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# Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act

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## Summary

Title I, Part A of the Elementary and Secondary Education Act (ESEA) authorizes aid to local educational agencies (LEAs) for the education of disadvantaged children. Title I-A grants are used to provide supplementary educational and related services to low-achieving and other pupils attending schools with relatively high concentrations of pupils from low-income families. Title I-A has detailed provisions regarding pupil assessment, program improvement, allocation of funds, school selection, fiscal accountability, and parental involvement, but very few constraints on such matters as the specific resources for which funds are used.

The No Child Left Behind Act of 2001, P.L. 107-110, builds upon Title I-A provisions adopted in 1994 that required participating states to adopt curriculum content and pupil performance standards, and assessments linked to these, at three grade levels in reading and mathematics; initiated steps toward identifying low-performing schools and LEAs; attempted to increase targeting of funds on high-poverty LEAs and schools; and increased flexibility.

Eight highlights of the Title I-A provisions of P.L. 107-110 are as follows: (1) Participating states are required to implement standards-based assessments for pupils in each of grades 3-8 in reading and mathematics by the end of the 2005-2006 school year, and to implement assessments at three grade levels in science by the 2007-2008 school year; (2) states receiving Title I-A funds are required to participate in National Assessment of Educational Progress tests in 4th and 8th grade reading and mathematics every two years; (3) adequate yearly progress (AYP) standards, with a goal of all pupils reaching a proficient or advanced level of achievement on state assessments within 12 years, must be developed by states and applied to each public school, LEA, and state; (4) pupils at schools participating in Title I-A that fail to meet AYP for two consecutive years must be offered public school choice options, and if a Title I-A school fails to meet AYP for a third consecutive year, pupils from low-income families must be offered the opportunity to receive instruction from a supplemental services provider of their choice; (5) "corrective actions" must be taken with respect to Title I-A schools that fail to meet AYP for four consecutive years, and those that fail for five years must be "restructured"; (6) Title I-A allocation formulas are modified to increase targeting on high-poverty states and LEAs under the Education Finance Incentive Grant formula, move Puerto Rico gradually toward parity with the states, and increase state minimum grants; (7) states must ensure that all of their teachers in core subject areas are "highly qualified," and that all paraprofessionals paid with Title I-A funds have completed at least two years of higher education or met a "rigorous standard of quality" by the end of the 2005-2006 school year; and (8) the authorization level for Title I-A is specified for each year, rising to $25 billion for FY2007. Issues regarding implementation of these requirements and other provisions are being considered by the 109th Congress. This report will be updated regularly to reflect legislative and implementation developments.

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## Introduction

Title I, Part A, of the Elementary and Secondary Education Act (ESEA) authorizes federal aid to local educational agencies (LEAs) for the education of disadvantaged children. Title I-A grants provide supplementary educational and related services to low-achieving and other pupils attending schools with relatively high concentrations of pupils from low-income families in pre-kindergarten through grade 12. Title I-A is the largest federal elementary and secondary education assistance program, with services provided to (1) over 90% of all LEAs; (2) approximately 45,000 (48% of all) public schools; and (3) approximately 15.8 million (33% of all) pupils, including approximately 167,000 pupils attending private schools. Four-fifths of all pupils served are in pre-kindergarten through grade 6, while only 5% of pupils served are in grades 10-12.

On January 8, 2002, the No Child Left Behind Act of 2001 (NCLBA), an act to extend and revise the ESEA, was signed into law as P.L. 107-110. Among other provisions, this act builds upon Title I-A provisions adopted initially in the Improving America's Schools Act (IASA) of 1994, which required states[1] to adopt curriculum content and pupil performance standards, and assessments linked to these, at three grade levels in reading and mathematics; initiated steps toward identifying low-performing schools and LEAs; attempted to increase targeting of funds on high-poverty LEAs and schools; and increased flexibility. It should be noted that all of the requirements described in this report apply only to states that participate in, and receive grants under, ESEA Title I-A (which currently includes all states, but this may not necessarily be the case in the future).

This report provides an overview of aspects of ESEA Title I-A that were substantially amended by the NCLBA; elements of the program that are important but that were not substantially revised by the NCLBA (such as parental involvement requirements) are not discussed in this report. Other current and forthcoming reports

[1] Throughout this report, unless noted otherwise, this term includes the District of Columbia and the Commonwealth of Puerto Rico, in addition to the 50 states.

will provide more detailed discussions and analyses of selected major aspects of the program, including pupil assessments[2] and accountability.[3] This report will be updated regularly, to reflect significant actions regarding funding and implementation of the NCLBA provisions.

Major ESEA Title I-A amendments adopted in the No Child Left Behind Act of 2001 (P.L. 107-110) were focused on pupil assessment, adequate yearly progress (AYP) requirements, program improvement and corrective actions for schools and LEAs, allocation formulas, staff qualifications, flexibility, and services to private school pupils, staff and parents. Each of these topics is discussed below. Issues regarding implementation of these requirements and other provisions are likely to be considered by the 109th Congress. Such debates may particularly occur as the Congress considers a new High School Initiative released by the Administration in conjunction with its FY2006 and FY2007 Budgets. Relevant aspects of this Initiative are discussed below, at the end of the report section on Pupil Assessment. This report concludes with a brief discussion of debate in some states and LEAs over continued participation in the Title I-A program, and the potential effects of opting-out of participation in the program.

## Pupil Assessment[4]

The IASA of 1994 required states participating in Title I-A to develop or adopt curriculum content standards, pupil performance standards, and assessments linked to these, at least in the subjects of mathematics and reading/language arts, and for at least one grade in each of three grade ranges (grades 3-5, 6-9, and 10-12). In general, these standards and assessments were to be applicable to Title I-A participants, as well as all other pupils in the state. These requirements were adopted in part to raise expectations that Title I-A participants would be required to meet challenging academic standards and to link the program to standards-based reforms taking place in most states. Typically, such standards-based reform involves the establishment of explicit and "challenging" goals for state school systems, and alignment of curricula, assessment methods, pupil performance standards, teacher professional development, instructional materials, and other school system policies in support of the goals.

The deadline for adopting content and performance standards was the 1997-1998 program year, and for assessments was the 2000-2001 program year. States were given several years to meet these requirements because many of them were at

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[2] See CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne C. Riddle.

[3] See CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, by Wayne Riddle; and CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*, by David P. Smole.

[4] For a more detailed discussion of, and analysis of issues related to, the Title I-A assessment requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne Riddle.

an early stage of standards-based reform in 1994. The U.S. Department of Education (ED) has been reviewing "evidence" that state standards and assessments meet the requirements of the Title I-A statute (e.g., that assessments are linked to state content and pupil performance standards, or that disabled and limited English proficient (LEP) pupils are assessed with appropriate accommodations or adaptations), but is not considering the substance of state standards and assessments. As of the date of this report, 21 states have been approved by ED as meeting all of these "1994 requirements." For most of the remaining states (26), "timeline waivers" have been granted, to allow them to complete the process of developing and implementing necessary assessments over the next couple of years.[5] "Compliance agreements" have been negotiated between ED and the remaining five states that are farther from meeting these requirements.[6]

P.L. 107-110 substantially expanded these previous Title I-A assessment provisions. In addition to the requirement for assessments at three grade levels in reading and mathematics, all participating states will be required to implement assessments, linked to state content and academic achievement standards, for all public school pupils in *each of grades 3-8* in reading and mathematics by the 2005-2006 school year. States will also have to develop and implement assessments at three grade levels in *science* by the 2007-2008 school year.[7] P.L. 107-110 requires assessments to be of "adequate technical quality for each purpose required under [this] Act."[8]

All states receiving Title I-A grants are required to participate in National Assessment of Educational Progress (NAEP) tests in 4th and 8th grade reading and mathematics administered every two years, with costs paid by the federal government. Individual pupils may *not* be required to take or administer NAEP tests; there are conflicting statutory and regulatory provisions regarding participation in NAEP tests by LEAs and schools.[9] Pupils who have been in U.S. schools (except

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[5] The latest deadline for any of the current timeline waivers was Jan. 31, 2004.

[6] The latest of the compliance agreements was scheduled to expire on Apr. 8, 2005.

[7] States must initially develop content and academic achievement standards in science by 2005-2006.

[8] Under regulations published in the *Federal Register* on July 5, 2002 (pp. 45038-45047), state assessments meeting the ESEA Title I-A requirements may include either criterion-referenced tests (CRTs) — tests that measure the extent to which pupils have mastered specified content (content standard) to a predetermined degree (achievement standard) — or norm-referenced tests (NRTs) — tests in which pupil performance is measured against that of other pupils, rather than against some fixed standard of performance — although any NRTs used must be augmented to incorporate the state's content standards and have results expressed in terms of the state's achievement standards. For further discussion of this and related issues, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne C. Riddle.

[9] The NCLBA explicitly provides that participation in NAEP tests is voluntary for all *pupils*, but it contains conflicting provisions regarding voluntary participation by *LEAs and schools*. The NAEP authorization statute (recently redesignated as Section 303 of the Education Sciences Reform Act by P.L. 107-279) states that participation is voluntary for LEAs and (continued...)

those in Puerto Rico) for at least three years must be tested (for reading) in English, and states are required to annually assess the English language proficiency of their LEP pupils.

The revised ESEA authorizes (in Title VI-A-1) annual grants to the states to help pay the costs of meeting the Title I-A standard and assessment requirements added by the NCLBA. These grants may be used by states for development of standards and assessments or, if these have been developed, for assessment administration and such related activities as developing or improving assessments of the English language proficiency of LEP pupils. The state assessment requirements that were newly adopted under the NCLBA are contingent upon the appropriation of minimum annual amounts for these state assessment grants; for each of FY2002-FY2005, at least the minimum amount was appropriated for these grants. (For FY2006, the minimum is $400 million, and the amount that would be provided under the second conference version of H.R. 3010, incorporating a 1% "across-the-board" reduction, is $407,563,200.)

The NCLBA also authorizes competitive grants to states for the development of enhanced assessment instruments. Aided activities may include efforts to improve the quality, validity, and reliability of assessments beyond the levels required by Title I-A, to track student progress over time, or to develop performance or technology-based assessments. Funds appropriated each year for state assessment grants that are in excess of the "trigger" amounts described above for assessment development grants are to be used for enhanced assessment grants; for FY2002, $17 million was made available for this purpose. In February 2003, grants to nine states were announced. The amount available for assessment enhancement grants was $4,484,000 under the FY2003 appropriation, but no funds were available for such grants under the FY2004 appropriation. For FY2005, $11.68 million was available for assessment development grants, and $7.6 million would be available for FY2006 under the second conference version of H.R. 3010. In addition, the Department is to contract with an independent organization for a study of the assessments and accountability policies used by states to meet Title I-A requirements.

Issues regarding the expanded ESEA Title I-A pupil assessment requirements include:

- Will ED allow any relaxation of the expanded assessment requirements for the 2005-2006 school year and beyond, and will states meet these assessment requirements on schedule?
- What will be the cost of developing and implementing the assessments, and will federal grants be sufficient to pay for them?

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[9] (...continued)
schools, as well as pupils. However, ESEA Title I-A provides that the plans of LEAs receiving aid under that program must include an assurance that they will participate in state NAEP tests if selected [Section 1112(b)(1)(F)]. Further, regulations (*Federal Register*, Dec. 2, 2002) explicitly require LEAs that receive Title I-A grants to participate in NAEP if selected [34 C.F.R. § 200.11(b)], and ED comments accompanying these regulations state that "an LEA cannot meet the NAEP participation requirement unless it requires all schools selected to participate" (*Federal Register*, Dec. 2, 2002, p. 71740).

- What might be the impact of the requirement for annual assessment of the English language proficiency of LEP pupils?
- What might be the impact *on* NAEP, as well as the impact *of* NAEP on state standards and assessments, of requiring state participation in NAEP, while not requiring participation by individual pupils and schools?
- What are the likely major benefits and costs of the expanded ESEA Title I-A pupil assessment requirements? Will they significantly increase the focus on assessments in public K-12 education? If so, will this enhance educational achievement and "quality," or will it undesirably limit instructional curricula or "drive out" assessments in subjects other than reading, mathematics or science?

## The Bush Administration's High School Initiative

In conjunction with its FY2006 and FY2007 Budgets, the Bush Administration has requested funding for a High School Initiative. Thus far, details of the proposal are not available, nor have bills based on the proposal been introduced or acted upon. Based on the available information, the HSI will be multifaceted, and some aspects of it are directly relevant to the topic discussed immediately above — assessment requirements for states participating in ESEA Title I-A. The other major aspect of the HSI would be targeted initiatives to improve low-performing high schools. For FY2007, a total of $1.475 billion has been requested for this Initiative.

Under the HSI, states receiving Title I-A grants would be required to administer state-developed, standards-based assessments in reading and mathematics in two additional high school grades (presumably between grades 9 and 12, since the NCLBA already requires such assessments in each of grades 3-8) by the 2009-2010 school year, in addition to the one grade (between grades 10 and 12) already required (as discussed above). Additional grants to states would be available to help pay the costs of developing these assessments. The Administration has also requested an additional $4 million in funding for NAEP for FY2007, to pay the costs of beginning to develop a new series of 12$^{th}$ grade reading and mathematics assessments at the state level.

At this point, there are several unanswered questions regarding the HSI. These include the following: Might the required assessments include high school exit or graduation tests? Given the relatively high degree of curriculum differentiation at the senior high school level (e.g., vocational and technical education programs, advanced placement courses, and so forth) might states be allowed to meet these requirements by adopting different types of tests for pupils in different types of academic programs? Might Advanced Placement or International Baccalaureate tests be used to meet the new assessment requirements for pupils participating in those programs?

## Report Cards

States and LEAs participating in the revised ESEA Title I-A must report assessment results and certain other data to parents and the public through "report cards." States are to publish report cards for the state overall, and LEAs (including

charter schools that are treated under state law as individual LEAs) are to publish report cards for the LEA and individual schools. The report cards must generally include information on pupils' academic performance disaggregated by race, ethnicity, and gender, as well as disability, migrant, English proficiency, and economic disadvantage status. The report cards must also include information on pupil progress toward meeting any other educational indicators included in the state's AYP standards, plus secondary school student graduation rates, the number and identity of any schools failing to meet AYP standards, and aggregate information on the qualifications of teachers. The report cards *may* include additional information, such as average class size or the incidence of school violence. LEA and school report cards are to be disseminated to parents of public school pupils and to the public at large; there are no specific provisions regarding dissemination of the state report cards. Preexisting report cards may be modified to meet these requirements.

One issue regarding these report card requirements is the extent to which they will lead to significant changes from previous practices. While a large majority of states have published report cards on school system performance in recent years, many have not provided such reports at all of the required levels: schools, LEAs, *and* states overall. Further, most state report cards have not included all of the types of information required under the NCLBA.[10] Other issues include whether the information provided will be of substantial help to parents, especially in the context of potentially increased options to select the schools that their children attend (see below).

## Adequate Yearly Progress Requirements

Under the NCLBA, the Title I-A requirements for state-developed standards of AYP are substantially expanded in scope and specificity.[11] These standards serve as the basis for identifying schools and LEAs where performance is inadequate, so that these inadequacies may be addressed first through provision of increased support and, ultimately, a variety of "corrective actions."

The NCLBA provisions regarding AYP were adopted largely in reaction to perceived weaknesses with the AYP requirements of the 1994 IASA. The latter were frequently criticized as being vague, lacking a required focus on specific disadvantaged pupil groups, failing to require continuous improvement toward an ultimate goal, and being applicable only to schools and LEAs participating in Title I-A, not to states overall or to all public schools. Before the enactment of the NCLBA, there was tremendous variation among the states in the impact of their AYP standards — i.e., the number and percentage of Title I-A schools and LEAs identified as failing to meet AYP standards. In some states, a very large percentage of Title I-A schools have been identified as needing improvement, while a small number of states

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[10] See *No State Left Behind: The Challenges and Opportunities of ESEA 2001*, available at [http://www.ecs.org/clearinghouse/32/37/3237.pdf].

[11] For a more detailed discussion and analysis of these requirements, see CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, by Wayne Riddle.

had identified very few or even no such schools for at least some years preceding the enactment of the NCLBA.[12]

As under the IASA, AYP is defined primarily on the basis of aggregate scores for various groups of pupils on state assessments of academic achievement. However, under the NCLBA, state AYP standards must also include at least one additional academic indicator, which in the case of high schools must be the graduation rate. AYP standards will now have to be applied separately and specifically to economically disadvantaged pupils, LEP pupils, pupils with disabilities, and pupils in major racial and ethnic groups, as well as all pupils. The only exception is that pupil groups need not be considered in cases where their number is so relatively small that achievement results would not be statistically significant or the identity of individual pupils might be divulged.[13] State AYP standards must also be applied to *all* public schools, LEAs, and states overall, although corrective actions for failing to meet AYP standards need only be applied to schools and LEAs participating in Title I-A. The AYP state standards will also have to incorporate a goal of all pupils reaching a proficient or advanced level of achievement within 12 years.

According to the revised ESEA statute, a "uniform bar" approach is to be employed: states are to set a threshold percentage (of pupils at proficient or advanced levels) each year that is applicable to all pupil subgroups of sufficient size (see above).[14] The "uniform bar" must generally be increased once every three years, although in the initial period it must be increased after two years. The minimum level for the "uniform bar" in the initial period is to be based on the greater of the percentage (of pupils at the proficient or advanced level of achievement) for the lowest-achieving pupil group *or* the threshold percentage for the lowest-performing quintile of schools statewide in the base year. Averaging of scores over two to three years is allowed. Under a "safe harbor" provision, a school that does not meet the standard AYP requirements may still be deemed to meet AYP if it experiences a 10% reduction in the gap between 100% and the base year for pupil groups that fail to meet the "uniform bar."[15] Finally, in order for a school to meet AYP standards, at least 95% of all pupils, as well as at least 95% of each of the demographic groups of pupils considered for AYP determinations for the school or LEA (see above), must participate in the assessments that serve as the primary basis for AYP determinations. This rule has recently been somewhat relaxed, as described later in this report.

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[12] See the U.S. Department of Education press release, *Paige Releases Number of Schools in School Improvement in Each State*, July 1, 2002.

[13] In addition, program regulations (*Federal Register*, Dec. 2, 2002) do not require graduation rates and other additional academic indicators to be disaggregated in determining whether schools or LEAs meet AYP standards.

[14] Under program regulations [34 C.F.R. § 200.16(c)(2)], the starting point may vary by grade span (e.g., elementary, middle, etc.) and subject

[15] In November 2005, the U.S. Secretary of Education announced a pilot program under which up to 10 states would be allowed to make AYP determinations for the 2005-06 school year using a "growth model." For details, see CRS Report RL33032, *Adequate Yearly Progress (AYP): Growth Models Under the No Child Left Behind Act*, by Wayne C. Riddle.

## Data on Schools Identified as Failing to Meet AYP

Beginning in the summer of 2003, a substantial amount of data has become available on the number of schools and LEAs that failed to meet the AYP standards of the NCLBA for the 2002-2003, 2003-2004, and 2004-2005 school years. A basic problem with almost all such reported data thus far is that they have generally been incomplete (i.e., not all states are included) and subject to change (i.e., the data for several states have been revised one or more times after being initially published, due largely to data corrections and appeals).[16] The currently available data reports are discussed below in two categories: reports focusing on the number and percentage of schools failing to meet AYP standards for *one or more years* versus reports on the number and percentage of public identified for school improvement — i.e., they had failed to meet AYP standards for *two, three, four, five, or more consecutive years*.

## Schools Failing to Meet AYP Standards for *One or More* Years

Compilations of AYP results for a majority of states for the 2002-2003 through 2004-2005 school years were published in December 2004 and 2005 by *Education Week*.[17] While national aggregate comparisons are not possible due to the number of states for which data were missing for one or more years, these data continue to reflect a pattern of wide variation among states in the percentage of public schools failing to meet AYP standards. Among states providing results, the percentage of public schools failing to meet AYP standards based on assessment results in the 2004-2005 school year ranged from 2% (Wisconsin) to 66% (Hawaii). For 48 states and the District of Columbia, the average share of schools failing to meet AYP standards was 26%. For the 46 states where such a comparison is possible, based on these data, the percentage of public schools failing to make AYP increased between 2003-2004 and 2004-2005 in 24 states, remained the same in two states, and declined in the remaining 20 states. This is largely a reversal of the pattern of change between 2002-03 and 2003-04, when among the 36 states where a comparison was possible, the percentage of public schools failing to make AYP increased in only five states, remained the same in one state, and declined in 30 states.

## Schools Failing to Meet AYP Standards for *Two or More* Consecutive Years

In December 2005, a survey of the number of schools identified for improvement — i.e., had failed to meet AYP standards for two or more consecutive years on the basis of assessment results for 2004-05 and preceding school years — was published in *Education Week*.[18] The survey included all states except one (Nebraska) and found that on average, 14% of public schools had been identified as

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[16] See also "Data Doubts Plague States, Federal Law," *Education Week*, Jan. 7, 2004.

[17] See "Taking Root," *Education Week*, Dec. 8, 2004, p. 1, and "Room to Maneuver," *Education Week*, Dec. 14, 2005, p. S1.

[18] See "Room to Maneuver," *Education Week*, Dec. 14, 2005, p. S1.

needing improvement. Again, the proportion varied widely among the states, ranging from 1% in Kansas and Utah to 48% in Hawaii.

Earlier, in March 2005, the non-governmental Center on Education Policy published its report, *From the Capital to the Classroom: Year 3 of the No Child Left Behind Act*.[19] This report provides estimates, based on a nationally representative sample survey of LEAs, of the number of Title I-A schools identified for improvement — i.e., they had failed to meet AYP standards for two or more consecutive years — for each of the 2002-2003, 2003-2004, and 2004-2005 school years (in each case, based on assessment scores for the preceding two or more school years). According to this report, the percentage of Title I-A schools identified for improvement has remained relatively constant, at 13%-14% per year, or approximately 6,000 schools. According to the authors of this report, schools in very large, urban LEAs, and middle schools in general, are most likely to be identified for improvement, while schools in small, rural LEAs, and elementary schools in general, are least likely to be so identified. In addition to these schools participating in Title I-A, an estimated 2,400 non-Title I-A schools were identified for improvement for 2004-2005.[20]

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[19] Available at [http://www.ctredpol.org/pubs/nclby3/].

[20] Also in Mar. 2005, a report was published by the Education Commission of the States (ECS) that provided a great deal of state-by-state data on schools identified for improvement. However, the ECS has since stopped disseminating the report and removed it from its Internet site, stating that the organization "regrets that news reports in several states misinterpreted the data in our recent report about the number of schools not meeting standards of Adequate Yearly Progress (AYP) under the No Child Left Behind Act. No conclusion about the quality of individual schools or a state's education system can be drawn simply by considering the status of a school or group of schools on the AYP standard. In view of the misinterpretations that can be drawn from comparison of state AYP data, ECS has removed the publication, "Schools' Status in School Improvement Categories," from its website and from publication. ECS apologizes for the unwarranted negative assessments of any state's schools that resulted from this document."

The report, "Schools' Status in School Improvement Categories," had provided data for each of the 50 states (but not the District of Columbia and Puerto Rico) on the number of schools identified for improvement for the 2004-2005 school year because they had failed to meet state AYP standards *for two or more consecutive school years*. It also provided detailed information on the number of schools facing the varying stages of school improvement specified under the NCLBA — i.e., the number of schools that had failed to meet AYP standards for two (only) versus three, four, or five or more consecutive years.

According to the report, only 14 states had any schools in the final stage of school improvement, restructuring, during the 2004-2005 school year. Most of these schools were reported to be in Alabama, Georgia, Hawaii, Maryland, Michigan, New York, and Pennsylvania. These would be schools that had already failed to meet AYP standards for multiple consecutive years before enactment of the NCLBA, and had consistently failed to meet the revised AYP standards afterward. Overall, it was reported that during the 2004-2005 school year, the percentage of all public schools that were in some stage of school improvement varied widely among the 50 states — from 1% or below in states such as Iowa, Kansas, or Nebraska, to 28% in Florida, 37% in Georgia, and 47% in Hawaii. The

(continued...)

For the present, it seems likely that state variations in the percentage of schools identified as failing to meet AYP standards or as needing improvement are based, at least in part, not only on underlying differences in achievement levels but also on differences in the degree of rigor or challenge in state pupil performance standards, and on state-determined standards for the minimum size of pupil demographic groups in order for them to be considered in AYP determinations of schools or LEAs. (In general, larger minimum sizes for pupil demographic groups reduce the likelihood that many disadvantaged groups, such as LEP pupils or pupils with disabilities, will be considered in determining whether a school or LEA meets AYP.) Also, in many cases it appears that schools or LEAs failed to meet AYP solely because of low participation rates in assessments — i.e., fewer than 95% of all pupils, as well as pupils in each relevant demographic group, took the assessments.

As a result of such estimates and reports, as well as state reports indicating that approximately 8,600 schools have failed to meet AYP even under the pre-NCLBA standards (see footnote 12), some have expressed concern that large percentages of all public schools are being identified as "failing" and subjected to a variety of corrective actions (described below), with consequent strain on financial and other resources necessary to provide technical assistance, public school choice and supplemental services options, and other corrective actions. In addition, some have expressed concern that random variation in test scores from year to year, unrelated to actual gains or losses in achievement levels, might substantially increase the number of schools identified as failing to meet AYP standards; or that schools might be more likely to fail to meet AYP simply because they have diverse enrollments and therefore more groups of pupils to be separately considered in determining whether the school meets AYP standards.[21]

In response to these concerns, ED officials have emphasized the importance of taking action to identify and move to improve underperforming schools, no matter how numerous. They have also emphasized the possibilities for flexibility and variation in taking corrective actions (see below) with respect to schools that fail to meet AYP, depending on the extent to which they fail to meet those standards.

**Recent ED Policy Developments Regarding Participation Rates Plus Treatment of Limited English Proficient Pupils and Certain Pupils with Disabilities in Assessments and AYP Determinations.** ED officials have recently published regulations and other policy guidance on participation rates plus the treatment of limited English proficient pupils and certain pupils with disabilities in assessments and the calculation of AYP for schools and LEAs, in an effort to provide additional flexibility and reduce the number of schools and LEAs identified as failing to make AYP. On March 29, 2004, ED announced that schools could meet the requirement that 95% or more of pupils (all pupils as well as pupils

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[20] (...continued)
nationwide average was reported to be 11% of public schools at some stage of school improvement.

[21] See Thomas J. Kane and Douglas O. Staiger, *Racial Subgroup Rules in School Accountability Systems*, preliminary draft (Sept. 2002) available at [http://www.sppsr.ucla.edu/faculty/kane/kanestaigerracialsubgroupsrevision.pdf].

in each designated demographic group) participate in assessments (in order for the school or LEA to make AYP) on the basis of *average* **participation rates** for the last two or three years, rather than having to post a 95% or higher participation rate each year. In other words, if a particular demographic group of pupils in a public school has a 93% test participation rate in the most recent year, but had a 97% rate the preceding year, the 95% participation rate requirement would be met. In addition, the new guidance would allow schools to exclude pupils who fail to participate in assessments due to a "significant medical emergency" from the participation rate calculations. The new guidance further emphasizes the authority for states to allow pupils who miss a primary assessment date to take make-up tests, and to determine the minimum size for demographic groups of pupils to be considered in making AYP determinations (including those related to participation rates). According to ED, in some states, as many as 20% of the schools failing to make AYP did so on the basis of assessment participation rates alone. It is not known how many of these schools would meet the new, somewhat more relaxed standard.

In a letter dated February 19, and proposed regulations published on June 24, 2004, ED officials announced two new policies with respect to **LEP pupils**.[22] First, with respect to assessments, LEP pupils who have attended schools in the United States (other than Puerto Rico) for less than 10 months must participate in English language proficiency and mathematics tests. However, the participation of such pupils in reading tests (in English), as well as the inclusion of any of these pupils' test scores in AYP calculations, is to be optional (i.e., schools and LEAs need not consider the scores of first year LEP pupils in determining whether schools or LEAs meet AYP standards). Such pupils are still considered in determining whether the 95% test participation has been met.

Second, in AYP determinations, schools and LEAs may continue to include pupils in the LEP demographic category for up to two years after they have attained proficiency in English. However, these formerly LEP pupils need not be included when determining whether a school or LEA's count of LEP pupils meets the state's minimum size threshold for inclusion of the group in AYP calculations, and scores of formerly LEP pupils may not be included in state, LEA, or school report cards. Both these options, if exercised, should increase average test scores for pupils categorized as being part of the LEP group, and reduce the extent to which schools or LEAs fail to meet AYP on the basis of LEP pupil groups.[23]

Regulations addressing the application of the Title I-A standards and assessment requirements to certain **pupils with disabilities** were published in the *Federal Register* on December 9, 2003 (pp. 68698-68708). The purpose of these regulations is to clarify the application of standard, assessment, and accountability provisions to pupils "with the most significant cognitive disabilities." Under the regulations, states

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[22] See the *Federal Register*, June 24, 2004, pp. 35462-35465; and [http://www.ed.gov/policy/gen/guid/secletter/040220.html].

[23] A bill introduced in the 108th Congress, H.R. 3049, would have authorized the exclusion of scores of LEP pupils who have resided in the United States for less than *three* years, and would have allowed formerly LEP pupils to be included in that group for AYP calculation purposes indefinitely.

and LEAs may adopt alternate assessments *based on alternate achievement standards* — aligned with the state's academic content standards and reflecting "professional judgment of the highest achievement standards possible" — for a limited percentage of pupils with disabilities.[24] The number of pupils whose proficient or higher scores on these alternate assessments may be considered as proficient or above for AYP purposes is limited to a maximum of 1.0% of all tested pupils (approximately 9% of all pupils with disabilities) at the state and LEA level (there is no limit for individual schools). SEAs may request from the U.S. Secretary of Education an exception allowing them to exceed the 1.0% cap statewide, and SEAs may grant such exceptions to LEAs within their state. According to ED staff, three states in 2003-04 (Montana, Ohio, and Virginia), and four states in 2004-2005 (the preceding three states plus South Dakota), received waivers to go marginally above the 1.0% limit statewide. In the absence of a waiver, the number of pupils scoring at the proficient level or higher on alternate assessments, based on alternate achievement standards, in excess of the 1.0% limit is to be added to those scoring below proficient in LEA or state level AYP determinations.

A new ED policy affecting an additional group of pupils with disabilities was announced initially in April 2005, with more details provided on May 10, 2005.[25] The new policy is divided into short-term — affecting AYP determinations for the 2005-2006 school year, based on the results of assessments administered during the 2004-2005 school year — and long-term — affecting subsequent years — phases. It is focused on pupils with "persistent academic disabilities," whose ability to perform academically is assumed to be greater than that of the pupils with "the most significant cognitive disabilities" discussed in the above paragraph, but below that of other pupils with disabilities. In ED's terminology, these pupils would be assessed using alternate assessments *based on modified achievement standards*.

Under the short-term policy, in eligible states that have not yet adopted modified achievement standards, schools may add to their proficient pupil group a number of pupils with disabilities equal to 2.0% of all pupils assessed (in effect, deeming the scores of all of these pupils to be at the proficient level).[26] This policy would be applicable only to schools and LEAs that would otherwise fail meet AYP standards due solely to their pupils with disabilities group. According to ED staff, as of the date of this report, 31 states have been authorized to exercise this short-term flexibility. Alternatively, in eligible states that have adopted modified achievement standards, schools and LEAs may count proficient scores for pupils with disabilities on these assessments, subject to a 2.0% (of all assessed pupils) cap at the LEA and state levels.

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[24] This limitation does *not* apply to the administration of alternate assessments *based on the same standards applicable to all students*, for other pupils with (non-cognitive or less severe cognitive) disabilities.

[25] See [http://www.ed.gov/news/pressreleases/2005/05/05102005.html].

[26] This would be calculated based on statewide demographic data, with the resulting percentage applied to each affected school and LEA in the state. In making the AYP determination using the adjusted data, no further use may be made of confidence intervals or other statistical techniques. (The actual, not just the adjusted, percentage of pupils who are proficient must also be reported to parents and the public.)

Both the short term and longer term flexibility policies will apply only to states meeting a number of eligibility criteria. For example, in order to be eligible for the short-term flexibility, states must set a minimum group size ("n") for pupils with disabilities in AYP determinations equal to that for other pupil groups, "provide information on actions taken to raise achievement for students with disabilities or narrow the achievement gap and evidence that such efforts are improving student achievement," and submit a variety of assurances regarding the adoption and implementation of alternate assessments and modified and alternate achievement standards.

On December 15, 2005, ED published proposed regulations embodying the longer-term policy for this group of pupils with disabilities. These proposed regulations would affect standards, assessments, and AYP for a group of pupils with disabilities who are unlikely to achieve grade-level proficiency within the current school year, but who are not among those pupils with the most significant cognitive disabilities (whose situation was addressed by an earlier set of regulations, discussed above). For this second group of pupils with disabilities, states would be authorized to develop "modified achievement standards" and alternate assessments linked to these. The modified achievement standards must be aligned with grade-level content standards, but may reflect reduced breadth or depth of grade-level content in comparison to the achievement standards applicable to the majority of pupils. The standards must provide access to grade-level curriculum and not preclude affected pupils from earning a regular high school diploma.

As with the previous regulations regarding pupils with the most significant cognitive disabilities, there would be no direct limit on the number of pupils who take alternate assessments based on modified achievement standards. However, in AYP determinations, pupil scores of proficient or advanced on alternate assessments based on modified achievement standards may be counted only as long as they do not exceed a number equal to 2.0% of all pupils tested at the state or LEA level (i.e., an estimated 20% of pupils with disabilities); such scores in excess of the limit would be considered to be "non-proficient." As with the 1.0% cap for pupils with the most significant cognitive disabilities, this 2.0% cap does not apply to individual schools. In general, LEAs or states could exceed the 2.0% cap only if they did not reach the 1.0% limit with respect to pupils with the most significant cognitive disabilities. Thus, in general, scores of proficient or above on alternate assessments based on alternate *and* modified achievement standards may not exceed a total of 3.0% of all pupils tested at a state or LEA level.[27] In particular, states would no longer be allowed to request a waiver of the 1.0% cap regarding pupils with the most significant cognitive disabilities.

The December 15 proposed regulations also include provisions that are widely applicable to AYP determinations. First, states would no longer be allowed to use varying minimum group sizes ("n") for different demographic groups of pupils. This would prohibit the frequent practice of setting higher "n" sizes for pupils with

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[27] The 3.0% limit might be exceeded for LEAs, but only if — and to the extent that — the SEA waives the 1.0% cap applicable to scores on alternate assessments based on alternate achievement standards.

disabilities or LEP pupils than for other pupil groups. Second, when pupils take state assessments multiple times, it would no longer be required that only the first test administration be used in AYP determinations; states and LEAs could use the highest score for pupils who take tests more than once. Finally, as with LEP pupils, states and LEAs could include the test scores of former pupils with disabilities in the disability subgroup for up to two years after such pupils have exited special education.[28]

Thus, eligible states and LEAs will be allowed to count as "proficient or above" in AYP determinations the proficient or higher scores of up to 1.0% of all tested pupils on "alternate assessments based on alternate achievement standards," and of up to an additional 2.0% of all tested pupils on "assessments based on modified achievement standards." For both groups, there is no limit for individual schools on the percentage of pupils in either of these categories, and there is no limit on the number or percentage of pupils to whom either type of alternate assessment may be administered.

Finally, following the damage to school systems and dispersion of pupils in the wake of **Hurricanes Katrina and Rita** in August and September 2005, interest in the possibility of waiving some of the NCLBA's assessment, AYP, or other accountability requirements has been expressed by officials of states and LEAs damaged by the storms, several of which have enrolled pupils displaced by them. In policy letters to chief state school officers (CSSOs), the Secretary of Education has emphasized forms of flexibility already available under current law, and announced a number of policy revisions and potential waivers that might be granted in the future.

In a September 29, 2005 letter to all CSSOs[29], the Secretary of Education noted that they could exercise existing natural disaster provisions of the NCLBA — Section 1116(b)(7)(D) and (c)(10)(F) — to postpone implementing school or LEA improvement designations and corrective actions for schools or LEAs failing to meet AYP standards that are located in the major disaster areas in Louisiana, Alabama, Mississippi, Texas, or Florida, without a specific waiver being required. In addition, waivers of these requirements will be considered for other heavily impacted LEAs or schools via the enrollment of large numbers of evacuee pupils. Further, all affected LEAs and schools could establish a separate subgroup for displaced students in AYP determinations based on assessments administered during the 2005-2006 school year. Pupils would appear only in the evacuee subgroup, not in other demographic subgroups (e.g., economically disadvantaged or LEP). Waivers could be requested in 2006 to allow schools or LEAs to meet AYP requirements if only the test scores of the evacuee subgroup would prevent them from making AYP. In any case, all such students must still be assessed and the assessment results reported to the public.

## Data on LEAs Failing to Meet AYP

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[28] In such cases, the former pupils with disabilities would *not* have to be counted in determining whether the minimum group size was met for the disability subgroup.

[29] See [http://www.ed.gov/policy/elsec/guid/secletter/050929.html].

As mentioned above, states receiving ESEA Title I-A grants are required to establish and implement AYP standards not only for all public schools in the state, but also for LEAs overall, and the state as a whole. While most attention, both the statute and implementation activities, thus far has been focused on application of the AYP concept to schools, a limited amount of information is becoming available about LEAs that fail to meet AYP requirements, and the consequences for them.

According to the *Year 3 report of the Center on Education Policy on No Child Left Behind* implementation (referred to above), an estimated 10% of all LEAs were identified as needing improvement — i.e., they had failed to meet AYP standards for two or more consecutive years — for the 2004-2005 school year, the first year for which LEAs might have been so identified fully under the provisions of the NCLBA.[30] According to this report, the odds of being identified for improvement were much greater for urban (25% identified) or very large (52%) LEAs than for rural (7%) or small (also 7%) LEAs. According to the report's authors, states "are just starting to face the prospect of administering corrective action programs for districts,"[31] and only very limited information on actions, if any, taken with respect to the LEAs identified for improvement.

## Timing and Other AYP Implementation Issues

Timing is an issue mainly because of the different effective AYP standards applicable to different school years. There are concerns regarding the application of inconsistent AYP standards in determining whether schools should be identified as needing improvement currently and over the next couple of years. There are two major dimensions to this issue. First, AYP determinations for years through 2001-2002 were made on the basis of widely varying pre-NCLBA state AYP standards. Second, even after the NCLBA began to be implemented, the degree of flexibility explicitly provided to states in several specific aspects of AYP determination have changed over time, so that often the post-NCLBA AYP criteria are not consistent from year to year, even within the same state. This raises at least two questions: (a) should corrective actions be applied to schools or LEAs on the basis of two or more consecutive years of failure to meet AYP, when those AYP standards have materially differed over the relevant time period; and (b) should states and LEAs be allowed to apply currently authorized forms of flexibility to revise AYP determinations for previous years?

With respect to (a), states and LEAs used pre-NCLBA standards for determining AYP for school years through 2001-2002, and varying corrective actions are to be taken with respect to schools that fail to meet AYP standards for up to five or more consecutive years. The relative significance of this aspect of the timing issue was

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[30] While there were AYP requirements for LEAs under the IASA, the application of these requirements by states was apparently quite uneven, and the provisions for consequences for LEAs that failed to meet AYP standards for multiple years were minimal. Thus, the application of AYP standards to LEAs, including consequences, is essentially a new process under the NCLBA.

[31] Center on Education Policy, *From the Capital to the Classroom, Year 3 of the No Child Left Behind Act*, Mar. 2005, p. 14.

greatest during the initial transition to the NCLBA — i.e., in the 2002-2003 and 2003-2004 school years — but it will remain somewhat significant for the next three years at least. The fact that corrective actions taken during the 2002-2003 school year were totally, and those taken during 2003-2004 and for the following few years will be partially, based on pre-NCLBA AYP standards raises concerns based on the wide variation in the structure and nature of pre-NCLBA AYP standards, as well as the fact that the pupil assessments that form the basis for AYP determinations were in many states "transitional" assessments that did not meet either the "1994 requirements" or those of the NCLBA. For example, those assessments may not have been linked to state content and achievement standards.

A more immediate issue involves debates over whether recently announced forms of flexibility in the implementation of the NCLBA AYP provisions may be applied to AYP determinations for previous (but still post-NCLBA) years. As is discussed above, ED has over the last several months published regulations and/or policy guidance providing additional flexibility with respect to three aspects of AYP calculations: pupils with disabilities, LEP pupils, and assessment participation rates. All of these forms of flexibility take effect with respect to AYP determinations based on assessments administered during the 2003-2004 school year. However, it is ED's position that these new forms of flexibility cannot be applied to revise AYP determinations for the previous school year, 2002-2003, which was the first year of AYP determinations based on the NCLBA.[32] According to ED, this is because such regulations or policy guidance cannot be retroactively applied without explicit statutory authority for such retroactive application.

In contrast, some Members of Congress argue that states and LEAs ought to be allowed to recalculate AYP determinations for 2002-2003, applying all currently allowed forms of flexibility. Bills were introduced in the House and Senate in the 108th Congress (H.R. 4605 and S. 2542) to allow such retroactive recalculation of AYP determinations for the 2002-2003 school year, if requested by schools or LEAs that have been identified as failing to meet AYP for that year. However, no action was taken on these bills. Insufficient data are available to make it possible to estimate the number of schools or LEAs whose identification as failing to meet AYP for 2002-2003 might be reversed if AYP were recalculated using all currently available forms of flexibility.

ED has argued that aside from the principle of retroactivity, recalculation of 2002-2003 AYP determinations would at this point be disruptive, and the issue is of limited significance because corrective actions are taken with respect to schools or LEAs only after *two or more consecutive years* of failure to meet AYP, so *one* year of determinations under less flexible policy guidance would not alone lead to substantive consequences. However, this overlooks the fact that a number of schools may have been determined to fail to meet AYP for 2001-2002 under pre-NCLBA requirements, then again for 2002-2003 under NCLBA requirements more strict than

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[32] The situation regarding pupils with disabilities differs from those of LEP pupils and participation rates, because ED had previously published draft regulations (Mar. 20, 2003) providing a degree of flexibility roughly comparable to that in the final regulations (published Dec. 9, 2003).

currently, but might not have failed to meet today's more flexible requirements if applied to determinations for 2002-2003.

In addition, some of the newly authorized forms of flexibility reflect policies that some states had already adopted as part of their initial NCLBA accountability plans, and have already applied in making AYP determinations for 2002-2003. For example, one of the key aspects of the expanded flexibility regarding LEP pupils in AYP determinations is that schools and LEAs may continue to include pupils in the LEP demographic category for up to two years after they have attained proficiency in English. Some states, such as Indiana, already had such a provision in their original NCLBA AYP standards, and were applying it to the AYP determinations for 2002-2003. Thus, this form of flexibility was available to, and used by, some states in 2002-2003, but not others. Of course, as was discussed above, there are significant variations and inconsistencies in several important aspects of AYP standards (e.g., minimum group size or use of confidence intervals) among states, whether for 2002-2003 or 2003-2004.

Aside from issues of timing, only limited analyses have thus far been conducted of the extent to which state accountability plans are fully consistent with the detailed requirements of the statute and regulations. Some analysts have concluded that ED is allowing at least marginally increased flexibility, in comparison to the statute and regulations, in approving state accountability plans thus far, although the approved plans appear to closely mirror the detailed provisions of the authorizing statute and regulations in most respects.[33] Aspects of state AYP plans receiving special attention include (1) the pace at which proficiency levels are expected to improve (e.g., equal increments of improvement over the entire period, or much more rapid improvement expected in later years than at the beginning); (2) whether schools or LEAs must fail to meet AYP with respect to the *same* pupil group(s), grade level(s) and/or subject areas to be identified as needing improvement, or whether two consecutive years of failure to meet AYP with respect to *any* of these categories should lead to identification;[34] (3) the length of time over which pupils should be identified as being LEP; (4) the minimum size of pupil groups in a school in order for the group to be considered in AYP determinations or for reporting of scores; (5) whether to allow schools credit for raising pupil scores from below basic to basic (as well as from basic or below to proficient or above) in making AYP determinations; and (6) whether to allow use of statistical techniques such as "confidence intervals" (i.e., whether scores are below the required level to a statistically significant extent) in AYP determinations.

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[33] See "States' Plans Likely to Test ESEA Pliancy," *Education Week*, Feb. 19, 2003; "ED Approves Five States' Accountability Plans; Flexibility Leads to More Questions, Confusion," *Title I Monitor*, Feb. 2003; "ED Makes Progress on Accountability Plans," *Title I Monitor*, May 2003; and "ED Shows Flexibility as State Plan Approval Concludes," *Title I Monitor*, June 2003.

[34] Reportedly, ED has approved state accountability plans under which schools or LEAs would be identified as failing to meet AYP only if they failed to meet the required level of performance in the same subject for two or more consecutive years, but has not approved proposals under which a school would be identified only if it failed to meet AYP in the same subject *and* pupil group for two or more consecutive years.

Another developing issue is whether some states might choose to lower their standards of "proficient" performance, in order to reduce the number of schools identified as failing to meet AYP and make it easier to meet the ultimate NCLBA goal of all pupils at the proficient level within 12 years. Reportedly, a few states have redesignated lower standards (e.g., "basic" or "partially proficient") as constituting a "proficient" level of performance for Title I-A purposes, or established new "proficient" levels of performance that are below levels previously understood to constitute that level of performance, and other states are considering such actions.[35] In the affected states, this would increase the percentage of pupils deemed to be achieving at a "proficient" level, and reduce the number of schools failing to meet AYP standards.

While states are generally free to take such actions without jeopardizing their eligibility for Title I-A grants, since performance standards are ultimately state-determined and have always varied widely, such actions have elicited public criticism from ED. In a policy letter dated October 22, 2002, the Secretary of Education stated that "Unfortunately, some states have lowered the bar of expectations to hide the low performance of their schools. And a few others are discussing how they can ratchet down their standards in order to remove schools from their lists of low performers. Sadly, a small number of persons have suggested reducing standards for defining "proficiency" in order to artificially present the facts.... Those who play semantic games or try to tinker with state numbers to lock out parents and the public, stand in the way of progress and reform. They are the enemies of equal justice and equal opportunity. They are apologists for failure."[36]

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[35] See, for example, "States Revise the Meaning of 'Proficient'," *Education Week*, Oct. 9, 2002.

[36] [http://www.ed.gov/policy/elsec/guid/secletter/021022.html?exp=0].

# Program Improvement and Corrective Actions

The NCLBA requires states and LEAs to identify schools or LEAs that fail to meet state AYP standards for two or more consecutive years as needing improvement, and to take a variety of corrective actions with respect to schools or LEAs that fail to meet AYP standards for four or more consecutive years.[37] While states are encouraged to establish unitary accountability systems affecting all public schools, *the Title I-A statute requires them only to take corrective actions regarding schools and LEAs that receive Title I-A funds, not all schools and LEAs*. Thus, the corrective actions described below need be taken with respect to a large majority of LEAs[38] and approximately 58% of all public schools.

## School Improvement and Corrective Actions

Title I-A *schools* that fail to meet AYP for two or more consecutive years must be identified as needing improvement. At this and every subsequent stage of the program improvement and corrective action process, the LEA and/or SEA are to arrange for technical assistance, "based on scientifically based research" [Section 1116(b)(4)(c)], to be provided to the school. Funding for this purpose is provided in part through the authorization for states to reserve shares of their total Part A grants (0.5% for FY2001, 2% for FY2002-FY2003 and 4% thereafter), as well as a separate authorization for additional funds ($500 million for FY2002 and "such sums as may be necessary" for subsequent years),[39] for school improvement activities. Parents of pupils in these schools are to be notified of the school's identification as needing improvement. Any school identified as needing improvement must spend at least 10% of its Title I-A grant for staff professional development activities.

In addition, pupils attending schools that have failed to meet AYP standards for two or more consecutive years must be provided with options to attend other public schools that meet AYP standards.[40] Public school choice must be offered to such pupils by the next school year unless prohibited by state law. LEAs are generally required only to offer public school choice options within the same LEA; however, if all public schools in the LEA to which a child might transfer have been identified as needing improvement, then LEAs "shall, to the extent practicable," establish cooperative agreements with other LEAs to offer expanded public school choice options.[41]

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[37] An analogous, separate series of provisions applies to schools operated by the Bureau of Indian Affairs (BIA).

[38] Over 90% of all LEAs receive Title I-A grants. In general, those that do not participate have very small enrollments and/or exceptionally low school-age child poverty rates, as a result of which they do not meet the minimum thresholds for Basic Grants of 10 school-age children from poor families and a 2% school-age child poverty rate.

[39] No funds have been appropriated under this authority for FY2002-FY2005.

[40] ED published a "policy letter" on these provisions on June 14, 2002; see [http://www.ed.gov/policy/elsec/guid/secletter/020614.html].

[41] This is an extension and expansion of provisions contained in FY2000 and FY2001 (continued...)

Transportation must be provided to pupils utilizing public school choice options. Children who transfer to other schools under this authority are to be allowed to remain in the school to which they transfer until they complete the highest grade in that school; however, the LEA is no longer required to provide transportation services if the originating school meets AYP standards for two consecutive years.

If a Title I-A school fails to meet AYP standards for *three or more consecutive years*, pupils from low-income families in the school must be offered the opportunity to receive instruction from a supplemental services provider of their choice,[42] in addition to continuing to offer public school choice options. States are to identify and provide lists of approved providers of such supplemental instructional services — which might include public or private schools, LEAs, commercial firms, or other entities or organizations — and monitor the quality of the services they provide. The amount spent per child for supplemental services is to be the lesser of the actual cost of the services or the LEA's Title I-A grant per (poor) child counted in the national allocation formula (approximately $1,400 on average for FY2005).[43]

LEAs are to use funds equal to as much as 20%[44] of their Title I-A funds for transportation of pupils exercising public school choice options plus supplemental services costs (combined), although the grant to any particular school identified for improvement, corrective action, or restructuring may not be reduced by more than 15%. *LEAs* are also authorized to use any funds that might be available under Innovative Programs (ESEA Title V-A) to pay additional supplemental services costs; *states* are authorized to use funds they reserve for program improvement or administration under Title I-A, or funds available to them under Title V-A, to pay additional supplemental services costs. If insufficient funds are available to pay the

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[41] (...continued)
appropriation acts for the Department of Education. Under that legislation, LEAs were required to offer to pupils attending public schools in need of improvement the option to enroll in different public schools within the same LEA (unless it was not possible, consistent with state and local law, to offer such choice options to all eligible pupils). The FY2001 legislation exempted all LEAs in several small-population states (those receiving a minimum state grant under either the Basic or Concentration Grant formulas) from this requirement.

[42] For a more detailed discussion of issues related to this provision, see CRS Report RL31329, *Supplemental Educational Services for Children From Low-Income Families*, by David Smole. Policy guidance on the supplemental services requirement was published by ED on Aug. 22, 2002; see [http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf].

[43] A limited number of states and LEAs have been allowed by ED to reverse the order for introducing public school choice and supplemental services — i.e., to offer supplemental services after two years of failing to meet AYP standards, and school choice after three years.

[44] More specifically, LEAs are to use an amount equal to 5% of their Title I-A grant (unless less is needed) for public school choice transportation costs, 5% (unless less is needed) for supplemental services, and up to an additional 10% for either. These funds may be taken from the LEA's Title I-A grant, or from other federal, state, or local sources. These are minimum amounts; if necessary to meet demands for public school choice and supplemental services, LEAs may use funds above these levels if they choose to do so and if needed. Under program regulations, costs of administering school choice and supplemental services programs are not to be counted in the application of these caps.

costs of supplemental services for all eligible pupils whose families wish to exercise this option, LEAs may limit services to the lowest-achieving eligible pupils. The requirement to provide supplemental services may be waived if none of the approved providers offers such services in or near a LEA.

One or more of a specified series of additional "corrective actions" must be taken with respect to Title I-A schools that fail to meet AYP for *four consecutive years*. These "corrective actions" include replacing relevant school staff; implementing a new curriculum; decreasing management authority at the school level; appointing an outside expert to advise the school; extending the school day or year; or changing the internal organizational structure of the school. Which of these specific actions is to be taken is left to state and/or LEA discretion.

Title I-A schools that fail to meet AYP standards for *five consecutive years* must be "restructured." Such restructuring must consist of one or more of the following "alternative governance" actions: reopening as a charter school; replacing all or most school staff; state takeover of school operations (if permitted under state law); or other "major restructuring" of school governance. In September 2005, the Education Commission of the States (ECS) published a report on actions taken in the 13 states where one or more schools reached the final stage of school improvement (year five) in 2004-05.[45] In general, the authors of the ECS study concluded that (1) SEAs vary widely in their involvement in the restructuring process; (2) in most cases, the restructuring options applied to affected schools have been relatively mild to "moderate" (e.g., changing curriculum, implementing a school reform strategy, or altering the school's management structure) rather than "strong" (e.g., reconstituting or closing the school, or converting it to a charter school); and (3) political difficulties have arisen in cases where stronger forms of restructuring have been applied. In several states, some restructuring options could not be implemented because they are not authorized under state law (e.g., charter schools).

## LEA Improvement and Corrective Actions

Procedures analogous to those for schools are to apply to ***LEAs*** that receive Title I-A grants and fail to meet AYP requirements. As with schools, while states are encouraged to implement unitary accountability systems applicable to all pupils and schools, states may base decisions regarding LEA status and corrective actions only on the Title I-A schools in each LEA (and, in the case of targeted assistance schools, only on the individual pupils served by Title I-A). Further, as noted earlier, identification as needing improvement and corrective actions need be taken only with respect to LEAs that receive Title I-A grants.

LEAs that fail to meet state AYP standards for *two or more consecutive years* are to be identified as *needing improvement*. Technical assistance, "based on scientifically based research" [Section 1116(c)(9)(B), is to be provided to the LEA by the state educational agency (SEA)]; and parents of pupils served by the LEA are to be notified that it has been identified as needing improvement.

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[45] See [http://www.ecs.org/clearinghouse/64/28/6428.pdf].

SEAs are to take *corrective actions* with respect to LEAs that fail to meet state AYP standards for *four or more consecutive years*. Such corrective action is to include at least one of the following (at SEA discretion): reducing administrative funds or deferring program funds; implementing a new curriculum; replacing relevant LEA staff; removing specific schools from the jurisdiction of the LEA; appointing a receiver or trustee to administer the LEA; abolishing or restructuring the LEA; authorizing pupils to transfer to higher-performing schools in another LEA (and providing transportation) in conjunction with at least one of the previous actions.

Finally, ED is required to establish a peer review process to evaluate whether ***states overall*** have met their statewide AYP goals. States that fail to meet their goals are to be listed in an annual report to Congress, and technical assistance is to be provided to states that fail to meet their goals for two or more consecutive years. Provisions for more extensive performance bonuses and sanctions for states, which were contained in the original House- and Senate-passed versions of the NCLBA, were not included in the conference version that was signed into law.

## Transition Provisions

The corrective actions outlined above are to be applied not only to schools and LEAs newly identified as having failed to meet AYP standards for two or more consecutive years, but also to schools and LEAs that have been so identified in previous years and have continued to fail to meet AYP since being identified.[46] The actions taken with respect to such schools or LEAs is to be based on the number of consecutive years during which they have failed to meet AYP standards, as outlined above.

Numerous schools, and a much smaller number of LEAs, have failed to meet state AYP standards (based primarily on transitional assessments and pre-NCLBA AYP provisions) consistently since initial implementation of the 1994 IASA in the 1995-1996 school year. In most cases, these schools faced no substantial corrective actions previously, in part because the corrective action provisions of the 1994 version of the ESEA were much less specific than those of the NCLBA, and in particular because the IASA provided that most forms of corrective action were not to be implemented before states adopted final standards and assessments meeting all

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[46] Under the ESEA statute and regulations, schools or LEAs that had been identified, *as of the date of enactment of the NCLBA* (Jan. 8, 2002), for school/LEA improvement or corrective actions were to be identified for, and subjected to, school/LEA improvement and corrective actions under the NCLBA during the 2002-2003 school year. However, according to ED, the statutory provisions are ambiguous regarding the particular group of schools or LEAs that failed to meet AYP requirements for a second consecutive year specifically on the basis of assessment results for the 2001-2002 school year. While some observers disagree with this interpretation, program regulations [34 C.F.R. § 200.32(e)] gave SEAs and LEAs the option whether or not to identify such schools or LEAs for improvement effective in 2002-2003 (although they must be so identified if they fail to meet AYP on the basis of assessment results for 2001-2002 and 2002-2003). The regulations provided comparable flexibility regarding whether SEAs and LEAs may remove from school/LEA improvement status any schools or LEAs that met AYP standards for a second consecutive year on the basis of assessment results for 2001-2002.

of the requirements of the 1994 IASA, which no state had done before the 2000-2001 school year. The only exception to this pattern were provisions in FY2000 and FY2001 appropriations acts that required public school choice options to be provided to pupils attending certain Title I-A schools that failed to meet AYP standards, but those provisions were more narrow in scope and application than those of the NCLBA. As was discussed earlier in this report, schools and LEAs have in past years been identified on the basis of widely varying "transitional" AYP standards developed by the states, raising a number of issues. Any school or LEA that has been identified for improvement or corrective action may be removed from this status if it meets state AYP standards for two consecutive years.

Data on the use of the school choice and supplemental services in most states during the 2003-2004 school year were recently published by *Education Week*.[47] These data were reported by the states to ED, and obtained by *Education Week* through a Freedom of Information Act request. Data are provided for 45 states plus the District of Columbia with respect to public school choice, and 46 states plus the District of Columbia with respect to supplemental services. They indicate a low rate of utilization of the supplemental services option by eligible pupils, and a very low rate of utilization of the school choice option by the much larger group of pupils eligible for that. Nationwide, the data indicate that 11.3% of eligible pupils received supplemental services in 2003-2004, with individual state rates ranging from zero for seven states (although four of these states reported that they had no eligible pupils in that year) to a high of 49.1% for Utah. Only 1.0% of eligible pupils were reported as taking advantage of school choice options under the NCLBA, with this rate ranging from zero in seven states (three of which reported that they had no pupils eligible to transfer that year) to a maximum of 94.4% for Alabama. It is unclear whether such low participation rates in most states, if continuing into the present, result from delayed implementation of these provisions by states and LEAs, low levels of parental interest, inadequate dissemination of information about the options to parents, limited availability of alternative public schools or tutorial services, or other factors.

## Issues

A number of issues have been raised with respect to these corrective action provisions of the NCLBA, including the following:

- Might relatively large percentages of public schools participating in Title I-A be identified for corrective actions, with the result that the ability of states and LEAs to provide substantial technical assistance, school choice and supplemental services options, and other resources necessary for effective corrective actions for all of these schools, would be seriously limited?
- Is the goal of having all pupils at the proficient or advanced level of achievement by 2013-2014 realistic? Might it result in increasing percentages of schools and LEAs failing to meet AYP in future years, or might it have the opposite effect of encouraging states to

[47] See [http://www.edweek.org/media/27admin.pdf].

weaken their performance standards? Might this goal lead states to lower their standards for what constitutes proficient or advanced levels of achievement, or to develop strategies to limit identification of schools or LEAs for improvement through extensive use of high minimum group sizes, narrow confidence intervals, and the like? Or might such a highly ambitious goal provide the stimulus for major improvements in the quality and equity of public education services?

- Will a meaningful range of public school choice options be available to pupils in LEAs that are small and/or sparsely populated, or in highly disadvantaged LEAs where a large percentage of public schools may fail to meet state AYP standards? Due to these and other limiting factors, might relatively few eligible families actually exercise the school choice and supplemental services options offered under the NCLBA?
- What sorts of entities, organizations, firms, or institutions will be available to provide supplemental services to eligible pupils? Will they be willing to provide these services for the level of funding made available under the NCLBA provisions? How likely is it that supplemental services provided by third parties will be more effective than conventional public school instruction?
- Will states and LEAs implement the NCLBA provisions for corrective actions and restructuring for schools and LEAs in a timely and effective manner?
- What might be the incentive effect of the very limited sanctions, and lack of performance bonuses, for states overall (as opposed to individual schools or LEAs)?

## Allocation Formula Provisions

ESEA Title I-A has four separate formulas — Basic, Concentration, Targeted, and Education Finance Incentive Grants (EFIG) — for the allocation of funds to states and LEAs. However, once these funds reach LEAs, they are no longer treated separately; they are combined and used for the same program purposes. The primary rationale for using four different formulas to allocate a share of the funds for a single program is that the formulas have distinct allocation patterns — providing varying shares of allocated funds to different types of localities. In addition, some of the formulas contain elements that are deemed to have important incentive effects or to be significant symbolically — such as the equity and effort factors in the EFIG formula — in addition to their impact on allocation patterns.

In the discussion below, we begin with a general discussion of the characteristics of the Title I-A allocation formulas, in order to provide context for the subsequent review of the Title I-A formula amendments in the NCLBA.

## General Characteristics of the Title I-A Allocation Formulas

There are several *common elements* of the four Title I-A allocation formulas, as amended by the NCLBA:[48]

- Each of them has a *population factor*, which is the same in each of the four formulas — children aged 5-17: (1) in poor families, according to the latest available data that are satisfactory to the Secretary of Education, and applying the Census Bureau's standard poverty income thresholds (approximately 95.5% of all formula children for FY2004);[49] (2) in certain institutions for neglected or delinquent children and youth or in certain foster homes (4.4% of all formula children); and (3) in families receiving Temporary Assistance for Needy Families (TANF) payments above the poverty income level for a family of four (only about 0.1% of all formula children).
- Under each of these formulas, this population factor is multiplied by an *expenditure factor*, which is based on state average expenditures per pupil (AEPP), subject to minimum and maximum levels.[50] Further, as is discussed below, special expenditure factor provisions apply to Puerto Rico. Due to the expenditure factor, LEAs in high-spending states receive up to 50% more per child counted in the Title I-A formulas than LEAs in low-spending states. The rationale for this factor is that it reflects differences in the cost of providing public education, and provides an incentive to increase spending. However, it is a spending, not a cost, index; it reflects ability and willingness to spend on public education as well as cost differences; it is crude (affecting all LEAs in a state equally); and the incentive it provides to increase state and local spending for public education is relatively small.
- Each of the formulas has a *hold-harmless* provision — a minimum annual grant level for LEAs that is calculated as a percentage of the previous year's grant under each formula.[51]

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[48] This discussion of formulas is based on their current provisions, incorporating where relevant amendments under the NCLBA, which are discussed in greater detail in the succeeding section of this report.

[49] These data are from the Census Bureau's Small Area Income and Population Estimates (SAIPE), which provides estimates of poor and total children aged 5-17 for LEAs, counties, and states. These intercensal estimates are updated every year. As of this writing, the latest SAIPE data are for income year 2003; these estimates were published in Nov. 2005, and will presumably be used for FY2006 Title I-A allocations.

[50] For all except the EFIG formula, the minimum is 80% and the maximum is 120% of the national average. For the EFIG formula, the minimum and maximum are 85% and 115%. These amounts are further multiplied by a "federal share" of 40% to determine maximum authorized grants, subject to state minimum, LEA hold-harmless, and other provisions.

[51] The hold-harmless rate under each formula is now 85%-95% of the previous year grant, depending on the LEA's school-age child poverty rate (children counted for Title I-A grants

(continued...)

- The four Title I-A formulas include a *state minimum grant* level as well — in general, no state is to receive less than approximately 0.25% of allocated funds up to the FY2001 appropriation level, and approximately 0.35% of funds above that level.[52]

- Finally, each formula has *a minimum eligibility threshold* for LEAs — a minimum number of poor and other formula children, and/or a minimum school-age child poverty rate,[53] in order to be eligible for grants (even hold-harmless amounts) in most cases. The LEA minimum eligibility threshold varies by formula — It is 10 formula children *and* a school-age child poverty rate of 2% for Basic Grants, a 5% school-age child poverty rate for the Targeted and EFIG formulas, and 6,500 formula children *or* a 15% school-age child poverty rate for Concentration Grants.

In addition to these common elements, two of the Title I-A formulas have *unique features*:

- For the *Targeted Grant* formula, as well as the *intra-state* allocation of funds under the *EFIG* formula, the poor and other children counted in the formula are assigned weights based on each LEA's school-age child poverty rate *and* number of poor school-age children. As a result, an LEA would receive higher grants per child counted in the formula, the higher its poverty rate or number. Under the Targeted Grant formula, the weighting factors are applied in the same manner nationwide — Poor and other formula children in LEAs with the highest poverty rates have a weight of up to four, and

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[51] (...continued)
as a percentage of total school-age population). If the LEA poverty rate is 30% or above, the hold-harmless rate is 95%; if the poverty rate is 15%-30%, the hold-harmless rate is 90%; and if the poverty rate is less than 15%, the hold-harmless rate is 85%. Note that with a partial exception for certain LEAs under the Concentration Grant formula, hold-harmless rates are applicable only to LEAs meeting the eligibility thresholds for each formula.

[52] More specifically, the minimum is *up to* 0.25% for Basic and Concentration Grants at funding levels up to the FY2001 appropriation for those formulas, and *up to* 0.35% for Basic and Concentration Grants above the FY2001 level plus all funds allocated under the Targeted and EFIG formulas. In addition, these state minimums are capped in all cases; under the Basic, Targeted, and EFIG formulas, a state may not, as a result of the state minimum provision, receive more than the *average* of — (1) 0.25% of the total FY2001 amount for state grants plus 0.35% of the amount above this, and (2) 150% of the national average grant per formula child, multiplied by the number of formula children in the state. Under the Concentration Grant formula, a state may not, as a result of the state minimum provision, receive more than the *average* of — (1) 0.25% of the total FY2001 amount for state grants plus 0.35% of the amount above this, and (2) the greater of — (i) 150% of the national average grant per formula child, multiplied by the number of formula children in the state, or (ii) $340,000.

[53] Throughout this report, this term refers to the number of poor and other children counted in the Title I-A allocation formulas, expressed as a percentage of the total school-age population for the LEA.

those in LEAs with the highest numbers of such children have a weight of up to three, compared to a weight of one for formula in the lowest rate and number ranges. In contrast, under the EFIG formula, the degree of targeting (in terms of the ratio of the highest to the lowest weight) varies depending on the value of each state's equity factor (three different weighting scales are used for states with equity factors within specified ranges). Under both formulas, the higher of its two weighted child counts (based on numbers and percentages) is used in calculating grants for each LEA.

- The *EFIG* formula has two unique factors — an *equity factor* and an *effort factor* — in addition to the population and expenditure factors.

  The *equity factor* is based upon a measure of the average disparity in expenditures per pupil among the LEAs of a state called the *coefficient of variation* (CV), which is expressed as a percentage of the state average expenditure per pupil.[54] In calculating grants, the equity factor is subtracted from 1.30. As a result, the lower a state's expenditure disparities among its LEAs, the lower is its CV, and the higher is its multiplier.

  The *effort factor* is based on a comparison of state expenditures per pupil for public elementary and secondary education with state personal income per capita. This ratio for each state is further compared to the national average ratio, resulting in an index number that is greater than 1.0 for states where the ratio of expenditures per pupil for public elementary and secondary education to personal income per capita is greater than average for the Nation as a whole, and below 1.0 for states where the ratio is less than average for the Nation as a whole. Narrow *bounds of 0.95 and 1.05* are placed on the resulting multiplier, so that its effects on state grants is limited.

Under the Basic, Concentration, and Targeted Grant formulas, maximum grants are calculated by multiplying the population factor by the expenditure factor for all LEAs meeting the minimum eligibility thresholds. The EFIG formula differs from the others both in terms of its use of unique formula factors and in being a two-stage formula. First, state total grants are calculated by multiplying the population factor by the expenditure factor, by 1.3 minus the equity factor, and by the effort factor. Then, as is described below, these state total grants are allocated to LEAs on the basis of a weighted population factor. Under all four formulas, maximum amounts are reduced proportionally to the aggregate level of available funds, subject to LEA hold-harmless and state minimum grant provisions.

## Title I-A Allocation Formula Amendments Under the NCLBA

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[54] In the CV calculations for this formula, an extra weight (1.4 vs. 1.0) is applied to estimated counts of children from poor families. Limited purpose LEAs, such as those providing only vocational education, are excluded from the calculations, as are small LEAs with enrollment below 200 pupils. There are special provisions for states meeting the expenditure disparity standard established in regulations for the Impact Aid program (ESEA Title VIII), as well as the single-LEA areas of Hawaii, Puerto Rico, and D.C.

The following section of this report focuses specifically on the aspects of the Title I-A formulas that were revised by the NCLBA. Overall, the NCLBA made a number of relatively modest changes to the Basic, Concentration, and Targeted Grant formulas, while substantially amending the EFIG formula. In addition, appropriations legislation for FY2002 and subsequent fiscal years has provided funds for each of the four formulas; in previous years only the Basic and Concentration Grant formulas were funded. This was consistent with the NCLBA provision that, in the allocation of Title I-A funds, an amount equal to the FY2001 appropriation is to be allocated under the Basic and Concentration Grant formulas, and any increases above the FY2001 level are to be allocated under the Targeted Grant or the EFIG formula.[55]

**EFIG Formula Amendments.** Major changes were made to the EFIG formula by the NCLBA.[56] First, while it retained its two-stage structure — one mechanism is used to allocate funds to states, while a second is used to suballocate state total grants to LEAs — the revised EFIG formula has its own, distinct substate allocation formula. Previously, state total EFIG grants would have simply been allocated to LEAs in proportion to total grants under the other three (Basic, Concentration, and Targeted Grant) formulas. Under the NCLBA, EFIG grants are to be allocated within states under a variation of the Targeted Grant formula, but with the degree of targeting — the ratio of the weight applied to formula children in the highest poverty ranges compared to the weight for such children in the lowest poverty ranges — varying in three stages. The stage, or degree of targeting, used for substate allocation varies depending on each state's equity factor — the higher the equity factor (and therefore the greater the disparities in expenditures per pupil among a state's LEAs), the greater will be the degree of targeting on high-poverty LEAs in the intrastate allocation of EFIG funds.

Second, in the allocation of funds to states, the population factor is changed from total school-age children to the same count of poor and other children used to calculate Basic, Concentration, and Targeted Grants. This change in the most fundamental formula factor results in a pattern of allocations under this formula that is substantially more similar to those of the other three formulas than would have been the case in the past (when the population factor was *total* school-age children), despite the other, distinctive factors in the EFIG formula.

Third, a variant of the state expenditure factor used in the other three Part A formulas is added to the EFIG formula; previously, this was the only Title I-A formula without an expenditure factor. For the EFIG formula, the floor and ceiling bounds on the expenditure factor are marginally narrowed — they are 85% and 115% of the national average, rather than 80% and 120% as under the other three formulas.

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[55] In practice, appropriations for FY2003-FY2005 for Basic Grants have been slightly below the FY2001 level, due to the application of small "across the board" funding reductions.

[56] For additional details, see CRS Report RL31256, *Education Finance Incentive Grants Under ESEA Title I-A*, by David P. Smole.

Finally, the equity and effort factors used in the allocation of EFIG grants to states remain essentially unchanged from previous law.[57] As noted above, each state's equity factor will also determine which of three variations of the Targeted Grant formula will be used for intrastate allocation of EFIG funds. The lowest degree of targeting, which is the same as the nationwide targeting under the Targeted Grant formula, will apply to states with an equity factor below .10 (14 states plus the District of Columbia and Puerto Rico for FY2003). A middle range of intrastate targeting, which is 50% greater than under the Targeted Grant formula (in terms of the ratio of child weights for the highest-poverty LEAs compared to the lowest poverty LEAs), will apply in the majority of states (35) with an equity factor equal to or above .10 and below .20. Finally, the greatest degree of targeting, twice as great as under the Targeted Grant formula, will apply in states with an equity factor of .20 or above (one state).

**Formula Revisions for Puerto Rico.** The relative share of funds allocated to *Puerto Rico* will increase over time as a result of two NCLBA amendments to the Title I-A formulas. First, a provision that has reduced the expenditure factor for Puerto Rico below the minimum applicable to the 50 states plus the District of Columbia will be gradually eliminated. Previously, for Puerto Rico only, the minimum expenditure factor for each of the four allocation formulas was further multiplied by the ratio of the Puerto Rico average expenditure per pupil divided by the lowest average for any state. For FY2001, the last pre-NCLBA year, this ratio was approximately 75.0%; as a result, the grant to Puerto Rico was approximately one-third less than the amount it would have received if it were treated fully in the same manner as the 50 states and the District of Columbia. The NCLBA places a floor on this ratio, which was 77.5% for FY2002, 80.0% for FY2003, 82.5% for FY2004, etc., in steps until it reaches 100.0% — i.e., the same minimum expenditure factor as for a state — for FY2007 and beyond. This increase is not supposed to take effect in any year if it would result in any state or the District of Columbia receiving total Title I-A grants below the amount it received for the preceding year.

Second, a cap on the aggregate weight applied to the population factor for Puerto Rico (only) under the Targeted Grant formula is marginally raised (from 1.72 to 1.82). This provides that the share of Targeted Grants allocated to Puerto Rico will be approximately equal to its share of grants under the Basic and Concentration Grant formulas for FY2001. While it provides an increase for Puerto Rico compared to the previous Targeted Grant cap, the remaining cap still reduces grants below the level that would obtain if there were no cap at all (i.e., if Puerto Rico were treated in the same manner as the 50 states and the District of Columbia), since Puerto Rico's

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[57] A few minor revisions were made to the provisions for calculating state equity factors. For example, under the 1994 IASA, for states with separate elementary or secondary (as opposed to unified K-12) LEAs, a special rule provided for separate calculation of the CV for each sector of LEAs, with these figures to be combined in proportion to relative enrollment in each sector to establish a statewide CV; under the NCLBA, data from elementary, secondary, and unified LEAs are combined at all stages of calculating CVs and the equity factor. In addition, the 1994 version contained authority for the Secretary of Education to revise the equity factor to adjust for regional variation in costs or the differing costs of meeting the needs of LEP pupils or those with disabilities; this authority was deleted from the NCLBA.

high number and percentage of poor school-age children would translate into a significantly higher weighting factor if not capped.

Largely as a result of these provisions, the Title I-A grants to Puerto Rico have risen substantially in recent years, from $274.4 million for FY2001, the last pre-NCLBA year, to $333.3 million for FY2002, $402.2 million for FY2003, and $449.2 million for FY2004.

**Other NCLBA Formula Amendments.** The NCLBA applies a *hold-harmless* rate of 85%-95% of previous year grants (the higher a LEA's child poverty rate, the higher is the hold-harmless percentage) to each of the four allocation formulas. Previously, this rate applied only to Basic and Targeted Grants — there was no hold harmless in the authorizing statute for Concentration or EFIG Grants. For Concentration Grants (only), the hold-harmless provision applies to *all* LEAs that received grants in the preceding year, not just those that currently meet the eligibility criteria for this formula,[58] except that if a LEA fails to meet such criteria for four successive years, then the hold harmless would no longer apply.[59]

*State minimum* grants are increased from up to 0.25% under current law to up to 0.35%, but only with respect to funds above the FY2001 level (see footnote 42). P.L. 107-110 also provides for the use of population data on school-age children in poor families that is updated annually, rather than every second year previously. As is discussed later in this report, the Census Bureau began to publish annual updates in November 2003. Further, the NCLBA revised the thresholds for application of varying weights to poor and other formula children in different poverty rate and number ranges under the Targeted and EFIG (intrastate) formulas, to reflect the latest available population estimates as of the time the NCLBA was enacted.[60]

## Targeting on High-Poverty LEAs Under the Revised Title I-A Formulas

For the last several years, the primary issue regarding the Title I-A allocation formulas has been the extent to which funds are targeted on high-poverty LEAs. Over 90% of the Nation's LEAs receive grants under ESEA Title I-A, largely because the eligibility thresholds for three of the four allocation formulas are

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[58] It has generally been ED's policy to apply hold-harmless rates only to LEAs or other grantees that meet basic program eligibility criteria.

[59] A primary rationale for this special provision limited to Concentration Grants is that several LEAs were eligible for, and received, Concentration Grants in years preceding FY1999, when these were calculated initially on the basis of counties, not LEAs. These LEAs continued to receive grants for FY1999 through FY2001 due to special hold-harmless provisions in annual appropriations legislation. For FY2002 and future grants, the NCLBA hold-harmless provision applies to Concentration Grants for these LEAs.

[60] These ranges are structured so that one-fifth of the Nation's formula children are in LEAs in each quintile on both the number and poverty rate scales. The previous ranges were based on 1990 census data, while the NCLBA ranges are based on income year 1997 SAIPE estimates.

relatively low.[61] In general, all LEAs receive Title I-A grants except those that have extraordinarily low school-age poverty rates and/or have extremely few pupils.[62] A few LEAs (including certain charter schools that are treated as separate LEAs under state law) are eligible for relatively small Title I-A grants, but do not choose to participate in the program, at least in part because the administrative responsibilities accompanying participation are perceived to exceed the value of the prospective grants.

**Table 1**, below, presents the distribution of Title I-A grants[63] among LEAs grouped by poverty rate quintile.[64] Each quintile contains LEAs with one-fifth of the Nation's school-age children in poor families, based on the Census Bureau population estimates used in calculating FY2005 grants (those for income year 2002). **Table 1** lists the percentage share (of the national total) of Title I-A grants that are allocated to LEAs in each poverty quintile. These data are provided separately for each of the four Title I-A allocation formulas, as well as for total grants for FY2005.

As illustrated in **Table 1**, the share of Title I-A funds allocated to LEAs in various poverty rate ranges varies significantly among the four allocation formulas. For Basic Grants, the share is similar for each quintile of LEAs, varying only within the narrow range of 19.2%-21.2%.

For Concentration Grants, the share of funds allocated to LEAs in each poverty rate range is again similar, with the exception of the lowest-poverty quintile, which receives a much lower share (6.7% of total grants vs. 21.1%-24.4% for the other four quintiles). This reflects the eligibility threshold for Concentration Grants (formula child rate of at least 15% or 6,500 or more formula children). Overall, the primary pattern for both Basic and Concentration Grants is relatively constant shares of funds for all LEAs meeting minimum eligibility thresholds. In other words, grants per poor and other child counted in the Title I-A allocation formulas are approximately the same for all LEAs meeting the initial eligibility criteria for Basic and Concentration Grants, whether those LEAs have high, average, or somewhat below average school-age child poverty rates.

The pattern of distribution of grants under the Targeted and EFIG formulas is somewhat different. Under each of these formulas, the share of total grants increases

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[61] In order to be eligible for Title I-A Basic Grants, LEAs must have at least 10 children counted in the formulas for grants to LEAs *and* a school-age child poverty rate of at least 2%. For Targeted and Education Finance Incentive Grants, the LEA eligibility criteria are a 5% school-age child poverty rate *and* 10 formula children. For Concentration Grants, LEAs must have a 15% school-age child poverty rate *or* 6,500 formula children.

[62] According to program data for FY2001, approximately two-thirds of the LEAs receiving no Title I-A grants have a total number of school-age children of less than 100.

[63] Except for analyses of FY2001 grants, which were based on only the Basic and Concentration Grant formulas under previous law, all of the analyses in this report are based on FY2002-FY2005 grants, using the Title I-A allocation formulas as modified by the No Child Left Behind Act, P.L. 107-110.

[64] For the LEA-level analyses in this report, "poverty rates" are based on total children counted in the Title I-A allocation formulas divided by total school-age population.

steadily from the lowest to the second-highest poverty rate quintile, then declines marginally between the 4th and 5th quintile. While this partly reflects the slightly higher eligibility threshold for these formulas in comparison to Basic Grants (5% vs. 2% formula child rate), it primarily results from the structure of these formulas. Under both the Targeted and EFIG (within-state) formulas, the grant per formula child continuously increases as either the school-age child poverty rate, or the total number of children counted in the Title I-A formulas, increases. The share of funds going to LEAs in the 4th quintile under each of these formulas is slightly higher than the share going to LEAs with the highest poverty rates (5th quintile) primarily because of the strong influence of high numbers of formula children on the allocation of funds,[65] as well as the influence of the expenditure factor.[66]

[65] With the exception of Puerto Rico, LEAs with the largest numbers of school-age children in poor families tend to have high, but not among the highest, school-age child poverty rates.

[66] LEAs with the highest school-age child poverty rates are frequently located in states with relatively low expenditure factors.

## Table 1. Share of ESEA Title I-A Funds Allocated to LEAs, by LEA Poverty Rate Quintile, FY2005

| Poverty rate quintile | | | | | | |
|---|---|---|---|---|---|---|
| | **1 (Poverty rates of 0 - 13.07%)** | **2 (Poverty rates of 13.07 - 18.81%)** | **3 (Poverty rates of 18.81 - 25.00%)** | **4 (Poverty rates of 25.00 - 31.99%)** | **5 (Poverty rates Above 31.99%)** | **All LEAs** |
| **Percentage share of total grants** | | | | | | |
| Total Title I-A Grants, FY2005 | 17.0% | 18.7% | 19.9% | 22.6% | 21.8% | 100.0% |
| Basic Grants (54% of FY2005 appropriations) | 21.2% | 19.2% | 19.6% | 20.2% | 19.8% | 100.0% |
| Concentration Grants (11% of FY2005 appropriations) | 6.7% | 21.1% | 24.1% | 24.4% | 23.7% | 100.0% |
| Targeted Grants (17% of FY2005 appropriations) | 13.7% | 17.1% | 19.4% | 25.0% | 24.8% | 100.0% |
| Education Finance Incentive Grants (17% of FY2005 appropriations) | 13.6% | 17.0% | 19.0% | 26.4% | 24.0% | 100.0% |

Table reads (for example): The quintile of LEAs with the highest school-age child poverty rates will receive 21.8% of total FY2005 ESEA Title I-A grants, 19.8% of all funds allocated as Basic Grants for FY2005, 23.7% of Concentration Grants, 24.8% of Targeted Grants, and 24.0% of Education Finance Incentive Grants.

## FY2002-FY2007 Funding for the Title I-A Allocation Formulas

**FY2002** appropriations legislation for ED, P.L. 107-116, provided a total of $10.35 billion for Title I-A. This legislation provided initial funding of $1.018 billion for the Targeted Grant formula and $793 million for the EFIG formula, both of which were first authorized in 1994 but not previously implemented or funded. In contrast to appropriations acts of several preceding years, P.L. 107-116 had no extraordinary hold-harmless provisions (i.e., none that go beyond the hold- harmless provisions of the authorizing statute).

For **FY2003**, the Bush Administration requested a total of $11.35 billion for Title I-A grants to LEAs, an increase of $1.0 billion (9.7%). All of the increased funds would have been allocated as Targeted Grants; the amounts allocated under the other three formulas would have remained the same as for FY2002. Final FY2003 appropriations legislation for ED (P.L. 108-7) provided a total of $11,684,311,000 for Title I-A. The increase over FY2002 was split much more evenly between the Targeted ($1,670,239,000) and EFIG ($1,541,759,000) formulas than requested by the Administration. Most FY2003 appropriations under P.L. 108-7 were affected by an "across-the-board" reduction provision; the amounts discussed herein reflect these reductions.[67]

For **FY2004**, the Administration requested a total of $12.35 billion for Title I-A, an increase of $665.7 million (5.7%) over FY2003. As in its request for FY2003, the Administration proposed that all funds above the FY2002 level be allocated as Targeted Grants, which would have resulted in a sharp reduction for EFIG grants from $1,541,759,000 (the FY2003 appropriation) to $793,499,000 (same as the FY2002 level).

Different versions of stand-alone FY2004 L-HHS-ED Appropriations bills were passed by the House and the Senate (H.R. 2660). The total FY2004 amount for ESEA Title I-A under each version of H.R. 2660 would have been the same as under the Administration request — $12.35 billion. The primary difference between the bills was in the distribution of funds above the FY2002 level under the Targeted versus the EFIG formula. As under the Administration request, the House bill would have allocated all funds above FY2002 under the Targeted Grant formula, reducing EFIG grants by almost one-half. In contrast, the Senate bill would have allocated the FY2003 amount under Targeted Grants, and distributed all increases over FY2003 under the EFIG formula. The House bill would have returned Basic Grants to the FY2002 level, while the Senate bill would have funded Basic Grants at the slightly reduced level of FY2003.

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[67] In addition to FY2003 Title I-A appropriations provided under P.L. 108-7, P.L. 108-83, the Emergency Supplemental Appropriations Act, 2003, provided for the transfer of an additional $4,353,368 in unobligated FY2003 funds from a variety of ED programs to Title I-A. These funds were allocated to the three states for which the initial FY2003 allocations under P.L. 108-7 were less than their FY2002 allocation (Iowa, Maryland, and Michigan); the amount transferred brings the FY2003 allocation for each of these states up to its FY2002 level.

In addition, the Senate version of H.R. 2660 would, in effect, have prohibited ED from updating the population data to be used in allocating FY2004 grants, requiring the Department to use the best available data *as of July 1, 2003*, to allocate FY2004 grants. Beginning with income year 2000 estimates released in November 2003, the Census Bureau has shifted from its previous schedule of updating the estimated number of school-age children in poor families in LEAs every second year, to a new schedule of *annual* updates for the LEA estimates. Thus, the Senate bill's provision would have prevented the use of the latest (at that time, income year 2000) population estimates to allocate FY2004 funds.

The *conference* version of FY2004 appropriations legislation for ED, H.R. 2673, the Consolidated Appropriations Act, 2004 (P.L. 108-199), provided a total of $12,342,309,000 for Title I-A (after the application of a small across-the-board reduction), marginally less than the House and Senate versions of H.R. 2660. The amount for Basic Grants was slightly below the FY2003 level, while the Concentration Grants total was the same as for FY2003. Under P.L. 108-199, the remaining amounts for Title I-A were split equally between Targeted and EFIG grants. The final legislation did not contain the Senate bill's provision regarding use of updated population data, allowing a transition to annually updated population estimates to occur beginning with FY2004 grants.

For **FY2005**, the Administration proposed a $1 billion (8.1%) increase over the FY2004 level for ESEA Title I-A. As in its budget requests for FY2003 and 2004, the Administration proposed that all funds above the FY2002 level be allocated as Targeted Grants, which would more than double the funds for this formula (from $1,969,843,000 to $4,146,187,000), while funds for the EFIG formula would be cut by approximately 60% (from $1,969,843,000 to $793,499,000). On July 14, 2004, the House Committee on Appropriations reported H.R. 5006, a bill to provide FY2005 appropriations for ED and other agencies. Under this bill, as passed by the House on September 9, 2004, the aggregate FY2005 appropriation for Title I-A would be the same as requested by the Administration ($13,342,309,000), but in contrast to the Administration's proposal, equal amounts would be allocated as Targeted and EFIG grants ($2,469,843,000 under each formula).

The Senate Committee on Appropriations reported its FY2005 appropriations act for ED and other agencies, S. 2810, on September 15, 2004. Under S. 2810, the total funding for Title I-A grants to LEAs would be $13,557,607,000 — $215,298,000 above both the Administration request and the House amount. However, approximately one-third of this difference — $71,557,000 — consists of funds that would be appropriated as FY2005 Basic Grants, but would be used during the 2004-2005 school year, the year during which *FY2004* appropriations would generally be used. These funds would be allocated to the 10 states (see following section) that currently are receiving less for FY2004 than they received for FY2003 under Title I-A overall. If this were to occur, no state would receive less for the 2004-2005 school year than it received for the previous year (although numerous LEAs would still receive reduced grants).

An additional $100 million of the difference between the Senate and House/Administration amounts consisted of funds provided under the Senate Committee bill for additional school improvement funding (i.e., beyond amounts

reserved by SEAs from LEA grant appropriations for this purpose) for FY2005. After deducting these two amounts, the difference in aggregate funding under the Senate bill versus the House bill and Administration request for FY2005 was $43,741,000 (0.3 %). The larger difference among these proposals is that the Senate bill would have allocated more funds under the EFIG ($2,756,175,000) than the Targeted Grant ($2,231,954,000) formula, in contrast to the 50-50 split under the House bill, or the heavy emphasis on Targeted Grants under the Administration request.

Finally, the conference version of H.R. 4818, Consolidated Appropriations Act, 2005, was passed by the House and Senate on November 20, 2004. It was signed into law, as P.L. 108-447, on December 8, 2004. It provides a total of $12,739,571,000 for Title I-A for FY2005. This amount is lower than the amounts that would have been provided under the Administration request, the House-passed bill, or the Senate Committee-reported bill. It represents an increase of $397,262,000 (3.2%) over the FY2004 appropriation. The Senate bill's provisions for additional FY2004 hold-harmless funds and additional school improvement grants were not included in H.R. 4818. Under P.L. 108-447, equal amounts ($2,219,843,000 each) were provided for Targeted and EFIG Grants, Concentration Grants are maintained at the FY2004 level ($1,365,031,000), and Basic Grants were reduced from $7,037,592,000 in FY2004 to $6,934,854,000 for FY2005. Note that all of these amounts incorporate "across-the-board" spending cuts as applied by ED in a table published on December 9, 2004; these are subject to possible (presumably minor) future revision.

The Administration's **FY2006** budget request was announced on February 7, 2005. The total amount requested for Title I-A was $13,342,309,000, the same as the FY2005 request, and $602,738,000 (4.7%) above the FY2005 appropriation. Under the Administration's FY2006 request, the amounts for Basic, Concentration, and EFIG Grants would remain unchanged from FY2005, with all of the increase devoted to Targeted Grants. While the emphasis on Targeted Grants is consistent with past Administration budget proposals, it is noteworthy that they no longer requested a reduction in funding for EFIG Grants.

On June 24, 2005, the House passed H.R. 3010, to provide FY2006 appropriations for ED and related agencies. The FY2006 appropriation for ESEA Title I-A under H.R. 3010 would have been $12,839,571,000, an increase of $100 million, or 0.8%, over the FY2005 level. All of the increase over FY2005 would be devoted to Targeted and EFIG Grants, with each of these rising by $50 million. Each of these amounts remained the same in the version of H.R. 3010 that was passed by the Senate on October 27, 2005, and the two conference versions of H.R. 3010 (H.Rept. 109-300 and 109-337), the latter of which was signed into law as P.L. 109-149. However, separate appropriations legislation (P.L. 109-148, Department of Defense Appropriations, 2006) provides for a 1% reduction in most FY2006 appropriations in all federal agencies, resulting in a FY2006 total for Title I-A of $12,713,125,290, an amount slightly ($26.4 million) below the FY2005 level. As with similar "across-the-board" reductions of recent years, all of this reduction was applied to Basic Grants. Separately, P.L. 109-148 provides for a one-year, 100% hold harmless for FY2006 Title I-A grants to LEAs directly affected by the 2005 Gulf Coast hurricanes.

For **FY2007**, the Administration has requested a funding level of $12,913,125,000 for Title I-A. Under this request, the same amount as for FY2006 would be provided for all aspects of Title I-A, except that $200 million would be provided for school improvement grants, under the statute's separate authorization for such grants, in addition to the 4% of state grants that is to be reserved for this purpose. The Administration budget also proposes elimination of a current prohibition against reducing a LEA's funding level below the previous year amount when applying the 4% reduction. As aggregate funding levels have stopped increasing in recent years, some states have had difficulty in reserving the full 4% while observing this requirement. As a result, some states may be unable to reserve the full 4%, while other states may be able to reserve the full 4% only by reducing some LEAs' grants (compared to their initial grant) by substantially more than 4% in order to meet this requirement.[68] Title I-A funding levels for FY2005-FY2007 may be found in **Table 2**, below.

**FY2005 Allocation Patterns.** FY2005 (2005-2006) grants are the latest available actual allocations. Overall, the FY2005 funding level for Title I-A was 3.2% above the FY2004 level. This was a smaller rate of increase over the previous year than occurred in either of FY2002-FY2004, when the increases over the previous year were 18.1%, 12.9%, and 5.6%, respectively. At the same time, the Census Bureau and ED initiated annual updates of the poverty estimates used to calculate Title I-A grants beginning with the FY2004 allocations. In addition, the share of funds that SEAs are generally required to deduct from state total allocations for program improvement activities increased from 2% to 4% beginning in FY2004. As a result of these factors, several states, and a large percentage of all LEAs, received smaller Title I-A grants for FY2005 than they received for FY2004.[69]

More specifically, nine states (Connecticut, Iowa, Kansas, Massachusetts, New Mexico, New York, Ohio, Oklahoma, and Oregon) received lower total grants for FY2005 than they received for FY2004. At the LEA level, approximately two-thirds of all LEAs nationwide that received Title I-A grants for both FY2004 and FY2005 received smaller grants for FY2005. At the same time, since the gaining LEAs are, on average, larger than the losers, a substantial majority of the nation's school age children, poor or otherwise, are in gaining LEAs. For example, using the latest (income year 2002) poverty estimates, approximately 67.5% of the nation's school-age children from poor families are in gaining LEAs, while approximately 32.5% are in losing LEAs.

In most cases, states and LEAs receiving lower Title I-A grants for FY2005 than for FY2004 have been experiencing reductions in their estimated number of school-age children in poor families. More specifically, a number of LEAs with relatively low school-age child poverty rates received lower grants for FY2005 than for FY2004 because they have fallen below the 5.0% eligibility threshold for Targeted

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[68] For a discussion of this issue, see "A Shell Game: Federal Funds to Improve Schools," by Tom Fagan, Center on Education Policy, February 2006; available at [http://www.ctredpol.org/titlei/TitleISchoolImpFundJan2006.pdf].

[69] State total Title I-A grants for FY2004 may be found at [http://www.ed.gov/about/overview/budget/statetables/index.html].

and EFIG grants. Under ED policy, grants under these formulas decline immediately to zero when LEAs fall below the eligibility threshold (only Concentration Grants provide for a continuation of hold-harmless payments, for up to four years, for ineligible LEAs).

**Appropriations Authorization Levels.** Prior to the NCLBA, ESEA legislation generally contained specific authorization amounts for ESEA Title I-A only for the first year of each authorization period, authorizing only "such sums as may be necessary" for the succeeding years. In contrast to this pattern, the NCLBA authorizes specific amounts for each year, beginning at $13.5 billion for FY2002 and increasing steadily to $25 billion for FY2007 (for the FY2005-FY2007 levels, see **Table 2**, below).[70]

[70] This specification of authorization amounts for each year may or may not resolve long-term debate over what constitutes the "full funding" level for Title I-A. Whether or not specific amounts have been specified in the authorizing statute for any year, many program advocates have argued that the "full funding" concept for Title I-A has always been based on maximum payment calculations under the Basic Grant allocation formula. As was described above, the Part A Basic Grant formula establishes a maximum payment based on poor and other "formula children" multiplied by a state expenditure factor. The total of these maximum payments is understood by a number of analysts to represent the "full funding" level for Part A. For FY2005, this amount would be approximately $27.1 billion.

## Table 2. FY2005-FY2007 Appropriations for ESEA Title I, Part A

| Formula | FY2005 appropriation under P.L. 108-447 | FY2006 Appropriation under P.L. 109-149 (incorporating 1% reduction per P.L. 109-148) | FY2007 Administration Budget Request |
|---|---|---|---|
| Basic Grants | $6,934,854,000 | $6,808,408,290 | $6,808,408,000 |
| Concentration Grants | $1,365,031,000 | $1,365,031,000 | $1,365,031,000 |
| Targeted Grants | $2,219,843,000 | $2,269,843,000 | $2,269,843,000 |
| Education Finance Incentive Grants | $2,219,843,000 | $2,269,843,000 | $2,269,843,000 |
| School Improvement Grants (separate authorization) | $0 | $0 | $200,000,000 |
| Total ESEA Title I-A Grants to LEAs | $12,739,571,000 | $12,713,125,290 | $12,913,125,000 |
| Authorization level | $20,500,000,000 | $22,750,000,000 | $25,000,000,000 |

**Notes:** The amounts shown above for Basic Grants include $3,472,000 for FY2005, $3,437,280 for FY2006, and $3,472,000 for FY2007 for census updates.

# Staff Qualifications

As is the case with state pupil assessment policies, the NCLBA establishes new requirements regarding teacher qualifications for states and LEAs participating in Title I-A that will affect public school systems overall. The revised ESEA also contains expanded qualification requirements for teacher aides or paraprofessionals, although these provisions are limited to certain paraprofessionals paid with Title I-A funds. An additional major provision of the NCLBA regarding instructional staff is the requirement that LEAs are to use between 5% and 10% of their Title I-A grants in FY2002-FY2003, and at least 5% of their grants thereafter, for professional development activities. Separately, as noted earlier, individual schools identified as having failed to meet AYP standards for two or more consecutive years must use at least 10% of their Title I-A grants for professional development.

## Teacher Qualifications

First, the NCLBA requires LEAs participating in ESEA Title I-A to ensure that, beginning with the *2002-2003* school year, teachers *newly hired* with Title I-A funds are "highly qualified." Second, participating states must establish plans providing that *all* public school teachers statewide *in core academic subjects* meet the bill's definition of "highly qualified" by the *2005-2006* school year, and that all LEAs will make annual progress toward meeting this deadline. Finally, according to the authorizing statute, LEAs participating in Title I-A must have a plan to ensure that *all* of their teachers are "highly qualified" by the 2005-2006 deadline.[71]

In an October 21, 2005 letter to CSSOs,[72] the Secretary of Education stated that the 2005-06 deadlines might be extended by one year (to 2006-07) for some states. States will qualify for the extension if they provide evidence that they are making a "good faith effort" toward meeting the requirement, as evidenced by such factors as whether the state's definition of a "highly qualified teacher" is consistent with the statute, regulations, and policy guidance; whether the state is meeting requirements to report on teacher quality to parents and the public; the quality of data on teacher quality reported by the state to ED; and steps taken by the state to assure that highly qualified teachers are equitably distributed among classrooms in high poverty versus low poverty schools. It will be determined early in 2006 whether states qualify for the extension.

The criteria that teachers must meet in order to be deemed to be "highly qualified" are found in Title IX, Part A (General Provisions) of the ESEA, as amended by the NCLBA. This definition of a "highly qualified" teacher includes some elements that are applicable to all public school teachers and others that apply

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[71] Regulations (*Federal Register*, Dec. 2, 2002) eliminate this potential conflict between references to all teachers versus those in core subjects, providing that all of the teacher qualification requirements apply only to teachers in core subject areas. The regulations also define core subject areas as including English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography [34 C.F.R. § 200.55(c].

[72] See [http://www.ed.gov/policy/elsec/guid/secletter/051021.html].

only to teachers who either are or are not "new to the profession." The criteria applicable to *all* public school teachers are that they must hold at least a bachelor's degree, must have obtained full state certification or passed the state teacher licensing examination, and must hold a license to teach, without any certification or licensure requirements having been waived for them. An exception is made for teachers in public charter schools, who must meet the requirements established in the state's charter school law. Program regulations also provide that individuals participating in alternate certification programs meeting certain requirements would qualify as being "highly qualified."

The additional criteria applicable to teachers who are *new to the profession* is that they must: (a) demonstrate, by passing a "rigorous" state test, subject area knowledge and teaching skills in basic elementary curriculum (if teaching at the elementary level); or (b) demonstrate "a high level of competency" by passing a rigorous state academic test or completing an academic major (or equivalent course work), graduate degree, or advanced certification in each subject taught (if teaching at the middle or high school level).

Finally, a public school teacher at any elementary or secondary level who is *not new to the profession* may be deemed to be "highly qualified" by either meeting the preceding criteria for a teacher who is new to the profession, or by demonstrating competence in all subjects taught "based on a high objective uniform State standard of evaluation" which, among other considerations, is not based primarily on the amount of time spent teaching each subject.[73]

## Qualification Requirements for Paraprofessionals

Paraprofessionals, also known as teacher aides, constitute approximately one-half of the staff hired with Title I-A grants, and their salaries constitute an estimated 15% of Title I-A funds. Use of Title I-A funds for paraprofessionals appears to be especially prevalent in many high-poverty LEAs and schools. Paraprofessionals whose salaries are paid with Title I-A funds provide a variety of instructional and non-instructional services in both schoolwide and targeted assistance programs. Some have criticized the performance of instructional duties by paraprofessionals who often lack educational credentials and may receive little supervision from classroom teachers. Others have questioned the appropriateness of using Title I-A funds to pay paraprofessionals who perform duties that are not directly related to instruction. The IASA in 1994 required teacher paraprofessionals funded under Title I-A to be directly supervised by teachers, and in general to have a high school diploma or equivalent within two years of employment.

The NCLBA established expanded requirements for paraprofessionals paid with Title I-A funds.[74] These requirements apply currently to all paraprofessionals newly

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[73] This and related concepts and issues are discussed in CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*, by James B. Stedman.

[74] In addition to regulations published in the *Federal Register* on Dec. 2, 2002, draft non-regulatory guidance on the Title I-A paraprofessional requirements was published by ED on (continued...)

hired with Title I-A funds after the date of enactment of P.L. 107-110 (January 8, 2002), and will apply to all such staff paid with Title I-A funds (i.e., all paraprofessionals employed in schools operating schoolwide programs plus those directly paid with Title I-A funds in targeted assistance schools) by the end of the 2005-2006 school year.

The affected paraprofessionals must have either: (a) completed at least two years of higher education; **or** (b) earned an associate's (or higher) degree; **or** (c) met a "rigorous standard of quality," established by their LEA, **and** "can demonstrate, through a formal State or local assessment ... knowledge of, and the ability to assist in instructing, reading, writing, and mathematics"[75] **or** readiness to learn these subjects, as appropriate. Under the authorizing statute, these requirements apply to all paraprofessionals paid with Title I-A funds *except* those engaged in translation or parental involvement activities; regulations (*Federal Register*, December 2, 2002) also exempt any other paraprofessionals whose duties do not include providing instructional support services. All paraprofessionals in Title I-A programs, regardless of duties, must have at least a high school diploma or equivalent; this requirement was effective upon enactment of the NCLBA.

Decisions regarding whether to allow paraprofessionals to meet these requirements via an assessment (or only by completing two years of higher education or earning an associate's degree), if via an assessment which test(s) would qualify and what constitutes a "passing" score, and whether these decisions should be made by LEAs or states, are primarily being left to state and LEA discretion, and a wide variety of approaches are being adopted. The Education Commission of the States (ECS) has compiled a database (covering 48 states) on state policies to meet the NCLBA paraprofessional qualification requirements.[76] ECS reports that all states are making progress toward meeting, or in several cases exceeding, the NCLBA paraprofessional requirements by the end of the 2005-06 school year. According to ECS, 12 states have established paraprofessional qualification requirements that exceed those under the NCLBA, and five states are applying their requirements to all paraprofessionals, not just those providing instructional services in Title I-A programs. Eleven states have established **certification** requirements for paraprofessionals (which is not specifically required by the NCLBA). Thirty-six states are using the ParaPro test published by the Educational Testing Service (ETS) to assess paraprofessional qualifications, while 17 are using the WorkKeys test published by the American College Testing Program (ACT), and 21 are allowing LEAs to use tests of their choice (several states are following multiple approaches).

According to the authorizing statute and ED policy guidance, there are several potential sources of funds to help pay the costs of any education that may be necessary for affected paraprofessionals to meet the Title I-A requirements. These

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[74] (...continued)
Nov. 15, 2002. See [http://www.ed.gov/policy/elsec/guid/paraguidance.pdf].

[75] Or reading readiness, writing readiness, or mathematics readiness, where appropriate, e.g., for paraprofessionals serving preschool or early elementary pupils.

[76] The database may be accessed at [http://www.ecs.org].

sources include funds received under: Title I-A, especially those reserved for professional development (as described above); ESEA Title II-A, Teacher and Principal Training and Recruiting Fund; ESEA Title III-A, the English Language Acquisition, Language Enhancement, and Academic Achievement Act; ESEA Title V-A Innovative Programs grants; and for applicable schools, Indian Education grants under ESEA Title VII-A. Paraprofessionals from relatively low-income families would also be eligible for federal postsecondary grants and subsidized loans to help pay costs of taking courses at institutions of higher education.

In December 2003, baseline data were published on the percentage of affected paraprofessionals who met the NCLBA qualification requirements during the 2002-2003 school year in 36 states. According to these data, an average of approximately 40% of the paraprofessionals met the qualification requirements in 2002-2003; for individual states, the qualification percentages ranged from 4.5% to 99.0%. A separate survey, of American Federation of Teachers (AFT)-member paraprofessionals employed in Title I-A programs concluded that in late 2003, 54% of the surveyed paraprofessionals met the NCLBA qualification requirements based on educational levels alone (i.e., without relying on whatever assessments states or LEAs might use to determine competence for those not meeting the educational requirements). However, the paraprofessionals surveyed by AFT are concentrated in selected large urban LEAs, and may not be representative of Title I-A paraprofessionals in general.[77]

In addition, *Education Week* published state data on paraprofessional qualifications during the 2003-2004 school year.[78] These data, covering 42 states and the District of Columbia, were reported to ED and obtained by *Education Week* through a Freedom of Information request. Among these 43 jurisdictions, the percentage of paraprofessionals in Title I programs that met the NCLBA qualification requirements in the 2003-2004 school year ranged from 27% in Massachusetts to 99% in Iowa.

In addition, the types of responsibilities to which all paraprofessionals paid with Title I-A funds may be assigned are outlined in the NCLBA. These include tutoring of eligible pupils, assistance with classroom management, parental involvement activities, translation, assistance in computer laboratories or library/media centers, and instruction under the direct supervision of a teacher.

## Issues

One issue regarding these NCLBA staff qualification requirements is whether high-poverty LEAs and schools will be able to meet the teacher qualification

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[77] See "State Data Show Majority of Paraprofessionals Still Fall Short of NCLB 'Qualified' Standard," *Title I Monitor*, Dec. 2003, p. 8.

[78] See [http://www.edweek.org/media/27admin.pdf].

requirements. Schools and LEAs disadvantaged by high pupil-poverty rates have generally had particular difficulty attracting highly qualified staff.[79]

A second major issue is whether the requirements for paraprofessionals are being interpreted and implemented in such a manner as to have substantial impact. The NCLBA provisions regarding paraprofessional qualifications are ambiguous. Their significance will depend very much on the extent and manner in which these provisions are interpreted and implemented by states and LEAs. It is thus far unclear what "standards of quality" or assessments states and LEAs will deem to be sufficient to meet these new requirements. Possible effects include substantial expansion of state or LEA procedures to certify the qualifications of paraprofessionals, or a significant reduction in the extent to which Title I-A funds are used to hire aides.

## Other Provisions Regarding Title I-A

Other aspects of ESEA Title I-A that were significantly modified by the NCLBA are discussed briefly below.

### Flexibility

One of the most distinctive changes in Title I-A since 1994 has been the rapid growth of schoolwide programs, which currently account for approximately 45% of all Title I-A schools and 60% of Title I-A funds spent at the school level. The IASA reduced the eligibility threshold for schoolwide programs from 75% to 50% low-income pupils in general, and the NCLBA has further reduced this threshold to 40%.[80] The statute allows the use of funds under most federal aid programs, not just Title I-A, on a schoolwide basis, if basic program objectives and fiscal accountability requirements are met.

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 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 number of low-income pupils in these schools. However, the NCLBA has reduced the eligibility

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[79] See, for example, The Education Trust, *Honor in the Boxcar: Equalizing Teacher Quality*, spring 2000.

[80] Under this provision, any school participating in Title I-A with 40% or more of its pupils from low-income families may qualify to operate a schoolwide program. However, Title I-A schools with lower percentages of pupils from low-income families may obtain waivers directly from ED or from their SEA (if the state participates in Ed-Flex) to operate schoolwide programs. In addition, program regulations [34 C.F.R. § 200.25(b)(2)] allow LEAs to use measures of low income in determining whether schools meet this threshold that are different from (and potentially broader than) those used in the selection of participating schools and allocation of funds among them, which may further expand the pool of eligible schools.

threshold to a level that is approximately the national average percentage of pupils from low-income families, and the validity of both aspects of this rationale might be questioned for schools that just meet the new threshold.[81] In addition, there is little direct evidence of the achievement effects of this expansion of schoolwide programs.

In addition, Title VI, Part A-1 of the revised ESEA allows most *LEAs* to transfer up to 50% of their grants among four programs — Teachers, Technology, Safe and Drug Free Schools, and the Innovative Programs Block Grant — or *into* (not from) Title I-A. LEAs that have been identified as failing to meet state AYP requirements under Title I-A 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. According to policy guidance published by ED, LEAs identified for corrective action may not transfer any funds under this authority.

Further, a pair of state and local flexibility demonstration authorities in the NCLBA might have limited impact on Title I-A. Under a State and Local Flexibility Demonstration Act (ESEA Title VI, Part A, Subpart 3), up to seven states, selected on a competitive basis, will be authorized to consolidate all of their *state administration and state activity funds* under Title I-A and several other ESEA programs (State Flex). The consolidated funds can be used for any purpose authorized under any ESEA program. The selected states are to enter into local performance agreements with 4-10 LEAs (at least one-half of which must have school-age child poverty rates of 20% or more), which may consolidate funds under the provisions of a local flexibility authority. Up to 80 additional LEAs — i.e., in states not participating in the state flexibility demonstration program — might be eligible for the local flexibility authority (Local Flex). The local flexibility authority has no direct relationship to Title I-A, although funds consolidated under this authority could be used for any purpose authorized under any ESEA program, including Title I-A. In addition, states and LEAs would lose their flexibility demonstration authority if they fail to meet Title I-A AYP requirements for two consecutive years.[82] As of the date of this report, one state has qualified for State Flex authority (Florida), with associated local performance agreements involving eight LEAs in Florida, and one LEA has qualified on its own for the Local Flex authority (Seattle, WA).

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[81] 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 public K-12 pupils meeting this criterion is approximately 40%. In a school just meeting this 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).

[82] For additional information on this and other flexibility authorities adopted under the No Child Left Behind Act, see CRS Report RL31583, *K-12 Education: Special Forms of Flexibility in the Administration of Federal Aid Programs*, by Wayne Clifton Riddle.

## Services to Private School Pupils, Staff, and Parents

The NCLBA makes a number of changes to the Title I-A provisions for services to pupils attending private schools. First, it provides that such services should be provided not only to eligible pupils but also to their families and school staff as well (consistent with the general Title I-A provisions for parental involvement and professional development activities). Second, it requires that services be provided to private school pupils "in a timely manner." Third, requirements for consultation between public and private school officials are significantly expanded to include such topics as the data to be used to determine the share of pupils from low-income families who attend private schools, and who will provide the services, including consideration of the possibility of providing services via a third-party contractor.

The revised Title I-A includes specific provisions regarding authorized methods for LEAs to determine the share of pupils from low-income families who attend private schools, which is the basis for determining the share of Title I-A grants that is to be devoted to serving eligible private school pupils. LEAs may (1) use the same measure of low income and source of data as used to count such children attending public schools; (2) conduct a survey, which may be based on a representative sample of pupils, using the same measure of low income as used to count children attending public schools; (3) apply the percentage of children from low-income families determined for *public* school pupils to private school pupils residing in the same school attendance area; or (4) use a different measure of low income than used for counting children attending public schools, adjusting these data by an appropriate proportion so that the measures may be equated.[83] These provisions are similar to those of policy guidance disseminated by ED under the previous authorizing statute.

Finally, the previous authorization for grants to pay "capital expenses" of providing Title I-A services to private school pupils was moved from Title I-A to Subpart 19 of Title V, Part D, the Fund for Improvement of Education. The revised authorization was extended only through FY2003.[84]

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[83] For example, assume that data are available on the number of public school pupils in a LEA who receive free school lunches and Medicaid, but are only available for private school pupils who receive Medicaid, that the LEA uses the number of pupils who receive free school lunches to allocate Title I-A funds among eligible schools, and that the ratio among public school pupils in the LEA of free school lunch recipients to Medicaid recipients is 2 to 1. The LEA could then multiply the number of relevant private school pupils receiving Medicaid by two to obtain an equivalent estimate of the number of such pupils who would be eligible to receive free school lunches.

[84] No funds have been appropriated for capital expenses grants since FY2001.

# Debates Over State or LEA Participation in Title I-A, or Over Whether All Title I-A Requirements Must Be Met If Doing So Might Arguably Require the Expenditure of Non-Federal Funds

As implementation of the new Title I-A requirements adopted under the NCLBA has proceeded, debate has arisen in some state legislatures, LEAs, and elsewhere over the federal role in K-12 education, and the costs and benefits of participating in Title I-A and other ESEA programs. While all states continue to participate in ESEA Title I-A, and therefore they continue to be subject to the requirements discussed in this report, bills have been considered in the legislatures of some states, and recently adopted in one state (Utah), that would attempt to limit or terminate state participation in ESEA Title I-A, in order to avoid being required to implement some of these requirements.[85] In addition, a national association has filed a court suit, and the attorney general of at least one state has said he plans to do so, for relief from meeting Title I-A requirements if doing so would require the expenditure of non-federal funds.

State legislative actions have thus far taken six forms: (1) resolutions expressing opinions that are critical of some aspects of the Title I-A requirements under the NCLBA, but have no direct impact on state participation in the program; (2) resolutions requesting exemptions or waivers of certain NCLBA requirements for a state; (3) resolutions criticizing the level of funding for the NCLBA as being inadequate; (4) bills attempting to prevent the state from spending its own funds on NCLBA implementation costs; (5) bills requiring LEAs in a state to place higher priority on state accountability requirements than those of Title I-A (where they may conflict), and discouraging the spending of non-federal funds to meet Title I-A requirements; and (6) bills authorizing or requiring the state to terminate participation in Title I-A in order to avoid being subject to its requirements. One or more states have adopted bills in categories (1)-(5); as of this writing, no state has yet enacted opt-out legislation (category 6).

The legislation passed by the Utah state legislature on April 19, 2005, is in category (5) above.[86] It would require school officials to place first priority on "meeting state goals, objectives, program needs, and accountability systems" and to "minimize additional state resources that are diverted to implement federal programs beyond the federal monies that are provided to fund the programs" (H.R. 1001, Section 5).[87] The practical implications of this state legislation, if signed by the governor and implemented, as well as the response by ED, remain to be seen.

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[85] See, for example, "More States Are Fighting 'No Child Left Behind' Law," *Washington Post*, Feb. 19, 2004, p. A3.

[86] See "Utah Lawmakers Pass Bill Flouting NCLB," *Education Week* [Web ed.], Apr. 20, 2005, available at [http://www.edweek.org].

[87] See [http://www.le.state.ut.us/~2005S1/bills/hbillenr/hb1001.pdf].

In addition to actions by state legislatures, a suit has been filed by the National Education Association,[88] and reportedly a similar suit is being considered by the attorney general of at least one state (Connecticut).[89] These actions focus largely on the provisions of ESEA Section 9527(a) — "Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." Both the NEA suit, and reportedly the prospective Connecticut suit, seek relief from meeting Title I-A requirements that, they argue would require the expenditure of state and/or local funds to meet. More specifically, Connecticut seeks a waiver of the Title I-A requirement for implementation of standards-based reading and mathematics assessments in grades 3, 5, and 7 (in addition to such assessments already administered in grades 4, 6, and 8) beginning in the 2005-2006 school year.

As discussed earlier in this report, the ESEA Title I-A requirements apply only to states that receive funds under this program. If a state chose to terminate its participation in Title I-A, none of the requirements discussed in this report would apply to that state. Of course, such a state would lose a significant amount of funding, since Title I-A is the largest federal K-12 education program. In addition, as described in a 2004 letter by the then-acting Deputy Secretary of Education, Eugene W. Hickok, to the Utah Superintendent of Public Instruction, such a state might also lose some or all of its funds under several other ESEA programs, under which grants are allocated to states using formulas that are linked to the Title I-A formulas.[90]

As with states, individual LEAs might choose to terminate their participation in Title I-A, in order to attempt to avoid implementing the requirements discussed in this report. However, even if it received no Title I-A grants, most of the requirements discussed in this report would continue to apply to a LEA if its state continues to participate in Title I-A. This includes the assessment, AYP, and report card requirements, which apply to *all* public schools and LEAs in states receiving Title I-A grants. A LEA that refuses Title I-A funds would be released only from the corrective action requirements discussed in this report. In addition, as with states, such a LEA would presumably lose funds under not only Title I-A but also several other ESEA programs under which allocations are based on those under Title I-A.



[88] See [http://www.nea.org/lawsuit/index.html].

[89] See [http://www.state.ct.us/sde/BJS_NCLB_lawsuit.pdf].

[90] The letter may be found at [http://www.grantsandfunding.com/libraries/grantmanage/tims/samplenews/tims0403a.html].