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# K-12 Education: Special Forms of Flexibility in the Administration of Federal Aid Programs

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## Summary

Beginning with the Improving America's Schools Act in 1994, and continuing through the Education Flexibility Partnership Act of 1999 and the No Child Left Behind Act of 2001 (NCLBA), the authorization of special forms of flexibility for grantees has been a focus of federal K-12 education legislation. These flexibility authorities apply primarily to programs under the Elementary and Secondary Education Act (ESEA), the largest source of federal aid to K-12 education.

In general, federal K-12 education assistance program requirements include a broad range of activities or outcomes that state or local educational agencies (SEAs, LEAs) are expected to provide or achieve in order to establish accountability for use of funds consistent with the purposes of statutes that authorize the programs. These requirements are usually intended to provide *target accountability* — ensuring that funds are focused on eligible localities, pupils, and purposes; *outcome accountability* — ensuring that funds are used effectively to improve student achievement and improve the quality of K-12 instruction; and *fiscal accountability* — ensuring financial integrity and providing that federal funds constitute a net increase in resources for the eligible pupils or purposes.

In contrast, special flexibility authorities allow exceptions to these general requirements; they include Ed-Flex, Secretarial case-by-case waivers, ESEA Title I-A schoolwide programs, flexibility for small rural LEAs, the Innovative Programs block grant, transferability authority, plus the State and Local Flexibility Demonstration Program (State-Flex and Local-Flex). In general, these authorities: (a) increase the ability of states or LEAs to use federal aid more completely in accordance with their own priorities; (b) are significantly limited in terms of the number of states and LEAs that may participate, the number and size of the programs affected, and/or the range of requirements that may be waived; (c) often require some degree of accountability based on pupil achievement outcomes in return for increased flexibility, although the primary outcome requirements are applicable to all states and LEAs participating in Title I-A and other ESEA programs, not just those granted special flexibility authority; (d) often include a variety of requirements for reporting on ways in which the authorities have been used and the impact of increased flexibility on pupil achievement, although little information has been published on the uses or effects of the flexibility authorities implemented thus far; and (e) have been adopted in a policy context of substantially increased accountability requirements and authorized degrees of flexibility *in general* for the ESEA and related programs.

Major issues regarding special forms of flexibility in federal K-12 education programs include: How significant are the degrees of flexibility allowed under these authorities? Is there substantial state or local interest in the authorized forms of flexibility? For what purposes have special flexibility authorities been used in the past, and is there evidence that these have resulted in increased pupil performance or had other major impacts? And, are the outcome accountability requirements consistent with the increased flexibility provided under these authorities? This report will be updated when major developments occur.

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## Introduction

Beginning with adoption of the Improving America's Schools Act (IASA) in 1994 (P.L. 103-382), and continuing through enactment of the Education Flexibility Partnership Act of 1999 (P.L. 106-25) and the No Child Left Behind Act of 2001 (NCLBA, P.L. 107-110), the authorization of special forms of flexibility for grantees has been a major focus of most federal K-12 education assistance legislation. In particular, the recently enacted NCLBA extended some flexibility authorities that had been established earlier, and initiated new ones, which are now beginning to be implemented. This report provides an overview of these authorizations for state and local flexibility in administering federal K-12 education programs. It will be updated infrequently to incorporate major new developments in the implementation of these authorities or new information on their use and impact.

"Flexibility" is defined for purposes of this report as authority under which federal program requirements, particularly restrictions on the use of federal aid, may be waived by, or on behalf of, state or local aid recipients meeting certain eligibility criteria. In some cases, this flexibility is granted in return for meeting specified accountability requirements related to program outcomes. Such flexibility includes provisions for consolidation of multiple programs, or for transfer of funds among programs, so that federal assistance may be used for a broader range of activities or purposes than ordinarily would be allowed, as well as the authority to waive specified types of program requirements.

In general, these flexibility authorities apply to federal aid programs authorized by the Elementary and Secondary Education Act (ESEA), the largest source of federal aid to K-12 education. In contrast, almost none of these authorities involve the second largest source of federal aid, the Individuals with Disabilities Education Act (IDEA). For this reason, as well as the existence of a number of issues regarding requirements and flexibility that are specific to that program, *the IDEA will not be discussed further in this report*, and discussions of federal involvement in K-12 education in this report should be understood to apply primarily to the ESEA and to exclude the IDEA.

This report begins with a review of the general nature of federal K-12 education program requirements, including their sources, purposes, and the concerns expressed by some grantees about them. This is followed by a description of the current special flexibility authorities under which may of these requirements may be waived or otherwise made inapplicable, along with an analysis of issues specific to individual

authorities. This section is divided between authorities initially adopted previous to the NCLBA, and new authorities included in that legislation. The report concludes with an analysis of selected cross-cutting issues regarding these special flexibility authorities overall.

# General Nature of Federal K-12 Program Accountability Requirements

We begin this report with a brief review of the general types of program requirements applicable to ESEA and related federal K-12 programs. Many of these requirements may be waived, in part or in whole, for some or all states and LEAs under the special flexibility authorities discussed later. We refer to these as "accountability requirements" because they are intended to provide accountability by assuring that federal funds are used in ways that are consistent with the purposes of the federal statutes authorizing the programs. Typically, federal programs of aid to elementary and secondary education exhibit a mix of relatively specific and explicit requirements in such areas as eligibility of pupils to be served, allocation of funds, or (increasingly) outcomes, along with substantial flexibility in many other important respects, such as instructional methods or grade levels to be served.

Federal K-12 education programs generally focus upon one or more of the following: (a) a student population with special educational needs — e.g., disadvantaged or limited English proficient (LEP) pupils; (b) a specific aspect of instructional services — e.g., educational technology or recruitment and professional development of teachers; (c) development, demonstration, and dissemination of innovative instructional approaches — e.g., charter schools or demonstrations of comprehensive school reform; or (d) a specific subject area, such as instruction in drug abuse prevention. Most of the larger federal programs, such as ESEA Title I-A, fall into category (a), while several programs of small to moderate size are in categories (b)-(d). Almost all federal K-12 education programs, in all of categories (a)-(d), are sometimes referred to as "categorical" programs, because their focus is targeted or limited in one or more important respects. In contrast, one ESEA program — the Innovative Programs authority of ESEA Title V-A — provides support for such a broad range of activities that it is generally considered to be a "block grant" at the other end of the intergovernmental assistance spectrum.

## Sources and Forms of Accountability Requirements

There are three general sources of federal requirements or related guidance to state and local recipients of federal aid. An important distinction (at least in theory) can be made between "requirements" and "non-regulatory policy guidance." **"Requirements"** *must* be met by grantees, as a matter of law. While they are always derived ultimately from the **authorizing statute** for a program, or other federal statutes or judicial actions, they may appear in the form of regulations, in addition to statutory text. Program **regulations**, which are published initially in the *Federal Register*, then later integrated into annual updates of the *Code of Federal Regulations*, supplement statutory language primarily with respect to a limited number of major issues or topics which are complex, where U.S. Department of

Education (ED) officials place high priority on grantees taking certain specific actions, and where statutory text is deemed by ED to provide insufficient guidance. One example would be ESEA Title I-A requirements regarding curriculum content and pupil performance standards and assessments. In a few cases, authorizing statutes explicitly provide that ED is to publish regulations addressing certain issues, although ED may issue regulations with respect to any aid program which it administers.

In contrast, **"non-regulatory policy guidance"** is also published by ED for many programs. Such "non-regulatory policy guidance" may be published in the form of extensive questions and answers regarding several aspects of a program, or more specific "Dear Colleague" policy letters from the U.S. Secretary of Education to chief state school officers or other state and local officials. As this designation implies, grantees are not legally required to follow this "guidance," which is generally intended to answer relatively specific questions regarding topics such as uses of funds or selection of pupils to be served. Nevertheless, the typical perception and use of "non-regulatory" guidance may be more complex than this stated intent would imply. Grantees may assume that they will face fewer effective challenges to their use of federal aid if they follow such "non-regulatory" guidance, and may often treat such guidance as if it were equivalent to regulations, even if they are not explicitly "required" to do so.

A somewhat analogous form of "non-regulatory guidance" may be found in the "competitive priorities" established by ED for competitive or discretionary (i.e., not formula) grant programs. In these grant competitions, ED typically sets certain priorities for applications which would receive preferential consideration in the awarding of grants. For example, a priority might be established for applicants which would use funds to provide services in schools with high percentages of pupils from low-income families. While applicants are not required to meet these priorities, it is obvious that they will have a much greater likelihood of receiving support if they do so. These priorities are not "regulations"; they are typically published only in the announcement of the grant competition in the *Federal Register*.

Over the past several years, especially since adoption of the IASA in 1994, there has been a trend toward the publication of regulations which are less voluminous and address fewer aspects of many federal elementary and secondary education programs than in the past. For several programs, ED has published no regulations at all, implying that guidance in the statute is sufficient and requires no supplementation by regulations, although in most cases some form of "non-regulatory policy guidance" is provided.

For ESEA programs where some regulations are still published, such as ESEA Title I-A, the regulations are generally somewhat briefer, and often address fewer issues, than was the case previous to the early 1990s. For example, proposed program regulations for ESEA Title I-A after enactment of the IASA in 1994 followed a rather "minimalist" approach in that they addressed relatively few program issues. Those regulations dealt with standards, assessments, and accountability; schoolwide programs; participation of children who attend private schools; and allocation of funds within states and LEAs. Several other major aspects of the Title I-A program — e.g., selection of schools and pupils to be served, parental

involvement, professional development, fiscal requirements, or several aspects of state and local plans — were not addressed in the regulations.

More recently, following enactment of the NCLBA of 2001, ED embraced a similar strategy. With respect to ESEA Title I-A, for example, it has thus far published regulations on a relatively limited number of topics.[1] The Department has stated:

> The Secretary intends to regulate only if absolutely necessary; for example, if the statute requires regulations or if regulations are necessary to provide flexibility or clarification for State and local educational agencies. Rather than regulating extensively, the Secretary intends to issue nonregulatory guidance addressing particular legal and policy issues under the Title I programs. This guidance will inform schools, parents, school districts, States, and other affected parties about the flexibility that exists under the statute, including different approaches they may take to carry out the statute's requirements.[2]

## Purposes of Accountability Requirements

Federal K-12 education assistance program requirements include a broad range of activities, services, or outcomes that SEAs, LEAs, and other aid grantees are expected to provide, perform, or achieve with, or in return for, federal grants, in order to show evidence that program goals are being met — i.e., to establish accountability for appropriate use of federal aid funds. Federal elementary and secondary education program requirements are usually intended to provide one or more of three basic types of accountability for use of funds consistent with the purposes of statutes that authorize the programs. These intended forms of accountability include:

- *Target accountability*: assuring that funds are focused on eligible localities, pupils, and purposes, usually for the ultimate purpose of promoting more equal educational opportunities;
- *Outcome accountability*: assuring that funds are used effectively to improve student achievement and enhance the quality of K-12 instruction — either in specific subject areas or for particular types of pupils, or overall; and
- *Fiscal accountability*: assuring financial integrity and providing that federal aid funds constitute a net increase in resources for the eligible pupils or purposes, rather than potentially replacing (supplanting) state or local funds that would otherwise be available for the same purpose.

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[1] These topics include participation in the National Assessment of Educational Progress (NAEP), state accountability systems, schoolwide programs, LEA and school improvement, qualifications of teachers and paraprofessionals, participation of eligible pupils attending private schools, allocations to LEAs and schools, and fiscal requirements.

[2] *Federal Register*, May 6, 2002, p. 30452.

Specific types of requirements intended to support one or more of these purposes include requirements to:

- Target resources on specific "high need" pupil groups or types of localities or schools,
- Limit the authorized uses of funds to certain high priority types of services,
- Conduct audits or assure that federal funds supplement, and do not supplant, state and local resources,
- Enhance parental participation or provide for equitable treatment of pupils attending non-public schools,
- Implement minimum qualifications for school staff,
- Report to parents and the general public of information on program activities and their impact,
- Meet certain student achievement and other outcome goals, and
- Evaluate the effectiveness of federally supported instructional services.

Grantees that violate any of these types of regulations *implicitly* face the possibility of having to repay funds to the federal government, or being prohibited from receiving further grants, although such sanctions are rarely invoked. In some cases, authorizing statutes *explicitly* provide for more limited, specific sanctions for states or LEAs which fail to meet some requirements.[3]

In addition to such program-specific requirements, a number of *general* requirements apply to all recipients of federal education assistance under any program. Many of these are published in the Education Department General Administrative Regulations (EDGAR),[4] as well as the financial management requirements contained in relevant "circulars" published by the Office of Management and Budget (OMB).[5] Other regulations that are generally applicable to ED programs include those related to civil rights and privacy of student records. LEAs that participate in the federal child nutrition programs administered by the Department of Agriculture must comply with a variety of related requirements — for example, they must provide free or reduced-price school lunches to pupils from low-income families. Finally, federal regulations published by federal agencies other than ED may be applicable to LEAs and schools in their role as employers (e.g.,

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[3] For example, the ESEA provides that the Secretary *shall* withhold 25% of funds otherwise available for state administration and program improvement activities from states which fail to meet the ESEA Title I-A requirements regarding standards and assessments which were originally adopted in the Improving America's Schools Act of 1994, and *may* withhold additional state administration funds for failure to meet new assessment requirements adopted under the NCLBA.

[4] 34 CFR 74-86.

[5] The most important of the OMB Circulars for administration of federal K-12 education programs by states and LEAs include Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (including the "Circular A-133 Compliance Supplement"), Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments, and Circular A-102, Grants and Cooperative Agreements with State and Local Governments.

regulations related to workplace safety, environmental protection, access for persons with disabilities, labor relations, etc.).

However, state and local educational agencies are given wide latitude in other aspects of the use of federal education assistance. Such matters as grade levels, subject areas, and instructional techniques have typically been left almost totally to state and local discretion. If a requirement *is* applied to instructional methods under the ESEA and related programs — for example, the requirement applied to selected programs under the NCLBA that instructional methods be "scientifically based" — it is almost always broad, leaving great scope to state and LEA discretion.

## Concerns About Selected Federal Program Requirements

**Program-Specific Requirements.** Complaints about ESEA and related program-specific requirements by proponents of greater flexibility are often focused on a selected range of particular types of requirements. Program-specific requirements that are often the focus of criticism include: (a) explicit or implicit prohibitions against commingling (mixing) of funds under different federal programs with each other or with revenues from state and local programs; (b) restrictions on the use of resources purchased with federal program funds for activities other than those conducted under that program; (c) requirements that aid be targeted on certain types of pupils or schools; (d) eligibility thresholds for special forms of flexibility (e.g., ESEA Title I-A schoolwide programs); and (e) ESEA Title I-A outcome accountability requirements adopted or expanded under the NCLBA.[6]

In general, prohibitions against commingling of funds ((a) above) arise from efforts to establish fiscal accountability. Restrictions on the use of instructional resources to the pupils eligible to be served (b), as well as requirements to target aid on pupils and schools with the greatest incidence of poverty (c), are intended to focus limited federal funds on those with the greatest needs. The eligibility thresholds for certain forms of flexibility, such as ESEA Title I-A schoolwide programs (d), have rationales that are discussed later in this report. Finally, the new or expanded outcome accountability requirements (e), which are a key element of the NCLBA, are intended to increase the effectiveness of federally supported education services and to help shift the focus away from other types of requirements toward improved outcomes.

Nevertheless, from a state or local perspective, these requirements may sometimes seem to be unnecessarily inflexible, especially in relatively low enrollment LEAs which may receive small grants under each of a variety of federal programs. While the categorical approach of most of the larger ED programs directs aid at high need pupil groups — disadvantaged pupils, limited English proficient (LEP) pupils, etc. — such an approach *may* have undesirable (and unintended) effects. Some of these effects may include: fragmentation of services to children,

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[6] These provisions are discussed in CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*, and CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, both by Wayne Riddle.

with challenges for coordinating special program instruction with their regular instruction; inefficient use of resources, that may remain unused when not required by the special needs pupils; treatment of partial needs when a more coherent focus on the whole child and her/his entire instructional program might be more effective, especially with respect to children with multiple special needs; or instruction of pupils in separate settings, whether or not this is explicitly required by the legislation, when this might not be the most effective instructional technique. The traditional federal categorical approach has been criticized as leading to fragmented instruction, and focusing more on targeting resources and inputs than on improving achievement and other outcomes for pupils. Difficulties may also arise from efforts to implement federal programs in states and LEAs with widely varying educational policies and demographic conditions.

Some of these problems with categorical program structures and associated requirements may be based on misunderstandings of the requirements of federal statutes and regulations, or overly strict state or local interpretations of these. Others may be the inevitable effects of efforts to ensure that federal aid is focused on pupils most in need, coupled with grantee efforts to avoid problems with federal program monitoring and audits. Whatever their basis, and regardless of whether regulatory burdens have been reduced in recent years, state and local education officials sometimes complain about these, and other, constraints on the use of federal funds.

**Cross-Cutting Requirements.** A 1998 Government Accountability Office (GAO) report,[7] based on a survey of staff in a nationally representative sample of LEAs, concluded that in addition to the program-specific varieties of requirements discussed above, LEA staff frequently expressed concern about certain cross-cutting requirements applicable to recipients of federal K-12 education assistance. First, LEA staff complained that it was difficult to obtain current, accurate, and concise information on the wide variety of federal requirements with which they must comply, and that existing sources of technical assistance on these matters were inadequate. The authors of the GAO report concluded that LEA staff often respond to such information gaps in a cautious manner that unnecessarily limits their flexibility — i.e., that they often are unaware of, or do not exercise, degrees of flexibility which are available to them. Second, staff in most of the surveyed LEAs expressed concern about the costs of meeting their administrative responsibilities under federal education programs, including the preparation of required reports. Finally, LEA staff indicated that meeting required timelines and other "logistical and management challenges" associated with federal K-12 education programs presented substantial difficulties.

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[7] Government Accountability Office, *Elementary and Secondary Education: Flexibility Initiatives Do Not Address Districts' Key Concerns About Federal Requirements*, GAO/HEHS-98-232.

# Special Flexibility Authorities Initiated Previous to Enactment of the No Child Left Behind Act of 2001

In recent years — particularly since 1994 — several authorities have been adopted that allow the waiver of many types of federal K-12 program requirements by, or on behalf of, SEAs and LEAs. Each of them is limited with respect to either the types of requirements that can be waived, the specific ESEA and other programs affected, or the number of states or LEAs that are currently eligible. Some require waivers to be requested on a case-by-case basis, while others offer "blanket" waiver authority. Further, some of these authorities require some form of additional accountability in terms of pupil outcomes, while others do not.

In addition to two general types of waiver authorities, Ed-Flex and Secretarial case-by-case waivers, a high degree of school-level flexibility in the use of funds under several federal programs is provided under the schoolwide program authority under ESEA Title I-A, an exceptional range of flexibility in the use of funds is provided under the Innovative Programs block grant, and an authority for flexibility in small, rural LEAs was initially adopted as part of FY2001 appropriations legislation for ED. These five types of special flexibility, which were initiated *before* adoption of the NCLBA of 2001, are described below. The succeeding section of this report discusses *new* forms of flexibility included in the NCLBA. Note that in cases where a previously initiated special flexibility authority was significantly amended by the NCLBA, the current (amended) version is described below.

## Ed-Flex

Under Ed-Flex, ED is authorized to delegate to eligible SEAs authority to waive a range of requirements under selected ESEA programs, on behalf of LEAs or schools in that state. Ed-Flex authority was initially authorized for up to six states in the 1994 Goals 2000: Educate America Act. It was expanded to a maximum of 12 states in FY1996 appropriations legislation for ED (P.L. 104-134). It was modified, and the cap on the number of participating states was removed, by the Education Flexibility Partnership Act of 1999 (P.L. 106-25). Finally, technical amendments were made to P.L. 106-25 by the NCLBA of 2001.

The original Ed-Flex authority was granted to 12 states, and 10 states — Colorado, Delaware, Kansas, Maryland, Massachusetts, North Carolina, Oregon, Pennsylvania, Texas, and Vermont — have been granted Ed-Flex status under P.L. 106-25.[8] No state has been granted Ed-Flex authority since January 2002, indicating

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[8] The Ed-Flex authority established under P.L. 106-25 did not automatically or immediately replace the original authority under the Goals 2000: Educate America Act. States that had obtained Ed-Flex authority under Goals 2000 retained that authority for the period for which it was granted (up to five years); they simply were required to obtain any extension of their Ed-Flex authority under the new statute, P.L. 106-25. Seven of the states with current Ed-Flex authority under P.L. 106-25 — Colorado, Kansas, Maryland, Massachusetts, Oregon, Texas, and Vermont — were also among the 12 Ed-Flex states under the previous authority. As for the remaining five states that had Ed-Flex authority under the original legislation

(continued...)

that interest in this program may have declined even before *the authority for ED to grant Ed-Flex authority to states expired at the end of FY2004*. Ed-Flex authority is granted to a state for up to five years; *the existing authority expires for each of the 10 states some time during the period of October 2005- January 2007*.

States participating in Ed-Flex must commit themselves to waiving state, as well as federal, requirements affecting LEAs and schools in the state. States must also meet the requirements for adoption of curriculum content and pupil performance standards, and assessments linked to these, under ESEA Title I-A.[9] States are to monitor the performance of LEAs and schools for which federal or state requirements are waived, and submit annual reports on these outcomes to ED.

The federal programs to which Ed-Flex applies are ESEA Titles:

- I-A (Education for the Disadvantaged),
- I-B-3 (William F. Goodling Even Start Family Literacy Programs),
- I-C (Education of Migratory Children),
- I-D (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At-Risk),
- I-F (Comprehensive School Reform Program),
- II-A (Teacher and Principal Training and Recruiting Fund),
- II-D-1 (State and Local Technology Grants),
- III-B-4 (Emergency Immigrant Education Act) *if* Title III-A is not in effect,[10]
- IV-A-1 (Safe and Drug-Free Schools and Communities), and
- V-A (Innovative Programs).

plus

- The Carl D. Perkins Vocational and Applied Technology Education Act (Perkins Act).

These include most of the ESEA programs that are administered via SEAs and that allocate funds by formula ("state-administered programs").[11] ED has also interpreted

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[8] (...continued)
(Illinois, Iowa, Michigan, New Mexico, and Ohio), that authority has expired and has not yet been replaced by new authority under the 1999 legislation.

[9] For a discussion of these requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne Riddle.

[10] Under provisions of the ESEA, as amended by the NCLBA, the Emergency Immigrant Education Act (Title III-B-4) may be funded only if Title III-A (English Language Acquisition and Enhancement) is *not* funded.

[11] State-administered formula grant programs authorized by the ESEA which are *not* subject to Ed-Flex authority include: Title I-B-1 (Reading First), Title I-B-4 (School Libraries), Title I-G (Advanced Placement Programs), Title I-H (School Dropout Prevention), Title III-A (English Language Acquisition and Enhancement), Title IV-B (21st Century Community (continued...)

the Ed-Flex statutes as providing authority for participating states to waive some cross-cutting administrative requirements of the General Education Provisions Act (GEPA) and the Education Department General Administrative Regulations (EDGAR) that apply to the above programs.

Several types of requirements may **not** be waived by Ed-Flex states, unless the underlying purposes of the statutory requirements are otherwise met to the satisfaction of the Secretary of Education. These include requirements related to:

- fiscal accountability (e.g., requirements for LEAs or SEAs to maintain their level of spending for specified educational services; to use federal aid only to supplement, and not supplant, state and local funds for specified purposes; or to provide state and local funding that is comparable in all schools of a LEA),
- equitable participation by private school pupils and teachers,
- parental involvement in program activities and services,
- allocation of funds to states or LEAs,
- certain ESEA Title I-A school selection requirements, and
- applicable civil rights requirements.

With the exception of statewide "blanket" waivers, LEAs or schools requesting waivers in Ed-Flex states must apply to their SEA, providing information analogous to that required for LEAs requesting waivers directly from ED (see the following section of this report). SEAs may not waive requirements applicable to the SEAs themselves. In all cases, SEAs must be satisfied that "the underlying purposes of the statutory requirements of each program or Act for which a waiver is granted continue to be met." Local waivers are to be terminated if student performance has been inadequate to justify their continuation, or performance has declined for 2 consecutive years (unless there are exceptional or uncontrollable circumstances).

States are required to submit annual reports on waivers they have granted; beginning with the second annual report, information on the effects of waivers on student performance must be included. Further, beginning two years after enactment of P.L. 106-25 (i.e., April 29, 2001), and annually thereafter, ED is to make these state reports available to Congress and the public, and to submit to Congress a report summarizing the state reports, including information on the effects of Ed-Flex waivers on state reform efforts and pupil performance. While such a report was prepared in 2001, it contained no information on the use of Ed-Flex authority by states or programmatic impacts, in part because it focused only on activities under the new authority in P.L. 106-25, overlooking ongoing activities in the 12 states that had received Ed-Flex authority earlier (even in cases where the same states were involved).[12] Apparently, no subsequent annual reports have been published by ED.

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[11] (...continued)
Learning Centers), and Title VI-B-2 (Rural and Low-Income School Program). Note that Title I-B-4 and Title I-H would become formula grant programs only if minimum threshold amounts were appropriated, which has not yet occurred.

[12] *2001 Report to Congress on the Implementation of the Education Flexibility Partnership* (continued...)

## Secretarial Case-by-Case Waiver Authorities

A second type of federal education program flexibility authority consists of waivers that may be granted to SEAs or LEAs on a case-by-case basis, directly by the U.S. Secretary of Education. While there are at least three such authorities affecting K-12 education programs, the following discussion will focus primarily on the most broadly applicable and frequently utilized of these, which is in Title IX, Part D of the ESEA, as amended by the NCLBA. Under this provision, the Secretary of Education is authorized to waive most requirements associated with any program authorized by the ESEA. The waivers must be specifically requested by SEAs, LEAs, Indian tribes or schools (via their LEAs). Waiver requests must include "specific, measurable educational goals, ... and the methods to be used to measure annually such progress for meeting such goals and outcomes" for pupils eligible to be served by the relevant programs.

With respect to types of requirements that *may not* be waived, the provisions regarding case-by-case waivers are generally the same as those for the Ed-Flex program. However, there are four types of requirements that may not be waived under the ESEA Title IX-D case-by-case waiver authority in addition to those that cannot be waived under Ed-Flex: (1) prohibitions against consideration of ESEA funds in state school finance programs; (2) prohibitions against use of funds for religious worship or instruction; (3) certain prohibitions against use of funds for sex education (under ESEA Title IX, Section 9526); and (4) the eligibility requirements for charter schools under the Public Charter Schools program (ESEA Title V-B-1). ESEA Title IX-D also has no authority analogous to the Ed-Flex provision that requirements generally not subject to waiver may be waived if the underlying purposes of the statutory requirements continue to be met to the satisfaction of the Secretary.

Waivers granted under the authority of ESEA Title IX-D may not exceed four years, except that they may be extended if the Secretary determines that the waiver has contributed to improved student achievement and is in the public interest. In contrast, waivers are to be terminated if the Secretary determines that pupil performance or other outcomes are inadequate to justify continuation of the waivers, or if the waiver is no longer necessary. The Secretary of Education is required to publish a notice of the decision to grant a waiver in the *Federal Register*. The most recent such notice was published on May 2, 2000; it indicated that as of December 31, 1999, ED had approved 471 requests for waivers under the Title IX-D authority, 104 of these during 1999. LEAs and SEAs that receive waivers must submit annual reports describing the effects of the waivers and evaluate their impact on pupil performance, beginning the second year the waiver is in effect. The Secretary is required to submit to Congress annual reports on the effects and effectiveness of waivers that have been granted, beginning in FY2002. It is not clear that such reports have been submitted.

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[12] (...continued)
*Act of 1999*, July 25, 2001.

**Charter Schools Waiver Authority.** A second case-by-case waiver authority affects only schools participating in the Public Charter Schools (PCS) program authorized by ESEA Title V, Part B. A distinctive aspect of the PCS waiver authority (ESEA Section 5204(e)) is that none of the limitations on types of requirements that may be waived, as listed above for Ed-Flex and the ESEA Title IX-D waiver authority, apply to the PCS waiver authority. Under the PCS authority, any requirement over which the Secretary of Education "exercises administrative authority" may be waived, with the sole exception of requirements associated with the definition of a charter school eligible to receive PCS funds (ESEA Section 5210(1)). However, this authority has been used infrequently and for relatively limited purposes, and therefore will not be discussed further in this report.[13]

## School-Level Flexibility: ESEA Title I-A Schoolwide Programs

Schools participating in the ESEA Title I-A program at which 40% or more of the pupils are from low-income families are eligible to conduct *schoolwide programs* with a broad and substantial degree of flexibility in the use of funds under almost all federal education programs. In a schoolwide program, federal aid provided under Title I-A plus many other federal K-12 education programs may be used to improve services to *all* pupils, rather than limiting services to particular pupils deemed to be the most disadvantaged. If they meet the intent and purposes of Title I-A and the other federal programs, and address the needs of the programs' intended beneficiaries, schoolwide programs are exempted from a variety of regulations under Title I-A and most other programs, with specified exceptions, such as regulations regarding health, safety, civil rights, parental participation, services to private school pupils and teachers, or fiscal accountability. Title I-A and other federal program funds must be used so that they supplement, and do not supplant, other federal and non-federal funds that the school would otherwise receive. Further, only commingling or flexibility in the use of funds is authorized with respect to the IDEA in schoolwide programs; all of the IDEA's programmatic requirements must still be met.[14]

While the schoolwide program authority applies to a wide variety of federal K-12 education programs, it is of significance primarily with respect to Title I-A. This is because almost all of the other programs affected typically are focused on LEAs overall, not individual schools. Further, to the extent that the non-Title I-A programs are focused on individual schools, they are not otherwise (i.e., in schools not eligible to conduct schoolwide programs) focused on groups of pupils with specific

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[13] According to John Fiegel of the U.S. Department of Education, as of August 1, 2002, eight waivers had been granted under this authority. Five of these waivers were to allow SEAs to use more than a statutory cap of 10% of their Public Charter Schools (PCS) program funds for dissemination grants; one waiver was to allow a state's Governor, rather than the SEA, to administer the PCS program (a practice which was later discontinued); and the final two approved requests were to waive certain Impact Aid (ESEA Title VIII) provisions with respect to individual charter schools serving Indian pupils.

[14] The latest published guidance from ED on schoolwide programs may be found in the *Federal Register* of July 2, 2004, pages 40360-40365.

educational needs (except for the IDEA, where the schoolwide program authority is specifically limited). Nevertheless, the ability to use Title I-A funds on a schoolwide basis, combining them with state and local funds without the need for separate accounting, is in itself quite a significant form of flexibility in comparison to the traditional "targeted Assistance" Title I-A program format, under which funds may be used only to serve the lowest achieving individual pupils in a school.

There are few additional requirements which schoolwide programs are required to meet in return for this increased flexibility. The number of schoolwides has grown rapidly in recent years, and a large majority of the pupils served by Title I-A are now in schoolwide programs; they constitute about one-half of Title I-A schools.[15] The eligibility threshold for schoolwide programs was reduced from 50% to 40% of pupils from low-income families by the NCLBA. Previous to this, many of the Ed-Flex and other waivers granted since 1994 had allowed schools below the 50% threshold to operate schoolwide programs.

The rationale for providing schoolwide program authority to relatively high poverty schools is that (a) in such schools, *all* pupils are disadvantaged, so most pupils are in need of special assistance, and it seems less equitable to select only the lowest-achieving individual pupils to receive Title I-A services, and (b) the level of Title I-A grants should be sufficient to meaningfully affect overall school services in high poverty schools, since these funds are allocated on the basis of the (relatively large) number of low-income pupils in these schools. The NCLBA has reduced the eligibility threshold to a level that is approximately the national average percentage of pupils from low-income families, which may raise questions regarding the validity of both aspects of this rationale for schools which just meet the new threshold.[16] In addition, there is little direct evidence of the achievement effects of this expansion of schoolwide programs.

## Flexibility for Small, Rural LEAs

A new form of flexibility under which small, rural LEAs may transfer funds among selected ESEA programs was initially authorized under P.L. 106-554, the

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[15] According to the latest available data (published in *State ESEA Title I Participation Information for 2000-2001*), 50% of Title I-A schools were operating schoolwide programs in 2000-2001, and these schools served 81% of all pupils served under Title I-A for that year.

[16] At the level of individual schools, the most commonly used criterion for determining whether pupils are from low-income families is eligibility for free and/or reduced-price school lunches (not the more narrow census poverty income standard). The national average percentage of K-12 pupils meeting this criterion (in public schools participating in the federal school lunch programs) is approximately 39% — 1 percentage point less than the 40% schoolwide program threshold. Further, in a school just meeting the 40% threshold, 100% of the pupils may be served under Title I-A, although the school would receive funds based on only 40% of its enrollment. In addition, the free/reduced price school lunch data may overestimate the percentage of pupils from low-income families, as there is evidence that more children and youth are counted than may be eligible based on family income (see "Officials Seek to Refine Lunch Program Tallies," *Education Week*, Mar. 27, 2002).

Consolidated Appropriations Act of 2001. It was extended in essentially similar form by the NCLBA, as follows.

The Rural Education Achievement Program (REAP), under ESEA Title VI-B, includes both a pair of grant programs for rural and/or small and relatively high poverty LEAs, plus a special flexibility authority for certain rural LEAs. Only the latter is relevant to this report and is described below.

LEAs with total average daily attendance below 600 pupils, *or* which are located in a county with a population density of fewer than 10 persons per square mile, *and* in which all schools are classified as being in rural locations,[17] may combine or transfer any funds received under ESEA Titles II-A (Teacher and Principal Training and Recruiting Fund), II-D (Enhancing Education Through Technology), IV-A (Safe and Drug-Free Schools and Communities), and V-A (Innovative Programs). These funds may be used for any activity authorized under any of these programs or under ESEA Titles I-A (Education for the Disadvantaged), III (English Language Acquisition and Enhancement), and IV-B (21st Century Community Learning Centers).

The primary rationale for this authority is that the smallest LEAs need special flexibility due to the small size of grants which they receive under a number of separate programs. These amounts, typically based in large part on LEA enrollment, are often too small to support separate programs of sufficient size and scope to be effective. Allowing such LEAs to combine and/or transfer funds among a limited range of program activities may facilitate more effective use of those funds.

The degree of special flexibility provided to eligible small, rural LEAs under this "Alternative Uses of Funds Authority" is similar to that now provided to *all LEAs* under a different transferability authority in the NCLBA, which is described below. The major differences are that the small, rural LEA authority applies to 100% of the funds under the affected programs, while the broader authority applies to only 50% (or in some cases less) of such funds; and the small, rural LEA authority includes additional programs into which funds may be transferred (ESEA Titles III and IV-B). In addition, perhaps the greatest advantage of the small, rural schools flexibility authority is that LEAs eligible for it are also eligible for supplementary grants that may be used for any of the purposes for which combined or transferred funds may be used under the flexibility authority.

## The Federal K-12 Education Block Grant: ESEA Title V-A

Finally, one individual ED program is worthy of mention in the context of special forms of flexibility for states and LEAs in the use of federal aid funds: ESEA Title V-A, Innovative Programs. While the identification of aid programs as

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[17] Under the statute, these would be schools with a locale code of 7 or 8, as determined by ED on the basis of a Census Bureau classification system. In addition, this specific criterion may be waived if the LEA can demonstrate, with concurrence of its SEA, that it is located in a rural area, as defined by an agency of that state.

"categorical" versus "block grants" is always somewhat judgmental, there seems to be widespread agreement that ESEA Title V-A is the one major K-12 education program currently administered by ED that may be considered to be a block grant. In the field of education, block grants are aid programs covering an exceptionally wide range of educational activities and types of students, and providing a great deal of flexibility to states and LEAs in using the funds. They are often constructed through consolidation of a number of preceding categorical programs that are more limited in the purposes or activities they support; in the case of Title V-A, the initial consolidation took place in 1981.

After reservation of 1% of appropriations for grants to the Outlying Areas, ESEA Title V-A funds are allocated to the 50 states, the District of Columbia and Puerto Rico in proportion to their total population aged 5-17 years, except that no state is to receive less than 0.5% of total grants to states. A majority of Title V-A funds must be allocated by SEAs to LEAs on the basis of state-developed formulas. These formulas must meet general criteria of taking into consideration each LEA's enrollment of pupils in public and private (non-profit) schools, and incorporating adjustments to provide increased grants per pupil to LEAs with the greatest numbers or percentages of "high cost" pupils, including those from economically disadvantaged families and those living in sparsely populated areas or areas of concentrated poverty.

The specific minimum percentage of funds which must be suballocated to LEAs varies depending on the program's aggregate funding level and whether the state receives the minimum grant amount (0.5% of total grants to states). All states must suballocate to LEAs an amount equal to at least 85% of the grant which they received under this program for FY2002. In addition, most states are to suballocate to LEAs 100% of their Title V-A grants in excess of the FY2002 level; however, for states receiving the minimum grant amount, the minimum share of Title V-A grants above the FY2002 level which must be suballocated to LEAs is only 50%.

Of the funds that may be retained by states, no more than 15% may be used for administrative costs; the remainder is to be used for one or more of seven specified types of programs and services. The latter include the design and implementation of pupil assessments; implementation of achievement standards; planning and implementation of charter schools; independent analysis and reporting on LEA achievement; (apparently) the implementation of policies to offer public school choice options to pupils attending unsafe schools;[18] school repair and renovation; and a broad category of "statewide education reform, school improvement programs and technical assistance and direct grants to" LEAs (Section 5121(3)).

LEAs may use their Title V-A funds for any of 27 different types of "innovative assistance programs" listed in Section 5131. While several of these are relatively specific — for example, planning and implementation of charter schools, "programs to provide same gender schools and classrooms (consistent with applicable law)," or programs to hire and support school nurses — others are broad, such as "promising

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[18] The language of ESEA Title V-A on this point contains an incorrect reference to a non-existent Section 9507. It appears that the intended reference was to Section 9532.

education reform projects," "activities that encourage and expand improvements throughout the area served by the local educational agency," or "programs to improve the academic achievement of educationally disadvantaged elementary and secondary school students." It is essentially because of the existence of these broad, "catchall" categories of authorized use of funds by LEAs and states that Title V-A is generally considered to be a block grant. In addition, the statute includes a prohibition against SEAs exercising influence over LEA decisions on how Title V-A funds will be used.[19]

**State and Local Experience with the ESEA Title V-A Block Grant.** The program now authorized by ESEA Title V-A was first enacted in 1981 (P.L. 97-35) as Chapter 2 of the Education Consolidation and Improvement Act (ECIA), which consolidated more than 40 previous federal K-12 education programs. Chapter 2 was the legislative response to a Reagan Administration proposal for a much broader block grant into which almost all federal K-12 education programs would have been consolidated. The block grant initially reduced the number of federal education programs. However, many new categorical programs were authorized in the years immediately following adoption of the consolidated program, including some that were essentially direct successors to programs initially consolidated into the block grant (e.g., aid for magnet schools).

The most recent study by ED of the program (*Study of Educational Resources and Federal Funding: Final Report*, August 2000), based on a survey of a representative sample of LEAs, found that 58% of recipient LEAs used "a great deal" of their Title V-A funds for instructional materials, while 39% of LEAs used substantial funds for educational technology, and 34% of LEAs for supplemental targeted academic services. Large LEAs were found to be especially likely to use Title V-A funds for teacher professional development services and school-based improvement efforts. Resources or services funded by this program were found to be infrequently targeted at particularly high-need pupils or schools. It was also reported that the primary factors influencing decisions on the use of Title V-A funds were long-term LEA plans and the priorities of individual schools.

Appropriations have declined significantly over the life of Title V-A, from $442 million in FY1982, the first year of funding, to $198.4 million for FY2005. For FY2006, the Administration has requested an appropriation of $100 million for this program. The House-passed version of H.R. 3010, FY2006 appropriations legislation for ED, would provide $198.4 million, while the version reported by the Senate Committee on Appropriations would provide $100 million. One reason for this trend is that there have been few constituencies promoting increased funding for the program. While it is apparently popular with a broad range of state and local public education officials, as well as many private school administrators, its support seems to be diffuse.

Limited information on the *effects* of Title V-A services may have reduced incentives to maintain the program's funding level. Title V-A has tended to receive

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[19] This prohibition does not apply to states participating in a new State-Flex authority, which is described later in this report.

less favorable treatment in funding decisions than programs that could demonstrate targeting of funds, or a linkage to improved educational outcomes, particularly for high need pupil groups. In part to address this concern, ESEA Title V-A was amended by the NCLBA to require participating states to prepare, and submit to ED, annual summaries of "how assistance under this part is contributing toward improving student academic achievement or improving the quality of education for students" (Section 5122(a)(2)). As discussed in later sections of this report, authorities under the NCLBA would allow SEAs and LEAs to transfer a portion of the funds they receive under selected other federal programs into Title V-A, if they choose to do so.

### Other Pre-NCLBA Flexibility Authorities

Finally, a number of additional provisions initially adopted in the years preceding enactment of the NCLBA are sometimes cited as providing increased flexibility to states and LEAs. These are not discussed in detail here because their potential impact is substantially more marginal than those of the flexibility authorities described above, and/or their impact is primarily in the area of administrative convenience for SEAs or LEAs. These additional forms of flexibility include authority for consolidated SEA or LEA applications, plans, or reports for a number of ESEA and related programs; and authority to consolidate certain funds used for SEA or LEA administration of federal programs. These authorities are provided currently in Parts B and C of ESEA Title IX.

## New Flexibility Authorities Adopted in the No Child Left Behind Act of 2001

The No Child Left Behind Act of 2001 (NCLBA), signed into law on January 8, 2002 (P.L. 107-110), contains a number of new flexibility authorities for ESEA programs, which are described below. The NCLBA also expanded and/or extended certain forms of flexibility which had been initiated earlier, such as lowering the eligibility threshold of ESEA Title I-A schoolwide programs; these NCLBA amendments were discussed above.

### Transferability Authority

Title VI, Part A, Subpart 2 of the ESEA, as amended by the NCLBA, allows most *LEAs* to transfer up to 50% of their formula grants among four ESEA programs — Teacher and Principal Training and Recruiting Fund (Title II-A), State and Local Technology Grants (Title II-D-1), Safe and Drug Free Schools and Communities (Title IV-A-1), and the Innovative Programs Block Grant (Title V-A). The affected shares of funds may also be transferred *into*, but *not from*, ESEA Title I-A. LEAs which have been identified as failing to meet state adequate yearly progress (AYP) requirements will be able to transfer only 30% of their grants under these programs, and only to activities intended to address the failure to meet AYP standards. Further,

according to guidance from ED, LEAs subject to corrective actions under Title I-A may not exercise this authority at all.[20]

*States* may transfer up to 50% of the relatively limited amount of program funds *over which they have authority*, except for administrative funds, among the first four of these programs plus the 21st Century Community Learning Centers program. Thus, states could *not* transfer either any of the funds they are required to suballocate to LEAs or funds reserved for state administration, so the significance of this transferability authority for states is limited.

The overall scale of the programs subject to this authority is moderately significant — the FY2005 appropriations for the four programs subject to LEA transferability authority total approximately $4.05 billion. The transferability authority is relatively simple and straightforward; it is available to most LEAs without the need for specific application or approval (although state or LEA plans must be modified to reflect the transfers, and LEAs must inform their SEA). Further, the range of purposes for which transferred funds might be used is especially wide, given that one of the programs into which funds could be shifted is the Innovative Programs block grant. Nevertheless, all program requirements would continue to apply to the transferred funds, including any requirements regarding shares of program funds which must or may be used for specified purposes; funds cannot be transferred across fiscal years; and all of the affected programs would continue to exist in places where the authority is exercised, since no state or LEA could transfer more than 50% of its funds out of any program. According to ED, approximately 12.5% of all LEAs utilized this transferability authority in 2002-2003.[21]

## State and Local Flexibility Demonstration Program

**State-Flex.** Under a new State and Local Flexibility Demonstration Act (ESEA Title VI, Part A, Subpart 3), up to seven states, selected on a competitive basis after peer review, may be authorized to consolidate all of their *state administration and state activity funds* under the Education for the Disadvantaged (Title I-A), Reading First (Title I-B-1), Even Start (Title I-B-3), Teacher and Principal Training and Recruiting Fund (Title II-A), State and Local Technology Grants (Title II-D-1), Safe and Drug Free Schools and Communities (Title IV-A-1), 21st Century Community Learning Centers (Title IV-B), and Innovative Programs block grant (Title V-A) programs. Under this "State-Flex" authority, the

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[20] For a discussion of ESEA Title I-A adequate yearly progress and corrective action requirements, see CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*, and CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, both by Wayne Riddle. The ED guidance specifying that LEAs identified for corrective action may not transfer any funds is contained in the document, *Guidance on the Transferability Authority*, June 8, 2004, found at [http://www.ed.gov/programs/transferability/legislation.html].

[21] "Appendix A: Performance Data Tables" from ED's "FY2004 Performance and Accountability Report" [http://www.ed.gov/about/reports/annual/2004report/appa.pdf], p. 195.

consolidated funds can be used for any purpose authorized under any ESEA program (i.e., not just the activities authorized by the programs whose funds may be consolidated). The schedule for competition for this authority is discussed below, following a discussion of the related Local-Flex authority.

This authority will be granted to states for a period of five years; states will lose the authority if they fail to meet state AYP requirements for two consecutive years. ED may also terminate the authority at any time if a state fails to comply with the terms of the flexibility authority. On the other hand, if all of the requirements associated with this authority have been met at the end of five years, the authority is to be renewed.

Each of the selected states is to enter into local performance agreements with between 4 and 10 LEAs; at least one-half of these LEAs must have school-age child poverty rates of 20% or more (slightly above the national average of approximately 18%). These LEAs may consolidate funds under the provisions of the local flexibility authority described below. These LEAs would be required to align the use of the funds they consolidate under this authority with the state's uses of the funds which it consolidates. In addition, participating states may specify the purposes for which *all* LEAs in the state use the funds they receive under the ESEA Title V-A Innovative Programs block grant. This is in contrast to the general rule, noted above, that LEAs may use Title V-A funds for whatever purpose they choose (among the wide range of purposes authorized in Title V-A).

Thus far, State-Flex authority has been granted to only one state, Florida. However, Florida withdrew from State-Flex participation in 2004, and *at this point, no states are participating in this program*.

**Local-Flex.** Under a companion "Local-Flex" authority, up to 80 LEAs[22] (no more than three per state initially), *plus* the 4-10 LEAs per state that enter into agreements under the state flexibility demonstration above, will be allowed to consolidate all of their funds under the Teacher and Principal Training and Recruiting Fund (Title II-A), State and Local Technology Grants (Title II-D-1), Safe and Drug Free Schools and Communities (Title IV-A-1), and Innovative Programs block grant (Title V-A) programs, and to use these funds for any purpose authorized under any ESEA program. LEAs may use no more than 4% of the consolidated funds for administration. The authority will be granted for a period of five years; LEAs will lose the authority if they fail to meet state AYP requirements for two consecutive years, or if they fail to comply with the requirements of the flexibility agreement. If LEAs meet the goals established in their agreements, their authority would be renewed for another two-year term.

Under both the state and local flexibility demonstration programs, a limited number of specified types of requirements — including those regarding civil rights, fiscal accountability (particularly the requirement that funds be used only to

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[22] Note: Section 6133 provides that single-LEA states (and entities treated as if they were states under the ESEA) — which would include the District of Columbia, Hawaii and Puerto Rico — are only eligible for the state flexibility authority, not the separate LEA authority.

supplement, and not supplant, non-federal funds), and equitable participation by private school pupils and teachers — may not be waived. Participating states and LEAs must also prepare and widely disseminate annual reports on how consolidated funds are used under this authority. However, program requirements other than those specified would not apply to the consolidated funds.

*At this point, only one LEA — Seattle, Washington — is participating in the Local-Flex program.*

**Competition for State-Flex and Local-Flex Authority.** Beginning in Spring 2002, ED conducted a multifaceted, sometimes complex, series of competitions for State-Flex and Local-Flex authority. However, there has ultimately been little effective interest by states and LEAs in obtaining these authorities. As noted above, currently only one LEA participates in Local-Flex, and no states in State-Flex. One state, and eight associated LEAs, initially received approval to participate in these programs, but they subsequently withdrew.

A fourth round of competition for these authorities began on March 18, 2004, when ED published in the *Federal Register* an announcement of a new, simultaneous round of competition for *both* State-Flex and Local-Flex. There is no deadline for this competition. The announcement indicates that, as an extra inducement to apply, states and LEAs participating in State-Flex or Local-Flex would receive preference in future competitions for grants under relevant discretionary grant programs administered by the Department. The rationale offered for this preference is that "...State-Flex and Local-Flex participants have undergone comprehensive planning to improve teacher quality and the academic achievement of all students, especially disadvantaged students, and are held to a higher degree of accountability...."[23]

**Comparison With Other Flexibility Authorities in the No Child Left Behind Act.** In comparison to the transferability authority described earlier, these state and local flexibility demonstration authorities are relatively broad, since *all* of the funds under the affected programs may be involved, the funds may be used for any purpose authorized under *any* ESEA program (including the exceptionally wide range of activities authorized under Title V-A), and only a comparatively small number of specified program requirements apply to the use of these funds. At the same time, the scope is more narrow in the sense that only a maximum of seven states (and 4-10 LEAs in each of these), plus up to 80 LEAs in other states, may participate. Given the tremendous variation in the size of states and LEAs, even this limited number of states and LEAs[24] could involve a substantial proportion of the nation's pupils depending on which particular states and LEAs successfully compete for this opportunity. Nevertheless, as indicated above, interest in these provisions on the part of SEAs and LEAs has thus far been very limited, in spite of multiple invitations to compete for them over an extended period of time.

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[23] *Federal Register*, Mar. 18, 2004, p. 12481.

[24] The maximum number of participating LEAs — 150 — would constitute only 1% of the approximately 15,000 regular LEAs in the nation. However, if most of the LEAs participating in Local-Flex were relatively large, they could constitute a substantial share of total enrolled pupils in the nation.

The scope of the State-Flex authority in particular is limited in at least two respects. First, although state administration funds may be used for other purposes under this authority, states are still responsible for meeting their administrative responsibilities under each program. Second, for many of these programs, the overall share of funds which may be used for state administration plus state-level activities is relatively small, and it is smallest for the largest affected program. This relevant share of state total grants varies from 1% for ESEA Title I-A, by far the largest program involved, to a high of 26.5% under the Safe and Drug-Free Schools and Communities program. However, participating states would also be given substantial influence over the use of funds consolidated by the 4-10 LEAs with local performance agreements, and over the use of Innovative Programs block grant funds in *all* of the states' LEAs.

In some respects, participating LEAs in the state demonstration program might have diminished flexibility, because their use of consolidated funds must be aligned with the state use of funds which they may consolidate, and because of the authority given to participating states to specify LEA use of Title V-A funds. Finally, the inclusion of the ESEA Title V-A Innovative Programs block grant in the Local-Flex authority (i.e., in states which do not participate in State-Flex) is of limited significance in the sense that those funds may already be used for an exceptionally wide range of activities.

**Comparison With State and Local Flexibility Authorities in Earlier Senate- and House-Passed Versions of H.R. 1.** It is instructive to compare the State-Flex and Local-Flex authority with flexibility authorities that were contained in the earlier House- and Senate-passed versions of H.R. 1, the legislation which was enacted as the NCLBA. The final provisions are in most respects *similar* to language in the *House* version of H.R. 1 authorizing local flexibility demonstrations in up to 100 LEAs, but may be contrasted with a broader state and local *flexibility/performance agreement authority* which was contained in the *Senate* version of H.R. 1. Even though the Senate program was not included in the final legislation, it is worthy of mention because of the amount of debate it stimulated during Senate and conference committee consideration of this legislation.[25]

Overall, the flexibility/performance agreement provisions of the Senate-passed version of H.R. 1 would have provided significantly greater flexibility than the enacted State-Flex and Local-Flex authorities, in return for at least marginally increased outcome accountability. At the same time, all of these authorities are substantially more limited than optional performance agreement/grant consolidation proposals considered, but not enacted, during the 106th Congress.[26]

The scope of the H.R. 1/Senate flexibility/performance agreement authority was the same in terms of the maximum number of participating states (7), and more

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[25] For a discussion of the flexibility authorities in the Senate- and House-passed versions of H.R. 1, see CRS Report RL30835, *Elementary and Secondary Education: Accountability and Flexibility in Federal Aid Proposals*, by Wayne Riddle.

[26] See CRS Report RL30393, *"Academic Achievement for All Act (Straight A's Act)" — Background and Analysis*, by Wayne Riddle.

narrow in number of LEAs in other states (25), which could participate. The types of program requirements (e.g., civil rights, fiscal accountability) which continued to apply to the use of consolidated funds was similar. However, the range of ESEA programs subject to the flexibility authority was much more broad and involved substantially higher levels of funding, incorporating most state-administered formula grant programs authorized by the ESEA, including such programs as Title I-A grants for Education of the Disadvantaged,[27] and Bilingual/Immigrant Education. As with State-Flex and Local-Flex, funds could be used for activities authorized under any of the combined programs, including the exceptionally wide range of authorized activities under the Innovative Programs block grant. Under the performance agreement authority, participating states could in general have reallocated funds under all of the affected programs among and within LEAs as long as the resulting allocations targeted funds on concentrations of poor children at least as well as the statutory formulas; State-Flex provides no similar authority to reallocate funds among LEAs.

The additional element of outcome accountability required of participating states and LEAs under the Senate version of H.R. 1 is that they would have been required to *exceed* AYP goals by a *statistically significant amount*. This would mean that achievement gains in excess of those required under state AYP standards must be sufficiently large that they are unlikely to have resulted from random variations in pupil achievement scores. While statistically significant, such an amount would not necessarily be large, especially in a state or LEA with a large pupil population.

## Major Cross-Cutting Issues Regarding Special Forms of Flexibility in Federal K-12 Education Programs

This report concludes with an analysis of selected cross-cutting issues that have arisen with respect to the special forms of flexibility described above. We introduce this topic with a brief review of the common themes of both the new forms of flexibility included in the NCLBA, and the special flexibility authorities enacted previously. In general, these flexibility authorities exhibit the following characteristics:

- They increase the ability of states and/or LEAs to use federal aid funds more thoroughly in accordance with their own priorities — which may or may not be consistent with federal priorities — than would otherwise be possible.
- Each of the special flexibility authorities is significantly limited in terms of the number of states and LEAs that may participate, the

[27] Most requirements regarding uses of funds in Title I-A schoolwide and targeted assistance programs would have continued to apply (with the schoolwide eligibility percentage reduced to 35%), as would the Title I-A requirements regarding standards, assessments, accountability, and parental involvement.

number and size of the ESEA and related programs affected, and/or the range of program requirements that may be waived.

- With the major exceptions of the transferability authority, the Innovative Programs block grant, and Title I-A schoolwide programs, states and/or LEAs are allowed to waive a variety of federal program requirements in return for some degree of accountability based on pupil achievement outcomes. However, the outcome accountability requirements are essentially just increased attention to, and/or consequences related to, outcome accountability requirements which are applicable to *all* states and LEAs participating in Title I-A and other ESEA programs.
- These special flexibility authorities, particularly those enacted as part of the NCLBA, have been adopted in a policy context of substantially increased accountability requirements and authorized degrees of flexibility in general for the ESEA and related federal programs.
- At least one of the flexibility authorities newly adopted under the NCLBA has been utilized relatively widely (transferability), while interest in others has been very limited (State-Flex, Local-Flex).
- The flexibility authorities often include a variety of requirements for regular reporting on ways in which the authorities have been used, and the impact of increased flexibility on pupil achievement. However, relatively little information has been compiled or published on the uses of these flexibility authorities, and there is very limited information regarding the specific impact of special forms of flexibility on pupil achievement.

Selected cross-cutting issues associated with these and other common characteristics of special flexibility authorities are discussed below.

## How Significant Are the Degrees of Flexibility Allowed under These Authorities?

The current flexibility authorities are restricted in many important respects, and it may be questioned whether they address the primary concerns of states and LEAs about restrictions on the use of federal funds or administrative burdens accompanying participation in federal programs. While broad in terms of the potential uses of funds and federal programs covered, the ESEA Title I-A schoolwide program authority is limited to the school level, and only schools with low-income pupil rates somewhat above average may generally qualify. Further, as noted earlier, the significance of this authority with respect to programs other than Title I-A is quite limited. The Secretarial case-by-case waiver authorities are limited by the necessity of submitting individual requests to the U.S. Secretary of Education. In most cases, LEAs must similarly apply to their SEAs for waivers under the Ed-Flex authority. While almost all states and most LEAs may exercise the fund transferability authority, none may transfer more than 50% of the funds received under any program, and therefore all of the requirements associated with participating in any of the affected programs must still be met. The rural LEA flexibility authority is available to only a select group of exceptionally low-enrollment LEAs.

In addition, the amount of funds subject to State-Flex authority is limited, and only seven states may participate. Local-Flex authority affects only a limited range of programs and is available in a maximum of only 80 LEAs plus 28-70 LEAs in State-Flex states. The limited increase in flexibility provided by these authorities is a probable reason for the very low rate of participation in these authorities thus far.

Importantly, there are several types of requirements that cannot be waived under any of these authorities, including those involving fiscal accountability, participation by private school pupils and staff, or the increasingly important ESEA Title I-A requirements regarding standards, assessments, and school/LEA accountability for pupil achievement. It is noteworthy that many of the flexibility authorities do not include the largest ESEA program, Title I-A, and none of them would allow states to reallocate funds among LEAs.

Further, the authors of a 1999 Government Accountability Office (GAO) report (*Elementary and Secondary Education: Ed-Flex States Vary in Implementation of Waiver Process*. HEHS-99-17) found that the flexibility authorities enacted as of that time do not address the main regulatory burdens of states and LEAs, which are associated with the IDEA, the Americans with Disabilities Act, child nutrition program administration, and environmental requirements (e.g., underground storage tanks and asbestos removal). According to this GAO report, SEA staff in some states think Ed-Flex is of limited value because of the relatively few programs and requirements that may be waived. In contrast, SEA staff in other states think its usefulness extends beyond specific use of the authority, through creating a "climate that encourages innovation and flexibility." These remarks would apply also to the new authorities enacted in 2001 and 2002.

Finally, it is significant that these authorities have been adopted during a period when "regular" federal program requirements have become more flexible in several important respects. For programs such as ESEA Title I-A, the increased emphasis on outcome accountability beginning in 1994 and continuing under the NCLBA has been accompanied by generally increased flexibility for all LEAs and schools in determining how funds may be used, especially in the schoolwide programs which have become the dominant service mode for this program. The NCLBA consolidated major groups of programs related to teachers and educational technology, giving states and LEAs substantially greater flexibility in deciding how to use these funds. In this context, the *additional* flexibility provided by the special authorities described above seems relatively marginal in many respects.

## For What Purposes Have Special Flexibility Authorities Been Used in the Past, and Is There Evidence That These Have Resulted in Increased Pupil Performance or Had Other Major Impacts?

Proponents of increased flexibility in federal education programs often argue that waivers can remove federal regulatory barriers to local educational reform and initiative. Very limited information is available on the use of the new forms of flexibility authorized under the NCLBA, partly because of low participation in some of them. Available information on waivers granted under pre-NCLBA authorities

indicates that they were used for relatively few purposes, at least some of which were not clearly related to innovation or reform. In addition, several of the requirements which were frequently waived in the past were subsequently eliminated or made less restrictive for all states and LEAs by the NCLBA.

Secretarial waivers, Ed-Flex and other pre-NCLBA flexibility authorities during the mid- to late-1990s were most often used to waive the following requirements: (1) the minimum low-income pupil percentage threshold for ESEA Title I-A schoolwide program eligibility (before this was reduced under the NCLBA); (2) within-LEA targeting of Title I-A funds on schools with the highest number or percentage of pupils from low-income families; (3) deadlines for adoption and implementation of standards and assessments under ESEA Title I-A; and (4) a series of limitations on the use of funds under two pre-NCLBA programs related to teacher recruitment and training — the Class Size Reduction (CSR) and Eisenhower Professional Development Programs.[28] Each of these categories is briefly discussed below.

While schoolwide programs offer a great deal of flexibility to use funds under not only Title I-A but also most other federal programs in ways that might not ordinarily be allowed, it has been questioned whether schools with relatively low percentages of their pupils from low-income families should be granted this authority. If schools with relatively low poverty rates receive permission to operate schoolwide programs, the scope of these programs might be limited (since the size of a school's Title I-A grant is based on its number of children from low-income families), and it would be difficult for such a modest program to have a significant schoolwide impact. Further, no systematic evidence is available that schoolwide programs are more effective than more traditional "targeted assistance" Title I-A programs in improving the education of disadvantaged pupils.

The use of waivers to maintain or expand the number of schools participating in Title I-A would tend to disperse Title I-A funds among an increased number of relatively low-poverty schools, reducing the concentration of funds on high-poverty schools. As noted above, Ed-Flex places restrictions on, but does not prohibit, waivers regarding ESEA Title I-A school selection.

The use of waivers to delay meeting deadlines for implementing ESEA Title I-A standard and assessment requirements arguably undercut the most substantial pre-NCLBA outcome accountability requirement. This increasingly important aspect of federal requirements is discussed further below.

With respect to the former CSR and Eisenhower programs, LEAs and states frequently requested the waiver of requirements intended to: focus teacher hiring on the early elementary grades; require small LEAs to form consortia if their CSR grants were too small to pay the salary of a new teacher; ensure that minimum shares of teacher training funds would be used to support instruction in the subject areas of mathematics and science; or to limit the share of CSR funds used for professional development (as opposed to hiring new teachers). Such waivers appear generally to

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[28] See, for example, the Notice of Waivers Granted, *Federal Register*, May 2, 2000.

have been requested to accommodate relatively strict and specific limitations on the use of funds to varying local conditions.

Following enactment of the NCLBA, some of these formerly common uses of Ed-Flex and other pre-NCLBA flexibility authorities are no longer as relevant as in the past. As noted earlier, the NCLBA lowered the schoolwide program eligibility threshold to 40% of pupils from low-income families nationwide (although some may still seek Ed-Flex or Secretarial waivers for schools below 40% to conduct schoolwide programs). The CSR and Eisenhower programs were consolidated into a broader and more flexible ESEA Title II program supporting teacher and principal recruitment and training.

Nevertheless, until substantial post-NCLBA data become available, these earlier reports provide the only available information on how states and LEAs have attempted to use similar authorities in the past. While it is difficult to project future activities based on this past experience, it would seem likely that states and LEAs may attempt to use these authorities, to the extent allowed under the numerous constraints, to increase their ability to use Title I-A funds on a schoolwide basis and in a maximum number of schools, and to avoid explicit constraints on the use of funds under other programs whenever possible. It might also be projected, based on past experience, that states and LEAs would be interested in obtaining waivers to postpone implementing the numerous ESEA Title I-A requirements regarding standards, assessments, and accountability which have been expanded under the NCLBA, although the extent to which they might be able to obtain such waivers seems likely to be very limited.[29]

**Impact of Past Waivers.** Regarding the impact of waivers on pupil achievement or other outcomes, only limited information has been made available with respect to waivers granted under the pre-NCLBA authorities. While states that received Ed-Flex authority have been required to submit annual reports to ED on waivers granted and their impact, the information reported by the original 12 Ed-Flex states (under the pre-P.L. 106-25 authority) was of limited value, and no reports have yet been published on the actual purposes of waivers or their effects in states under the Ed-Flex authority enacted in 1999.[30] Anecdotal information on the achievement

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[29] The NCLBA established a deadline (April 8, 2002), after which states could no longer apply for waivers of the Title I-A standard and assessment requirements *adopted in 1994*. This prohibition does not apply to new requirements in this area adopted under the NCLBA. Nevertheless, a "policy letter" dated February 15, 2002, from U.S. Secretary of Education Roderick Paige to the Chief State School Officers [http://www.ed.gov/policy/elsec/guid/secletter/020215.html], includes the statement "Consistent with the spirit of these provisions and with the principle that requirements should not be waived if doing so would undermine the intent and purpose of the law, we do not intend to waive fundamental requirements on standards, assessments, adequate yearly progress, and accountability in the new law" (i.e., the NCLBA). For a discussion of Title I-A standard and assessment requirements first adopted in 1994 versus those initiated under the NCLBA, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne C. Riddle.

[30] See *2001 Report to Congress on the Implementation of the Education Flexibility* (continued...)

effects of a number of Ed-Flex and Secretarial waivers in a limited number of LEAs was included in a 1999 ED report (*Waivers: Flexibility to Achieve High Standards*). The information in this report was primarily limited to whether affected LEAs or schools met state AYP standards in effect at the time.

At the same time, supporters of special flexibility authorities often point to broader forms of evidence of their impact on state and local public education systems. These arguments are reflected in a 1998 ED report on Ed-Flex,[31] the authors of which concluded that Ed-Flex authority has supported standards-based reform in the affected states in three major ways:

- Ed-Flex "facilitates the coordination of programs and strengthens the planning process," by encouraging LEAs and schools to develop instructional programs without regard to the perceived constraints of many standard federal or state program requirements.
- Ed-Flex "provides the opportunity for States to streamline the administration of programs" by reducing paperwork deemed unessential to meeting basic purposes of federal programs.
- Ed-Flex "supports the use of resources in a way that can, together with the implementation of standards-based approaches, lead to increased student achievement and reduction in the gap in achievement between different populations" by shifting oversight focus away from inputs or procedures and toward outcomes.

**Availability and Dissemination of Information on Use and Impact of Special Flexibility Authorities.** Given the limited amount of data showing improved pupil achievement outcomes in states, LEAs, or schools to which special forms of flexibility have been granted, the conclusions by ED (immediately above) should presumably be considered to be debatable. This is related to a final aspect of this set of issues: *Will sufficient information be available on the use of special flexibility authorities, and their effects on pupil achievement, to make it possible to analyze or judge their benefits and impact?*

As mentioned earlier, while the statutes authorizing several forms of flexibility include significant requirements for reporting to and by ED on the use of waivers and other special authorities, and the pupil achievement and other effects of these activities, little relevant information has been disseminated by ED. Efforts by ED to compile and publish information on the use of waiver or other special flexibility authorities seem to have been a priority only infrequently and not recently, primarily limited to the period just preceding congressional consideration of the Ed-Flex legislation in 1999 (P.L. 106-25). This makes it very difficult to evaluate the significance, advantages, and disadvantages of these flexibility authorities.

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[30] (...continued)
*Partnership Act of 1999*, July 25, 2001.

[31] *Goals 2000: Reforming Education to Improve Student Achievement*, Appendix B, Apr. 30, 1998.

## Are the Outcome Accountability Requirements Consistent with the Increased Flexibility Provided under These Authorities?

A basic question regarding all special forms of flexibility is whether the increased emphasis on outcomes that is typically associated with them — whether or not such additional outcome requirements are substantial — is an adequate substitute for other forms of accountability requirements, such as required targeting of services on priority activities or high need pupil groups, which may be diminished through the grant of flexibility.

In general, the outcome accountability requirements associated with either obtaining or maintaining the special flexibility authorities in this report are a combination of: (a) goals established by the states and LEAs themselves, either in the implementation of programs such as Ed-Flex or in competing for (and ultimately implementing) State-Flex or Local-Flex authority; and (b) meeting the state-established adequate yearly progress (AYP) requirements under ESEA Title I-A. In some cases, such as the Innovative Programs block grant or Title I-A schoolwide programs, there is no direct linkage between the flexibility authority and any form of outcome accountability.[32]

Regarding (a) above, the most substantial evidence is contained in a GAO study,[33] which found that states granted Ed-Flex authority under the original (pre-P.L. 106-25) legislation differed substantially in the clarity and specificity of their outcome goals related to the granting of waivers. Five of the original 12 Ed-Flex states had set no specific objectives at all for LEAs or schools being granted waivers, and only one of the states had established outcome objectives that were specifically linked to the LEAs, schools, and pupils affected by the waivers. The GAO study further concluded that ED oversight of Ed-Flex implementation by the states was limited, involving mostly the collection of annual reports from the states with highly varying degrees of detail in the information they provided.

If such practices continue, then the most significant (and the only concrete) outcome accountability requirement associated with any of the special flexibility authorities is (b) above — meeting AYP requirements. Thus, the current flexibility authorities do not actually require substantial *additional* outcome accountability for participating LEAs and states — i.e., accountability for pupil outcomes *beyond* that which is applicable to all other states and LEAs participating in Title I-A and other ESEA programs. Instead, they place increased emphasis on, attention to, and consequences for failing to meet, generally applicable outcome accountability requirements.

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[32] Like all schools participating in Title I-A, schoolwide programs must meet AYP standards, but their eligibility to operate as a schoolwide program is not dependent on meeting the AYP requirements.

[33] *Elementary and Secondary Education: Ed-Flex States Vary in Implementation of Waiver Process*. HEHS-99-17.

While this outcome requirement is not an additional one, in comparison to states and LEAs which do not receive special flexibility authority, it may nevertheless be substantial, as states continue to implement the AYP and related requirements under the NCLBA.[34] While all schools, LEAs, and states are required to meet these requirements, and are to face a variety of consequences if they fail to do so, those with special flexibility authority would have an additional incentive to meet the requirements (i.e., to maintain their eligibility to exercise the flexibility authority), and an additional negative consequence of failing to do so.

While limited, such an enhancement of outcome accountability requirements may be consistent with the nature of the special flexibility authorities described in this report. In many respects, *both* the additional flexibility and the increased outcome accountability are quite limited. At the same time, these provisions take effect in the context of recent legislation, particularly the NCLBA, which substantially expands both outcome accountability requirements and, at least in some major respects, flexibility in the use of federal aid funds for *all* states, LEAs, and schools, whether or not they have been granted one of the special flexibility authorities described in this report.[35]

Finally, some proponents of high degrees of state and local flexibility in the use of federal K-12 education aid funds often argue that *no* increase in outcome or other accountability requirements is necessary to justify the granting of special forms of flexibility. To such proponents, increasing the ability of states and LEAs to use federal funds for purposes which they deem to be most appropriate and effective is sufficient justification for such policies, and is most likely to lead to improved pupil outcomes.

At the same time, critics of these authorities might argue that there is no justification for granting special forms of flexibility in return for little or nothing more than the same outcome accountability requirements which are applicable to states, LEAs, and schools which have not been granted such authority. Such critics often defend the full range of generally applicable accountability requirements as embodying important national priorities, and are concerned that special flexibility authorities not only have insufficient accountability provisions, but have been used thus far largely for purposes that have not been proven to increase program effectiveness.

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[34] For a discussion of the AYP and other ESEA Title I-A accountability requirements under the NCLBA, see CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*, and CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, both by Wayne Riddle.

[35] For an overview of the accountability, flexibility, and other provisions of the NCLBA overall, see CRS Report RL31284, *K-12 Education: Highlights of the No Child Left Behind Act of 2001 (P.L.107-110)*, coordinated by Wayne Riddle.