circumstances and for a limited period of time, to continue to implement their alternate assessments based on modified academic achievement standards and, subject to limitations on the number of proficient scores that may be counted for AYP purposes in current §200.13(c), include the results of such assessments in AYP calculations.<sup>1</sup> More specifically, under these proposed

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<sup>1</sup> The Department is offering States flexibility from certain requirements of the ESEA in exchange for implementing rigorous, comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and

regulations, a State could continue to administer alternate assessments based on modified academic achievement standards and use the results of those assessments for accountability purposes in accordance with the current Title I regulations and Part B of the Individuals with Disabilities Education Act (IDEA) if the State administered alternate assessments based on modified academic achievement standards in the 2012-13 school year. A State meeting this criterion would be permitted to administer alternate assessments based on modified academic achievement standards and use the results of those assessments for accountability purposes through the 2013-14 school year.

Although these proposed regulations do not amend the regulations implementing Part B of the IDEA in 34 CFR part 300, they nonetheless will affect the application of the assessment regulations under 34 CFR 300.160. Under section 612(a)(16)(A) of the IDEA and 34 CFR 300.160(a), a State must ensure that all children with disabilities are

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improve the quality of instruction. Under this initiative, known as "ESEA flexibility," a State may request a waiver of the requirements to make AYP determinations and instead use its own differentiated State-developed recognition, accountability, and support system to hold schools accountable. Accordingly, a State that meets the criteria in these proposed regulations, subject to the limitations on the number of proficient scores that may be counted for making AYP determinations in §200.13(c), which is not waived under ESEA flexibility, could count the proficient scores of students with disabilities assessed using alternate assessments based on modified academic achievement standards in making accountability determinations, including determinations of whether schools meet a State's annual measurable objectives (AMOs).

included in all general State and district-wide assessment programs, including assessments described under section 1111 of the ESEA, if necessary with appropriate accommodations and alternate assessments, as indicated in their respective individualized education programs (IEPs). Under §300.160(c)(1), a State (or, in the case of a district-wide assessment, a local educational agency (LEA)) must develop and implement alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments even with the accommodations provided for in their IEPs. Section 300.160(c)(2)(ii) further provides that, if a State has adopted modified academic achievement standards to assess the academic progress of students with disabilities under Title I of the ESEA, it must measure the achievement of children with disabilities meeting the State's criteria under current §200.1(e)(2) against those standards. Thus, the proposed regulations would mean that the transition from alternate assessments based on modified academic achievement standards under Title I of the ESEA also would apply to how States include children with disabilities in these assessments under the IDEA. However, to the extent that a State is permitted to administer alternate

assessments based on modified academic achievement standards, §300.160(c)(2)(ii) will continue to apply.

#### Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

#### Section 200.1--State Responsibilities for Developing Challenging Academic Standards

Statute: Section 1111(b)(1) of the ESEA requires each State to adopt challenging academic content standards and challenging student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must be the same for all public elementary and secondary schools and all public school students in the State. The State's challenging academic content standards must specify what all students are expected to know and be able to do, contain coherent and rigorous content, and encourage the teaching of advanced skills. The State's challenging student academic achievement standards must be aligned with the State's academic content standards and must describe at least three levels of achievement: advanced, proficient, and basic.

Current Regulations: Current §200.1 of the Title I

regulations implements the statutory requirements in section 1111(b)(1) of the ESEA regarding the development of challenging academic content standards and challenging academic achievement standards. Regarding academic achievement standards, current §200.1(e)(1) permits a State to define modified academic achievement standards for eligible students with disabilities, so long as those standards are aligned with the State's academic content standards for the grade in which the student is enrolled, are challenging for eligible students (but may be less difficult than the grade-level academic achievement standards under current §200.1(c)), include at least three achievement levels, and are developed through a documented and validated standards-setting process that includes broad stakeholder input.

For a State implementing modified academic achievement standards, current §200.1(e)(2) requires the State to adopt criteria for IEP teams to use in determining which students with disabilities are eligible to be assessed based on modified academic achievement standards. At a minimum, these criteria must include the following:

(i) The student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by objective evidence;

(ii) The student's progress to date (based on multiple measurements over a period of time that are valid for the subjects being assessed) in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such, that even if significant growth occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student's IEP; and

(iii) If the student's IEP includes goals for a subject assessed under §200.2, those goals are based on the academic content standards for the grade in which the student is enrolled.

In addition, current §200.1(f) requires a State to establish guidelines related to assessing eligible students with disabilities with alternate assessments based on modified academic achievement standards. In particular, current §200.1(f)(1)(i)(B) requires a State to establish and monitor implementation of guidelines for IEP teams to apply in determining which students with disabilities meet the State's criteria to be assessed based on modified academic achievement standards under current §200.1(e)(2) and provides that these students may be assessed based on modified academic achievement standards in one or more

subjects. Current §200.1(f)(2) specifies additional requirements for State guidelines for students assessed based on modified academic achievement standards.

Proposed Regulations: Under these proposed amendments, current §200.1(e) would be amended to limit a State's authority to define modified academic achievement standards. Specifically, we propose to amend current §200.1(e)(1) to no longer authorize a State to define modified academic achievement standards, unless the State meets certain criteria.

Under proposed §200.1(e)(2), a State could define modified academic achievement standards only if the State administered alternate assessments based on modified academic achievement standards in the 2012-13 school year.

Proposed §200.1(e)(4) would then provide that, for any State meeting the criterion in proposed §200.1(e)(2), the authority to define modified academic achievement standards terminates at the end of the 2013-14 school year. The remaining requirements in current §200.1 applicable to modified academic achievement standards, as well as those requirements related to determining student eligibility to be assessed based on alternate academic achievement standards, would remain unchanged and fully applicable to a State that has adopted such standards.

Finally, we would redesignate current paragraph (e)(2) of §200.1 as paragraph (e)(3) to accommodate the proposed additions of new paragraphs (e)(2) and (e)(4), as described in the preceding paragraphs.

Reasons: Through these proposed amendments to §200.1, we seek to reemphasize the importance of holding all students, including students with disabilities, to high standards. Research demonstrates that low-achieving students with disabilities who struggle in reading<sup>2</sup> and low-achieving students with disabilities who struggle in mathematics<sup>3</sup> can make academic progress when provided appropriate supports

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<sup>2</sup> For example, see: Allor, J. H., Mathes, P. G., Roberts, J. K., Cheatham, J.P., & Champlin, T. M. (2010). Comprehensive reading instruction for students with intellectual disabilities. Psychology in the Schools, 47, 445-466; Kamps, D., Abbott, M., Greenwood, C., Wills, H., Veerkamp, M., & Kaufman, J. (2008). Effects of small-group reading instruction and curriculum differences for students most at risk in kindergarten: Two-year results for secondary- and tertiary-level interventions. Journal of Learning Disabilities, 41, 101-114; Mautone, J. A., DuPaul, G. J., Jitendra, A. K., Tresco, K. E., Junod, R. V., & Volpe, R. J. (2009). The relationship between treatment integrity and acceptability of reading interventions for children with attention-deficit/hyperactivity disorder. Psychology in the Schools, 46, 919-931; Scammacca, N., Vaughn, S., Roberts, G., Wanzek, J., & Torgesen, J. K. (2007). Extensive reading interventions in grades K-3: From research to practice. Portsmouth, N.H.: RMC Research Corporation, Center on Instruction; Vaughn, S., Denton, C. A., & Fletcher, J. M. (2010). Why intensive interventions are necessary for students with severe reading difficulties. Psychology in the Schools, 47, 32-444; Wanzek, J. & Vaughn, S. (2010). Tier 3 interventions for students with significant reading problems. Theory Into Practice, 49, 305-314.

<sup>3</sup> For example, see: Fuchs, L. S. & Fuchs, D., Powell, S. R., Seethaler, P. M., Cirino, P. T., & Fletcher, J. M. (2008). Intensive intervention for students with mathematics disabilities: Seven principles of effective practice. Learning Disabilities Quarterly, 31, 79-92; Gersten, R., Beckmann, S., Clarke, B., Foegen, A., Marsh, L., Star, J. R., & Witzel, B. (2009). Assisting students struggling with mathematics: Response to Intervention (RtI) for elementary and middle schools (NCEE 2009-4060). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. Retrieved November 1, 2010 from <http://ies.ed.gov/ncee/wwc/publications/practiceguides/>.

and instruction. As noted earlier in the preamble, many States are now working together to develop and implement new general assessments that will be more accessible to most students with disabilities. More specifically, 44 States and the District of Columbia are participating in two consortia, funded by the Race to the Top Assessment (RTTA) program, that are developing new assessments to measure student achievement against college- and career-ready standards. As stated in the notice inviting applications for the RTTA program, published in the Federal Register on Friday, April 9, 2010, these assessments must be valid, reliable, and fair for all student subgroups, including students with disabilities (see 75 FR 18171, 18173). The only exception is for students with disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards under 34 CFR 200.6(a)(2)(ii)(B); those students are excluded from the definition of "students with disabilities" under the RTTA program (see 75 FR 18171, 18178). We expect that the application of universal design principles, new technologies, and new research on accommodations to the new assessments developed through the RTTA program will improve access to the assessments and the validity of scores for students with disabilities,

including students who currently are eligible for alternate assessments based on modified academic achievement standards. Other new assessments also may draw on universal design principles, new technologies, and new research to improve access for students with disabilities and more validly measure the achievement of these students.

With the development and implementation of more accessible general assessments, combined with appropriate supports and instruction, we believe that modified academic achievement standards and alternate assessments based on those standards will no longer be educationally appropriate. Consequently, it is no longer in the best interest of students with disabilities for a State to invest further resources in the development or refinement of modified academic achievement standards and alternate assessments based on those standards. Rather, resources for future assessment development are best focused on preparing for implementation of more accessible general assessments, such as those currently being developed in many States. Therefore, these proposed regulations would no longer authorize a State to define modified academic achievement standards and administer alternate assessments based on those standards.

Although we believe that new, more accessible

assessments will eliminate the need for modified academic achievement standards and alternate assessments based on those standards, we recognize that these new assessments cannot be implemented immediately. In particular, we recognize that assessments being developed through the RTTA program are not expected to be fully operational in all participating States until the 2014-15 school year. We also recognize that some States have devoted substantial resources toward developing and implementing alternate assessments based on modified academic achievement standards. For these reasons, we believe that providing States with time to move from alternate assessments based on modified academic achievement standards and complete development of more accessible general assessments, such as those aligned with college- and career-ready standards that are currently being developed in many States, will support a smooth transition between assessments for the students affected by this regulatory change. Accordingly, proposed §200.1(e)(2) would permit a State that administered alternate assessments based on modified academic achievement standards in the 2012-13 school year to continue to administer those alternate assessments. Proposed §200.1(e)(4) would require a State to terminate its use of such alternate assessments, and concomitantly

its use of modified academic achievement standards, at the end of the 2013-14 school year. In setting this proposed timeline, we believe we have provided States sufficient time and notice to phase out their alternate assessments based on modified academic achievement standards.

Moreover, any State interested in ESEA flexibility knew as early as September 2011 that alternate assessments based on modified academic achievement standards were not part of the definition of high-quality assessments that are required to be administered beginning in 2014-15.

Section 200.6--Inclusion of All Students

Statute: Section 1111(b)(3)(C) of the ESEA requires, among other things, that a State's academic assessment system be aligned with the State's challenging academic content and student academic achievement standards and that it measure the achievement of all students in the grades assessed, including students with disabilities as defined under section 602(3) of the IDEA. For students with disabilities in particular, under section 1111(b)(3)(C)(ix)(II) of the ESEA, a State's academic assessment system must provide for reasonable accommodations necessary to measure their academic achievement against the State's academic content and achievement standards that all students are expected to meet.

Current Regulations: Current §200.6 sets forth the requirements under which a State must provide for the participation of all students in the State's academic assessment system. Current §200.6(a)(3) permits a State to develop and implement alternate assessments to assess eligible students with disabilities based on modified academic achievement standards. In particular, current §200.6(a)(3)(ii) provides that any alternate assessments based on modified academic achievement standards must-- (i) be aligned with the State's grade-level academic content standards; (ii) yield results that measure the achievement of those students separately in reading or language arts and in mathematics relative to the modified academic achievement standards; (iii) meet the requirements in §§200.2 and 200.3, including the requirements relating to validity, reliability, and high technical quality; and (iv) fit coherently in the State's overall assessment system.

In addition, current §200.6(a)(4) requires a State to report to the Secretary the number and percentage of students with disabilities taking regular assessments described in §200.2, regular assessments with accommodations, alternate assessments based on the grade-level academic achievement standards described in

§200.1(c), alternate assessments based on the modified academic achievement standards described in §200.1(e), and alternate assessments based on the alternate academic achievement standards described in §200.1(d).

Proposed Regulations: We propose to amend §200.6(a)(3)(i) to no longer authorize a State to develop and administer alternate assessments based on modified academic achievement standards for ESEA assessment and accountability purposes, unless the State administered alternate assessments based on modified academic achievement standards in the 2012-13 school year.

Under proposed §200.6(a)(3)(ii), a State would be able to administer alternate assessments based on modified academic achievement standards and use the results of these assessments in accountability determinations only if the State administered alternate assessments based on modified academic achievement standards in the 2012-13 school year. Additionally, a State meeting this criterion would be further limited on how long it could use these assessments. Under proposed §200.6(a)(3)(iv), such a State would only be able to administer and use the results of these assessments for accountability determinations through the 2013-14 school year. All other requirements in current §200.6 applicable to alternate assessments based on modified

academic achievement standards would remain unchanged and fully applicable to States administering these alternate assessments. Please note that, to the extent a State is permitted to administer alternate assessments based on modified academic achievement standards, inclusion of the results in accountability determinations would remain subject to limitations on the number of proficient scores that may be counted for AYP purposes in current §200.13(c).

Finally, for the sake of readability, we would redesignate current paragraph (a)(3)(ii) of §200.6 as paragraph (a)(3)(iii) to accommodate the proposed additions of new paragraphs (a)(3)(ii) and (a)(3)(iv), as described in the preceding paragraphs.

Reasons: For the reasons discussed earlier with respect to the proposed amendments to §200.1(e), the proposed amendments to §200.6 are necessary to make clear the limitations on a State's authority to develop and administer alternate assessments based on modified academic achievement standards.

#### Executive Orders 12866 and 13563

#### Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the

Executive order and subject to review by the Office of Management and Budget (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 a significant regulatory action 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 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 are issuing these regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

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.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits of this regulatory action. The potential costs associated with this regulatory action are those resulting from

statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Potential Costs and Benefits:

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action and have determined that these proposed regulations would not impose additional costs to State and local educational agencies or to the Federal Government. For example, each of the forty States and the District of Columbia that has received ESEA flexibility has agreed to phase out its use of alternate assessments based on modified academic achievement standards, if it has those assessments, by the 2014-15 school year. Only California, North Dakota, and Texas have an alternate assessment based on modified academic achievement standards but have not received ESEA flexibility, and Texas' request for ESEA flexibility is pending. Moreover, the proposed regulations would not impose additional costs or administrative burdens on the large majority of States, including California and North Dakota, that are working collaboratively through the RTTA program to develop and implement general assessments aligned with college- and career-ready standards that will be more accessible to students with disabilities than those

in place at the time States began developing alternate assessments based on modified academic achievement standards. Under the RTTA program requirements, these new assessments already must be valid, reliable, and fair for all student subgroups, including students with disabilities, with the exception of students with disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards consistent with 34 CFR 200.6(a)(2)(ii)(B) (see 75 FR 18171, 18173).

In this context, the proposed regulations largely reflect already planned and funded changes in assessment practices and would not impose additional costs on States or LEAs or the Federal Government. On the contrary, to the extent that the proposed regulations reinforce the transition to State assessment systems with fewer components, the Department believes these proposed regulations ultimately would reduce the costs of complying with ESEA assessment requirements (because States would no longer have to develop and implement separate alternate assessments based on modified academic achievement standards).

Further, a State that administered alternate assessments based on modified academic achievement

standards in the 2012-13 school year would be permitted to continue to use such assessments through the 2013-14 school year. Thus, the proposed regulations would not impose any new costs on States that have already developed modified academic achievement standards and alternate assessments based on those standards. The proposed regulations also would not impose significant additional costs on States that have not developed modified academic achievement standards because the proposed regulations do not place any additional requirements on such States. In addition, to the extent that the proposed regulations encourage States to strengthen their plans to transition to new general assessments that would be used to assess students currently taking alternate assessments based on modified academic achievement standards, funding to support such a transition is available through existing ESEA programs, such as the Grants for State Assessments program, which will make available \$360 million in State formula grant assistance in fiscal year 2012.

In sum, the additional costs imposed on States by the proposed regulations are estimated to be negligible, primarily because they reflect changes already under way in State assessment systems under the ESEA. Moreover, we believe these costs are significantly outweighed by the

potential educational benefits of increasing the access of students with disabilities to the general assessments as States develop new, more accessible assessments, including assessments aligned with college- and career-ready standards.

#### Regulatory Alternatives Considered:

An alternative to the amendments proposed in this notice would be for the Secretary to leave in place the existing regulations permitting the development and administration of alternate assessments based on modified academic achievement standards. However, the Department believes that the proposed regulations are needed to help refocus assessment efforts and resources on the development of new general assessments that are accessible to a broader range of students with disabilities. Such new general assessments will eliminate the usefulness of separate alternate assessments based on modified academic achievement standards for eligible students with disabilities.

#### 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, §200.1(e)(1).)
- 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 of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed

regulations would not have a significant economic impact on a substantial number of small entities. The small entities that this proposed regulatory action would affect are small LEAs administering assessments under the ESEA.

These proposed regulations would not have a significant economic impact on small LEAs because most affected LEAs would continue to implement existing State assessments required by the ESEA, including general assessments and alternate assessments for certain students with disabilities, until either the reauthorization of the ESEA or the implementation of new State assessments aligned with college- and career-ready standards. In addition, the implementation of these new assessments can be expected to result in a positive economic impact by reducing the number of separate assessments that must be administered to comply with the ESEA.

The Secretary invites comments from small LEAs as to whether they believe this proposed regulatory action would have a significant economic impact on them and, if so, requests evidence to support that belief.

#### Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

#### Intergovernmental Review

This program is not subject to Executive Order 12372

and the regulations in 34 CFR part 79.

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(Catalog of Federal Domestic Assistance Numbers: 84.010 Improving Programs Operated by Local Educational Agencies; 84.027 Assistance to States for the Education of Children with Disabilities)

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: August 20, 2013

\_\_\_\_\_  
Arne Duncan,  
Secretary of Education.

For the reasons discussed in the preamble, the Secretary 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 through 6578, unless otherwise noted.

2. Section 200.1 is amended by:

- A. Revising paragraph (e)(1) introductory text.
- B. Redesignating paragraph (e)(2) as (e)(3).
- C. Adding new paragraph (e)(2) and paragraph (e)(4).

The revision and additions read as follows:

§200.1 State responsibilities for developing challenging academic standards.

\* \* \* \* \*

(e) Modified academic achievement standards. (1)

Except as provided in paragraphs (e)(2) and (e)(4) of this section, a State may not define modified academic achievement standards for students with disabilities under section 602(3) of the Individuals with Disabilities Education Act (IDEA) who meet the State's criteria under paragraph (e)(3) of this section. Modified academic

achievement standards are standards that--

\* \* \* \* \*

(2) A State may define modified academic achievement standards for students with disabilities who meet the State's criteria under paragraph (e)(3) of this section only if the State administered alternate assessments based on modified academic achievement standards in the 2012-13 school year.

\* \* \* \* \*

(4) A State's authority to define modified academic achievement standards under paragraph (e)(2) of this section terminates following the State's administration of alternate assessments based on those standards during the 2013-14 school year.

\* \* \* \* \*

3. Section 200.6 is amended by:

- A. Revising paragraph (a)(3)(i).
- B. Redesignating paragraph (a)(3)(ii) as (a)(3)(iii).
- C. Adding new paragraph (a)(3)(ii) and paragraph (a)(3)(iv).

The revision and additions read as follows:

§200.6 Inclusion of all students.

\* \* \* \* \*

(a) \* \* \*

(3) Alternate assessments that are based on modified academic achievement standards. (i) Except as provided in paragraphs (a)(3)(ii) and (iv) of this section, a State may not develop and administer an alternate assessment based on modified academic achievement standards as defined in § 200.1(e)(1) to assess students with disabilities who meet the State's criteria under § 200.1(e)(3).

(ii) A State may continue to administer an alternate assessment based on modified academic achievement standards to assess students with disabilities who meet the State's criteria under § 200.1(e)(3) and use the results of that assessment for accountability determinations only if the State administered the assessment in the 2012-13 school year.

\* \* \* \* \*

(iv) A State's authority to administer an alternate assessment based on modified academic achievement standards and use the results for accountability determinations terminates following the State's administration of that assessment during the 2013-14 school year.

\* \* \* \* \*

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