

## DEPARTMENT OF EDUCATION

## 34 CFR Part 200

RIN 1810-AA97

## Title I—Improving the Academic Achievement of the Disadvantaged

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

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations governing the programs administered under Title I, Part A, of the Elementary and Secondary Education Act of 1965, as amended (ESEA). These regulations are needed to implement statutory provisions regarding State, local educational agency (LEA), and school accountability for the academic achievement of limited English proficient (LEP) students and are needed to implement changes to Title I of the ESEA made by the No Child Left Behind Act of 2001 (NCLB Act).

**DATES:** These regulations are effective October 13, 2006. Affected parties do not have to comply with the information collection requirements in § 200.6(b)(4)(i)(C) until the Department publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Jacquelyn C. Jackson, Ed.D., Director, Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3W202, FB-6, Washington, DC 20202-6132. Telephone: (202) 260-0826.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

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**SUPPLEMENTARY INFORMATION:** These regulations implement statutory provisions of Title I, Part A of the ESEA, as amended by the NCLB Act (Pub. L. 107-110), enacted January 8, 2002. On June 24, 2004, the Secretary published

a notice of proposed rulemaking (NPRM) in the **Federal Register** (69 FR 35462).

Under Title I of the ESEA, LEP students must be included in a State's assessment of academic achievement in reading/language arts and mathematics, and must receive appropriate accommodations and, to the extent practicable, native language assessments. LEP students must also be assessed annually for their proficiency in English in the modalities of listening, speaking, reading, and writing.

In the preamble to the NPRM, the Secretary discussed on pages 35463 and 35464 the major changes proposed to the current Title I regulations. These changes are summarized as follows:

- Under proposed § 200.6(b)(4), a State would be able to exempt "recently arrived LEP students" from one administration of the State's reading/language arts assessment. Proposed § 200.6(b)(4)(i) would define a recently arrived LEP student as a LEP student who has attended schools in the United States (not including Puerto Rico) for less than 10 months.

- Under proposed § 200.20(f)(1)(ii), a State would not be required to include the scores of recently arrived LEP students on the reading/language arts assessment (if taken) in decisions regarding adequate yearly progress (AYP), even if the student has been enrolled for a full academic year as defined by the State. However, these students could be counted as participants toward meeting the 95 percent participation requirement for AYP determinations in reading/language arts if they take an English language proficiency test. Under proposed § 200.20(f)(1)(ii), the State also would not be required to include the scores of recently arrived LEP students on the mathematics assessment in AYP decisions.

- Under proposed § 200.20(f)(2), a State would be permitted to include "former LEP" students within the LEP subgroup in making AYP determinations for up to two years after they no longer meet the State's definition for limited English proficiency.

- Proposed § 200.20(f)(2)(iii) would not allow States to include former LEP students when reporting achievement results on State and LEA report cards, as required under section 1111(h)(1)(C) and (2) of the ESEA.

In these final regulations, we are making several significant changes from the regulations proposed in the NPRM. These changes are as follows:

- *Definition of recently arrived LEP students.* The Secretary has made

several changes in the definition of recently arrived LEP students. First, § 200.6(b)(4)(iv) defines a recently arrived LEP student as a student with limited proficiency in English who has attended schools in the United States for less than twelve months, rather than ten months as provided in the NPRM. The Secretary made this change to accommodate year-round schools. The Secretary notes that this definition focuses on length of time in United States schools, not length of time in the United States. The Secretary also notes that States may only exempt recently arrived LEP students from one administration of the State's reading/language arts assessment.

Second, the Secretary has clarified, in § 200.6(b)(4)(iv) that the phrase "schools in the United States" means only schools in the 50 States and the District of Columbia. It does not include schools in Puerto Rico, the outlying areas, or the freely associated states.

- *Instruction for recently arrived LEP students.* The Secretary has added § 200.6(b)(4)(i)(D) to emphasize that, notwithstanding the flexibility the regulations afford regarding assessment and accountability with respect to recently arrived LEP students, an LEA has the responsibility to provide appropriate instruction to these students to assist them in gaining English-language proficiency as well as content knowledge in reading/language arts and mathematics.

- *Reporting data on exemptions for recently arrived LEP students.* The Secretary has added § 200.6(b)(4)(i)(C) to require a State and its LEAs, on State and district report cards, respectively, to report annually the number of recently arrived LEP students exempted from one administration of the State's reading/language arts assessment.

- *Reporting data on former LEP students.* In § 200.20(f)(2)(iii), the Secretary has clarified how to report data relating to former LEP students on a State's or LEA's report card. This section clarifies that a State or LEA may include the scores of former LEP students as part of the LEP subgroup only for the purpose of reporting AYP. States and LEAs may not include former LEP students in the LEP subgroup on State or LEA report cards for any other purpose. The Secretary also has clarified that, if a State or LEA chooses to include the scores of former LEP students as part of the LEP subgroup for calculating and reporting AYP, the State or LEA must include the scores of all students defined as former LEP students in AYP calculations and reporting.

## Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, approximately 50 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law.

### Section 200.6 Inclusion of all students

*Comment:* Many commenters recommended changing the definition of a "recently arrived" LEP student to mean a LEP student who has attended schools in the United States for a period of time ranging from 12 months to five years or to tie the definition to a student's English language proficiency. Several others commented that a requirement based on the length of time a student has attended schools in the United States may be difficult to implement. One commenter recommended defining a "recently arrived" LEP student by the length of time the student has attended schools in a particular State.

*Discussion:* The purpose of these regulations is to allow a one-time exemption from content assessments in reading/language arts for those students who have had little instructional time in United States schools and are not proficient in English. The definition of recently arrived LEP students in the proposed regulations had two components: (1) A time limit, and (2) a limit on the number of times a student may be exempted from taking the reading/language arts assessment. We believed it was important to have a time limit to ensure that the one-time exemption is used only for LEP students who have recently arrived in schools in the United States, not for those students who have lived in the United States for a number of years and attended United States schools but who still possess limited proficiency in English.

The proposed regulations provided that recently arrived LEP students would be those who have attended schools in the United States for less than ten months before the State's reading/language arts test is administered. The purpose of the ten-month time limit was to provide a limit that was the equivalent of one year's worth of instruction. However, a ten-month time limit may not equate to a full year of instruction in certain circumstances, such as in a year-round

school that operates over 12 months. The Secretary thus agrees that ten months may be confusing to implement in certain circumstances, and that changing the limit to 12 months maintains a limit of one year while affording flexibility and reducing any potential confusion. Even with this change, recently arrived LEP students are exempt from only one administration of the State's reading/language arts assessment.

While the Secretary recognizes that ascertaining the number of months of attendance in U.S. schools for recently arrived LEP students may be challenging for some States, in order to implement the flexibility related to recently arrived LEP students, a State must be able to identify such students. The Department intends to prepare guidance to assist States in making these determinations.

The definition of a recently arrived LEP student is not intended to include students who have lived in the United States for much of their lives and/or have attended United States schools for more than 12 months but have not learned sufficient English to demonstrate even limited proficiency.

*Changes:* Section 200.6(b)(4)(iv) has been amended to permit States to consider LEP students as being recently arrived if they have attended schools in the United States for less than 12 months.

*Comment:* Several commenters recommended that recently arrived LEP students also be exempt from the first administration of the State's mathematics assessment, as well as the science assessment required by 2007–2008.

*Discussion:* The final regulations require that recently arrived LEP students take the mathematics assessment. The Secretary believes that English language proficiency is not a prerequisite to participating in State mathematics assessments to the same extent as it is to participating in State reading/language arts assessments. Research provides evidence on accommodations that can be used with LEP students in mathematics and have been shown not to compromise the validity of the test and skills being measured when appropriately implemented.<sup>1</sup> With accommodations, recently arrived LEP students should be able to demonstrate sufficient

knowledge of mathematics to provide useful information to teachers in order to inform instruction and to parents to let them know how their child is achieving. The regulations recognize that valuable information can be obtained to inform instruction when recently arrived LEP students take the mathematics assessment, but provide flexibility to States to exclude these scores from AYP calculations for one year.

While taking these assessments, recently arrived LEP students should receive the same accommodations as provided during classroom instruction. Science assessments are not required to be in place until the 2007–2008 school year and even then are not required to be included in AYP determinations.

*Changes:* None.

*Comment:* Two commenters expressed concern that the language in proposed § 200.6(b)(4)(i) could be misconstrued to mean that students who attended schools in Puerto Rico, a Commonwealth of the United States, may not be included in the population of recently arrived LEP students.

*Discussion:* In proposed § 200.6(b)(4)(i), the Secretary intended that students who come to the United States from Puerto Rico, where Spanish is the language of instruction, would not be considered to have been enrolled in United States schools while in Puerto Rico. Thus, LEP students from Puerto Rico would be included in the definition of recently arrived LEP students for purposes of these regulations.

*Changes:* Section 200.6(b)(4)(iv) has been changed to state explicitly that only schools in the 50 States and the District of Columbia are considered to be schools in the United States for purposes of these regulations. As a result, LEP students from Puerto Rico, the outlying areas, and the freely associated States are included in the definition of recently arrived LEP students.

*Comment:* Two commenters expressed concern that the regulations provide no incentive for LEAs to serve recently arrived LEP students and urged the Secretary to encourage LEAs to provide recently arrived LEP students with intensified instruction in both English language development and academic content so that the students will be better prepared to take the State's assessments the following year.

*Discussion:* The Secretary agrees that these regulations are not an invitation for LEAs to ignore either content or English language instruction for recently arrived LEP students merely because the students' scores may not be included in

<sup>1</sup> See, for example, Abedi and Leon, 1999; Abedi, Leon and Mirocha, 2001; Abedi *et al.*, 2000, for research on test accommodations and findings related to accommodations used on mathematics assessments with LEP students that allow students to demonstrate knowledge of content without unfair advantage or without compromising test validity.

accountability decisions. To the contrary, the purpose of the regulations is to afford LEAs time to provide instruction in English as well as content to recently arrived LEP students to prepare them to take the State's assessment in reading/language arts the following year.

*Changes:* Section 200.6(b)(4)(i)(D) has been added to explicitly state that nothing in these regulations relieves an LEA of its responsibility under applicable law to provide recently arrived LEP students with appropriate instruction to enhance their English language proficiency and their knowledge of content in reading/language arts during the period in which they may be exempt from the State's reading/language arts assessment.

*Comment:* Several commenters urged the Secretary to assist in research, development, validation, and dissemination of native language assessments.

*Discussion:* The Secretary recognizes the value of native language assessments in measuring the proficiency of limited English proficient students in reading, mathematics, science, and other core academic subjects that are anchored to rigorous State content standards. States may use funds under section 6111 of the ESEA, Grants for State Assessments and Related Activities, section 6112 of the ESEA, Grants for Enhanced Assessment Instruments, and consolidated State administrative funds to address this need and can join various consortia funded by the Department that are developing better strategies and instruments to include LEP students in State standards-based assessment systems. In addition, the Department has recently initiated a partnership with States to offer long-term support and technical assistance in order to help States improve content assessment options for LEP students, including native language assessments, assessments using plain language or simplified English, effective use of accommodations with LEP students and other approaches.

*Changes:* None.

*Comment:* Two commenters requested that the final regulations define Spanish native language assessments as always "practicable" and clarify the States' responsibilities to develop and administer native language assessments.

*Discussion:* Section 200.6(b) of the current Title I regulations requires that States assess limited English proficient students in a valid and reliable manner that includes reasonable accommodations and, to the extent practicable, assessments in the language

and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in subjects other than English. Although Spanish is the most common of the hundreds of different languages spoken by LEP students, Spanish native language assessments are not always practicable, nor do they always result in accurate and reliable information on what students know and can do. For example, a native language assessment may not yield valid and reliable results for students who are not literate in their native language, who speak a dialect that is different from the one in which the native language assessment is written, or who receive the majority of their instruction in English and thus have not been exposed to the academic vocabulary of their native language.

*Changes:* None.

*Comment:* None.

*Discussion:* Dissemination, through report cards, of clear and understandable data on student participation in and performance on State assessments is central to the NCLB Act and is the best management tool we have for improving schools. Upon the Department's own internal review of these regulations, the Secretary has determined that these regulations should help ensure that parents and the public are informed annually about the number of recently arrived LEP students exempted from State reading/language arts assessments.

*Change:* We have added new § 200.6(b)(4)(i)(C) to require States and LEAs to report on their report cards the number of recently arrived LEP students who are not assessed on the State's reading/language arts assessment.

#### *Section 200.20 Making Adequate Yearly Progress*

*Comment:* Several commenters recommended that the regulations permit States to include formerly LEP students in reporting the achievement of the LEP subgroup on State and LEA report cards required under section 1111(h) of the ESEA.

*Discussion:* The Secretary recognizes that the LEP subgroup is one whose membership can change from year to year as students who have attained English proficiency exit the subgroup and new students not proficient in English enter the subgroup. Because LEP students exit the LEP subgroup once they attain English language proficiency, school assessment results for that subgroup may not reflect the gains that LEP students have made in academic achievement. Recognizing this, the final regulations allow a State

to include "former LEP" students within the LEP subgroup in making AYP determinations for up to two years after they no longer meet the State's definition for limited English proficiency. At the same time, however, it is important that parents and the public have a clear picture of the academic achievement of those students who are presently limited English proficient. Thus, the final regulations distinguish between including former LEP students in the LEP subgroup for assessment data reporting and including them in that subgroup when reporting AYP on State and LEA report cards.

Under the ESEA, in section 1111(h)(1)(C), and section 1111(h)(2)(B) as that section applies to an LEA and each school served by the LEA, information on subgroups is reported in two distinct ways. Under section 1111(h)(1)(C)(i, iii, iv, v, and vi) and section 1111(h)(2)(B) as that section applies to an LEA and each school served by the LEA, information is reported for all students and the students in each subgroup (race/ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged), regardless of whether a student's achievement is used in determining if the subgroup has made AYP (*i.e.*, reporting includes students who have not been enrolled for a full academic year, as defined by the State, and students in subgroups too small to meet the State's minimum group size for determining AYP). For reporting under the above-referenced provisions, former LEP students may not be included in the LEP subgroup because it is important that parents and the public have a clear picture of the academic achievement of students who are currently limited English proficient. On the other hand, section 1111(h)(1)(C)(ii) and section 1111(h)(2)(B), as that section applies to an LEA and each school served by the LEA, provide for a comparison between the achievement levels of subgroups and the State's annual measurable objectives for AYP in reading/language arts and mathematics (for all students, and disaggregated by race/ethnicity, disability status, English proficiency, and status as economically disadvantaged). For this section of State and LEA report cards, States and LEAs are reporting on how students whose assessment scores were used in determining AYP (*i.e.*, students enrolled for a full academic year) for reading/language arts and mathematics compare to the State's annual measurable objective for AYP. For reporting AYP by

subgroup, former LEP students may be included in the LEP subgroup.

*Changes:* Section 200.20(f)(2)(iii) has been changed to clarify the distinction between reporting assessment data and reporting accountability data on State and LEA report cards and to clarify that "former LEP" students may be included within the LEP subgroup only under section 1111(h)(1)(C)(ii) of the ESEA, and section 1111(h)(2)(B) of the ESEA as that section applies to comparable data reported on LEA report cards.

*Comment:* One commenter contended that § 200.20 should allow the State to include, in the LEP subgroup, those students who were LEP but who no longer meet the State's definition for up to three years instead of the two years proposed in the NPRM.

*Discussion:* Section 3121(a)(4) of Title III of the ESEA requires LEAs that receive Title III funds to monitor the progress of students served by Title III in meeting challenging State academic content and academic achievement standards for each of the two years after such students are no longer receiving Title III services. Because of this Title III requirement, States have already begun designing data collection systems to track students in this manner. The Secretary believes the final regulations should be consistent with the Title III provisions.

*Changes:* None.

*Comment:* One commenter recommended that States be required to include former LEP students in the LEP subgroup in determining whether a school or LEA has a sufficient number of LEP students to yield statistically reliable information under § 200.7(a).

*Discussion:* The regulations are designed to assist schools and LEAs that have a LEP subgroup of sufficient size (without including former LEP students) to yield statistically reliable information, as determined by the State, to demonstrate their progress with that subgroup by enabling those schools and LEAs to include the scores of former LEP students in AYP calculations for up to two years after the student exits the LEP subgroup. States that wish to include former LEP students in the LEP subgroup in determining whether a school or LEA has a sufficient number of LEP students to yield statistically reliable information under § 200.7(a) may do so.

*Changes:* None.

*Comment:* One commenter recommended that the Secretary clarify that, if States include former LEP students in AYP calculations for LEP subgroups, this action must be taken on a statewide basis.

*Discussion:* The Secretary expects each State to have a policy governing the inclusion of former LEP students in AYP calculations. A State may certainly establish and apply statewide a uniform policy requiring all LEAs to include the scores of former LEP students in their AYP calculations. However, the Secretary believes that a State should have the discretion to give LEAs the option, based on their individual circumstances, of deciding whether to include the scores of former LEP students in the LEP subgroup for AYP calculations. For example, an LEA with a small LEP population might decide it is not practical to disaggregate the scores of former LEP students for AYP purposes.

*Changes:* None.

*Comment:* One commenter recommended that the Secretary prohibit States from including recently arrived LEP students in the State's assessment participation rate if the State does not count the scores of these students in determining AYP.

*Discussion:* The Secretary believes that recently arrived LEP students should be counted as participants because they are taking the State's mathematics assessment and English language proficiency assessment, and they may be taking the State's reading/language arts assessment as well. A school or LEA should not be penalized in its participation rate if the scores of recently arrived LEP students are not included for determining AYP.

*Changes:* None.

*Comment:* A few commenters requested that the Secretary extend the flexibility in proposed § 200.20(f)(2) to students who were formerly classified as having a disability. The commenters specifically urged that the regulations be amended to allow the scores of students with disabilities who are no longer eligible for special education to be included, for up to two years, in the same manner that they allow for including the scores of former LEP students. The commenters believe that the circumstances prompting the proposed regulations for former LEP students are similar with respect to students with disabilities.

*Discussion:* On December 15, 2005, the Secretary published in the **Federal Register** a notice of proposed rulemaking (70 FR 74624) that would permit a State, in determining AYP for the students with disabilities subgroup, to include in that subgroup any student tested in the current year who had exited special education within the prior two-year period. The Secretary is currently considering the public comments she has received on this issue

and will address it in response to the December 15 proposed rules.

*Changes:* None.

*Comment:* One commenter pointed out that a State could not take advantage of the flexibility provided in the regulations if its current data system does not include the number of years a student has been "formerly LEP." The commenter recommended that the regulations permit States to include all formerly LEP students in the LEP subgroup through 2005–2006, providing time for the data system to collect new data on the number of years a student has been "formerly LEP."

*Discussion:* Permitting States to include all former LEP students in the LEP subgroup through the 2005–2006 school year could significantly mask the achievement of the LEP subgroup by overweighting it with former LEP students (including those who have not been LEP for several years) and, thus, creating the potential for ill-advised decisions regarding appropriate instructional strategies for this group of students. A State that improves its data collection procedures to track former LEP students may take advantage of the flexibility as the data become available. Thus, in the first year, the State may include in the AYP calculations for the LEP subgroup the scores for former LEP students who have been determined to no longer be LEP for one year and, in the second year, include the scores of all former LEP students who have been determined to no longer be LEP for one and two years.

*Changes:* None.

*Comment:* None.

*Discussion:* Upon the Department's own internal review of these regulations, the Secretary believes it is important to clarify how States and LEAs may implement the flexibility related to including the scores of former LEP students in calculating and reporting AYP for the LEP subgroup. If a State or LEA decides to include the scores of former LEP students in determining AYP, that State or LEA must include the entire group of former LEP students in such AYP calculations. The regulations are not intended to permit States and LEAs to pick and choose which former LEP students to include, or to choose a subset of former LEP students, such as only former LEP students who score proficient or higher on State assessments. In other words, if a State or LEA chooses to take advantage of this flexibility and include the scores of former LEP students in calculating and reporting AYP, the State or LEA must include all such defined students.

*Changes:* We have modified § 200.20(f)(2)(ii) to clarify that, if a State

or LEA chooses to include the scores of former LEP students as part of the LEP subgroup for purposes of calculating and reporting AYP, it must include the scores of all students it defines as former LEP students.

#### *General Comments*

*Comment:* One commenter noted that States without a student-based data management system would have to develop such a system in order to obtain the data necessary to implement these regulations. The commenter further indicated that, because there are costs associated with the development of a student-based data management system, there are costs associated with implementing these regulations.

*Discussion:* The flexibility afforded by the final regulations is purely permissive. No State is required to exercise it and, thus, none is required to incur any additional costs as a result of these regulations.

*Changes:* None.

*Comment:* One commenter requested that the Secretary apply these regulations retroactively to AYP determinations from the 2002–03 school year. The commenter argued that schools should not be penalized for failing to make AYP if they would have made it under the new rules.

*Discussion:* The Secretary first announced the flexibility included in these regulations in a letter dated February 20, 2004, and in that letter permitted States to implement the flexibility provided in these regulations for AYP decisions based on 2003–2004 assessment data. Because identification for improvement depends on a school not making AYP for two consecutive years, a school or district would not be identified for improvement solely on the basis of the performance of its LEP subgroup, absent this flexibility, on the State's 2002–2003 assessments. Further, if a school or district did not make AYP for the LEP subgroup based on the 2003–2004 assessment with this new flexibility, the determination that the school or district did not make AYP based also on the 2002–2003 assessment was most likely appropriate.

*Changes:* None.

*Comment:* One commenter requested that the final regulations allow States to count former LEP students for the purposes of determining the amount of Title III funding a State will receive.

*Discussion:* The primary purposes of Title III of the ESEA are to ensure that students who are LEP, as measured against State English language proficiency standards, attain English language proficiency and develop high levels of academic attainment; to

develop high-quality instructional programs for LEP students; and to assist States, LEAs, and schools to build and enhance their capacity to establish, implement, and sustain language instruction programs for LEP students. Former LEP students are, by definition, students who, as measured against State English language proficiency standards and assessments, have attained English language proficiency. Counting students who are no longer LEP for the purposes of determining Title III funding would be contrary to the targeted purposes of the Title III program. Furthermore, Title III of the ESEA includes explicit statutory instructions for how funding allocations to States are to be made.

*Changes:* None.

#### **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 the final 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 of the final 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.

We summarized the potential costs and benefits of these final regulations in the preamble to the NPRM (69 FR 35464). We include additional discussion of potential costs and benefits in the section of this preamble titled *Analysis of Comments and Changes*.

#### **Regulatory Flexibility Act**

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

These provisions require States and LEAs to take certain actions only if States choose to implement the flexibility these regulations afford. The Department believes that these activities will be financed through the appropriations for Title I and other Federal programs and that the responsibilities encompassed in the law and regulations will not impose a financial burden that States and LEAs will have to meet from non-Federal resources.

#### **Paperwork Reduction Act of 1995**

The amendments to § 200.6 contain information collection requirements. Under the Paperwork Reduction Act of 1995, the Department has submitted a copy of this section to the Office of Management and Budget (OMB) for its review. The burden hours associated with this data collection are estimated at 52 hours total, based on each State taking one hour to report these data in the appropriate form. The Department is requesting approval of these burden hours as a “new” information collection. However, the Department intends to eventually transfer these hours to the information collection covered under OMB Control Number 1810–0581.

This information collection relates to a change in the reporting requirements already required under Title I, Part A of the ESEA for States that voluntarily choose to take advantage of the flexibility afforded by this regulation. States and districts already collect the number of students exempted from State assessments, and report, on State and local report cards, the percentage of students not tested (Section 1111(h)(1)(C)(iii)), disaggregated by student category. The regulations would add a reporting category, to be reported on State and local report cards, for the number of students who were not tested because they were identified as LEP students who are recent arrivals to the United States.

Each of the 50 States, Puerto Rico, and the District of Columbia that wishes to take advantage of the flexibility related to recently arrived LEP students would need to report these data on SEA and LEA report cards.

There is no appreciable burden associated with the collection as SEAs and LEAs already report on student exemptions from State assessments on report cards. The cost for this collection is also minimal as it is a matter of adding to or recoding SEA and LEA test exemption collection instruments to include this newly available exemption option and adding that information to report cards.

In order to take advantage of the flexibility related to recently arrived LEP students, SEAs and LEAs would have to be able to, and would want to, account for and track separately the students to which this exemption would apply in order that those students are not miscounted as non-participants in the State's reading/language arts assessment for meeting the 95 percent participation requirement. We estimate annual reporting and recordkeeping burden for this collection of information

to average 1 hour for each of the 52 respondents.

If you want to comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503. You may also send a copy of these comments to the Department's representative named in the **FOR FURTHER INFORMATION CONTACT** section of this document.

We consider your comments on this proposed information collection in:

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of this proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology, e.g. permitting electronic submissions of response.

OMB is required to make a decision concerning the collection of information contained in this regulation between 30 and 60 days after the publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication.

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(Catalog of Federal Domestic Assistance Number: 84.010 Improving Programs Operated by Local Educational Agencies)

#### List of Subjects

##### 34 CFR Part 200

Administrative practice and procedure, Adult education, Children, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family-centered education, Grant programs—education, Indians—education, Institutions of higher education, Juvenile Delinquency, Local educational agencies, Migrant labor, Nonprofit private agencies, Private schools, Public agencies, Reporting and recordkeeping requirements, State-administered programs, State educational agencies.

Dated: September 11, 2006.

**Margaret Spellings**,  
*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends 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. Amend § 200.6 as follows:

- A. Revise the introductory text of the section;
- B. Revise paragraph (b)(1)(i) introductory text; and
- C. Add a new paragraph (b)(4).

The revisions and addition read as follows:

##### § 200.6 Inclusion of all students.

A State's academic assessment system required under § 200.2 must provide for the participation of all students in the grades assessed in accordance with this section.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Consistent with paragraphs (b)(2) and (b)(4) of this section, the State must assess limited English proficient students in a valid and reliable manner that includes—

\* \* \* \* \*

(4) *Recently arrived limited English proficient students.* (i)(A) A State may exempt a recently arrived limited English proficient student, as defined in paragraph (b)(4)(iv) of this section, from one administration of the State's

reading/language arts assessment under § 200.2.

(B) If the State does not assess a recently arrived limited English proficient student on the State's reading/language arts assessment, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language under section 1111(b)(3)(C)(x) of the Act.

(C) The State and its LEAs must report on State and district report cards under section 1111(h) of the Act the number of recently arrived limited English proficient students who are not assessed on the State's reading/language arts assessment.

(D) Nothing in paragraph (b)(4) of this section relieves an LEA from its responsibility under applicable law to provide recently arrived limited English proficient students with appropriate instruction to assist them in gaining English language proficiency as well as content knowledge in reading/language arts and mathematics.

(ii) A State must assess the English language proficiency of a recently arrived limited English proficient student pursuant to paragraph (b)(3) of this section.

(iii) A State must assess the mathematics achievement of a recently arrived limited English proficient student pursuant to § 200.2.

(iv) A recently arrived limited English proficient student is a student with limited English proficiency who has attended schools in the United States for less than twelve months. The phrase "schools in the United States" includes only schools in the 50 States and the District of Columbia.

\* \* \* \* \*

■ 3. Amend § 200.20 as follows:

- A. Revise paragraphs (a)(1) introductory text, (b) introductory text, and (c)(1) introductory text; and
- B. Add a new paragraph (f).

The revisions and addition read as follows:

##### § 200.20 Making adequate yearly progress.

\* \* \* \* \*

(a)(1) A school or LEA makes AYP if, consistent with paragraph (f) of this section—

\* \* \* \* \*

(b) If students in any group under § 200.13(b)(7) in a school or LEA do not meet the State's annual measurable objectives under § 200.18, the school or LEA makes AYP if, consistent with paragraph (f) of this section—

\* \* \* \* \*

(c)(1) A school or LEA makes AYP if, consistent with paragraph (f) of this section—

\* \* \* \* \*

(f)(1) In determining AYP for a school or LEA, a State may—

(i) Count recently arrived limited English proficient students as having participated in the State assessments for purposes of meeting the 95 percent participation requirement under paragraph (c)(1)(i) of this section if they take—

(A) Either an assessment of English language proficiency under § 200.6(b)(3) or the State's reading/language arts assessment under § 200.2; and

(B) The State's mathematics assessment under § 200.2; and

(ii) Choose not to include the scores of recently arrived limited English proficient students on the mathematics assessment, the reading/language arts assessment (if administered to these students), or both, even if these students have been enrolled in the same school

or LEA for a full academic year as defined by the State.

(2)(i) In determining AYP for the subgroup of limited English proficient students, a State may include, for a period of up to two years, the scores of students who were limited English proficient but who no longer meet the State's definition of limited English proficiency.

(ii) If a State, in determining AYP for the subgroup of limited English proficient students, includes the scores of the students described in paragraph (f)(2)(i) of this section, the State must include the scores of all such students, but is not required to—

(A) Include those students in the limited English proficient subgroup in determining if the number of limited English proficient students is sufficient to yield statistically reliable information under § 200.7(a);

(B) Assess those students' English language proficiency under § 200.6(b)(3); or

(C) Provide English language services to those students.

(iii) For the purpose of reporting information on report cards under section 1111(h) of the Act—

(A) A State may include the scores of former limited English proficient students as part of the limited English proficient subgroup for the purpose of reporting AYP at the State level under section 1111(h)(1)(C)(ii) of the Act;

(B) An LEA may include the scores of former limited English proficient students as part of the limited English proficient subgroup for the purpose of reporting AYP at the LEA and school levels under section 1111(h)(2)(B) of the Act; but

(C) A State or LEA may not include the scores of former limited English proficient students as part of the limited English proficient subgroup in reporting any other information under section 1111(h) of the Act.

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