General Education Provisions Act (GEPA): Overview and Issues

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Summary

The General Education Provisions Act (GEPA) contains a broad array of statutory provisions that are applicable to the majority of federal education programs administered by the U.S. Department of Education (ED), as well as provisions related to the powers and responsibilities of ED. While these provisions cover topics as varied as appropriations and evaluations to privacy and enforcement, several provisions are particularly worth noting, especially with respect to the development of new programs or the appropriation of funds for existing programs. These provisions include an extension of the period available for the obligation and expenditure of appropriation funds; an automatic extension of the authorization of an applicable program for one additional fiscal year; a prohibition on using funds for transportation of students or teachers to overcome a racial imbalance or to carry out a desegregation plan; a prohibition on federal control of education; privacy provisions that require educational agencies that receive federal funds to provide parents with access to children's educational records and that prohibit such agencies from releasing such records without written consent; and a general prohibition on the use of funds provided to ED or to an applicable program to support a national test unless it is explicitly authorized in statutory language.

The first part of this report highlights some of the key provisions contained in GEPA. This is followed by a section-by-section overview of the act. The report concludes with an analysis of some of the policy issues that have arisen in the past or that may arise in the future with respect to GEPA.

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The General Education Provisions Act (GEPA) contains statutory provisions that are applicable to the majority of federal education programs administered by the U.S. Department of Education (ED), as well as provisions related to the powers and responsibilities of ED.[1] GEPA was originally enacted as Title IV of the Elementary and Secondary Education Amendments of 1967 (P.L. 90-247), but the statute was not referred to as the "General Education Provisions Act" until the law was amended by Title IV of the Elementary and Secondary Education Amendments of 1969 (ESEA, P.L. 91-230) and the relevant provisions were renamed. GEPA has been amended numerous times since its initial enactment in the 1960s. This report provides a summary of GEPA provisions as of the most recent amendments made to the act by the Education Sciences Reform Act (P.L. 107-279).

The first part of this report highlights some of the key provisions contained in GEPA. This is followed by a section-by-section overview of the act. The report concludes with an analysis of some of the policy issues that have arisen in the past or that may arise in the future with respect to GEPA.

Key GEPA Provisions

GEPA includes numerous provisions that apply to applicable programs administered by ED,[2] as well as provisions related to the powers and responsibilities of ED. While these provisions cover topics as varied as appropriations and evaluations to privacy and enforcement, several provisions are particularly worth noting, especially with respect to the development of new programs or the appropriation of funds for existing programs. These provisions are highlighted below.

- Extension of the period available for the obligation and expenditure of appropriation funds (Section 421).
- Automatic extension of the authorization of an applicable program for one additional fiscal year (Section 422).
- Prohibition on using funds for transportation of students or teachers to overcome a racial imbalance or to carry out a desegregation plan (Section 426).
- Prohibition on federal control of education (Section 438).
- Privacy provisions that require educational agencies that receive federal funds to provide parents with access to children's educational records and that prohibit such agencies from releasing such records without written consent (Section 444).
- General prohibition on the use of funds provided to ED or to an applicable program to support a national test unless it is explicitly authorized in statutory language (Section 447).

[1] 20 U.S.C. §§ 1221 et seq.

[2] As defined in Section 400 of GEPA, an applicable program includes any program for which the Secretary of Education or ED has administrative responsibility as provided by law or by delegation of authority pursuant to law.

Section-by-Section Overview of GEPA Provisions

GEPA includes multiple sections, primarily organized under four parts: Part A—Functions of the Department of Education; Part B—Appropriations and Evaluations; Part C—General Requirements and Conditions Concerning the Operation and Administration of Education Programs: General Authority of the Secretary; and Part D—Enforcement. The act begins with a section that includes provisions related to the applicability of the GEPA provisions to education programs. A summary of each section of GEPA is provided below. The summary is not intended to be a comprehensive examination of GEPA, but rather an overview of the contents of this act.

Short Title, Applicability, Definitions

Section 400 states that, except as otherwise provided, GEPA applies to each applicable program of ED, but does not apply to any contract made by ED. The section defines several terms, including "applicable program," which is defined to include any program for which the Secretary of Education (hereafter referred to as the Secretary) or ED has administrative responsibility as provided by law or by delegation of authority pursuant to law. Section 400 also states that nothing in GEPA shall be construed to affect the applicability of statutes prohibiting discrimination, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.[3]

Part A—Functions of the Department of Education

Part A of GEPA includes two sections. The first section addresses the general authority of the Secretary, while the second section includes provisions related to an education impact statement.

Section 410. General Authority of the Secretary

This section confers regulatory authority on the Secretary. Specifically, it authorizes the Secretary to "make, promulgate, issue, rescind, and amend rules and regulations" governing the operation of ED and governing the applicable programs administered by ED.

Section 411. Education Impact Statement

This section specifies that any regulation affecting an institution of higher education (IHE) shall only become effective if the regulation is published in the *Federal Register* with an educational impact assessment statement. The statement shall determine whether any information required to be provided under the regulation is already being collected or is available from another agency.

[3] 42 U.S.C. §§ 2000d et seq; 20 U.S.C. §§ 1681 et seq; 29 U.S.C. §§ 790 et seq; 42 U.S.C. §§ 6101 et seq.

Part B—Appropriations and Evaluations

Part B is divided into two subparts. The first subpart addresses appropriations and includes Sections 420 through 423. The second subpart addresses the planning and evaluation of federal education activities and includes Sections 424 through 429.

Section 420. Forward Funding[4]

In order to provide federal, state, and local officers "adequate notice" of the availability of federal funds for carrying out ongoing education activities and projects, appropriations under any applicable program may be included in the appropriations act for the fiscal year preceding the fiscal year during which such activities and projects shall be conducted (e.g., appropriated funds that are to be obligated during FY2011 may be appropriated in the FY2010 appropriations act). Further, in order to provide for the provision of funds in this manner, the appropriations act for a given year may contain separate appropriations for an applicable program for two consecutive years (e.g., the FY2010 appropriations act could contain an appropriation of funds that are to be obligated in FY2010 and an appropriation of funds that are to be obligated in FY2011).

Section 421. Availability of Appropriations on Academic- or School-Year Basis; Additional Period for Obligation of Funds

Appropriations for applicable programs for any fiscal year may be made available for obligation by the grantee on the basis of an academic or school year differing from such fiscal year, subject to regulations by the Secretary.

In addition, unless specifically prohibited, any funds appropriated for an applicable program that are not obligated and expended by the recipient educational agencies and institutions before the end of the fiscal year shall remain available for obligation and expenditure for one additional fiscal year.[5] Funds so carried over are to be obligated and expended in accordance with program requirements that are in effect for such succeeding fiscal year.

If funds appropriated to carry out any applicable program are not obligated until after the institution of a judicial proceeding for release of such funds, then such released funds shall remain available for obligation and expenditure until the end of the fiscal year that begins after the termination of such judicial proceeding.

Section 422. Contingent Extension of Programs

If Congress, in the regular session that ends prior to the beginning of the terminal fiscal year of authorization of appropriations of an applicable program, does not pass legislation extending the program, the program is automatically extended for one additional fiscal year. The authorized level of appropriations for the program for this additional year shall be the same as that for the

[4] While this section is referred to as "forward funding," the appropriations activity authorized by this section is more commonly known as "advanced appropriations." The difference between these two concepts is discussed at the end of this report.

[5] This provision is often referred to as the "Tydings amendment." The additional year provided for the obligation and expenditure of funds is often referred to as the "Tydings period."

terminal year of the program. In addition, if the Secretary is required, in the terminal fiscal year of an applicable program, to carry out acts or determinations necessary for the continuation of the program, such acts or determinations must be made during the period of automatic program extension. The automatic extension of an applicable program for one year does not apply to the authorization of appropriations for a commission, council, or committee that is required by statute to terminate on a specific date.

Section 423. Payments

Payments under any applicable program may be made in installments, and in advance or by way of reimbursement, as determined by the Secretary. The payments may be adjusted to account for overpayments or underpayments.

Section 424. Responsibility of States to Furnish Information

Each state educational agency (SEA) is required to submit a report to the Secretary every two years that provides information with respect to the use of federal funds in the state for any applicable program for the two preceding fiscal years, as well as the use of federal funds for applicable programs administered by the state and provided to local educational agencies (LEAs). Each SEA is required to include specific information in its report, including a list for each applicable program of all grants made to and contracts entered into with LEAs and other agencies within the state during each fiscal year. The Secretary is required to provide the information contained in each report to the National Center for Education Statistics and to make the information available, at a reasonable cost, to any interested individual. Further, in each year in which reports are submitted by SEAs, the Secretary must submit to Congress a report summarizing the data provided by the states.

Section 425. Biennial Evaluation Report

Not later than March 31, 1995, and every two years after such date, the Secretary is required to submit an evaluation report to the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources[6] on the effectiveness of applicable programs in meeting their legislative intent and purposes during the two preceding fiscal years. The report must contain specific information such as program profiles, information on the progress being made toward program objectives, and significant program activities.

Section 426. Prohibition Against Use of Appropriated Funds for Busing

No funds appropriated for any applicable program may be used for the transportation of students or teachers (or the purchase of equipment for such transportation) to overcome a racial imbalance in any school or school system or to carry out a plan of racial desegregation, except for funds appropriated for the Impact Aid program authorized by Title VIII of the ESEA.[7]

[6] GEPA has not been updated to include the Senate Committee on Health, Education, Pensions, and Labor instead of the Senate Committee on Labor and Human Resources.

[7] Excluded from the Impact Aid provision is any portion of funds that is attributable to children counted under Section 8003(d) (i.e., certain children with disabilities) or residing on property described in Section 8013(10) (i.e., low-rent (continued...)

Section 427. Equity for Students, Teachers, and Other Program Beneficiaries

The Secretary must require all applicants for assistance under an applicable program to describe the steps the applicant will take to ensure equitable access to and equitable participation in the activities to be conducted using such funds. Specifically, applicants must address the special needs of program beneficiaries (e.g., students and teachers) in order to overcome barriers to equitable participation, including "barriers based on gender, race, color, national origin, disability, and age."

Section 428. Coordination

The National Assessment Governing Board (NAGB), the Advisory Council on Education Statistics, the National Education Goals Panel, and any other board established to "analyze, address, or approve education content or student performance standards and assessments" are required to coordinate their work to ensure that they do not duplicate one another's efforts in assisting states with education reform efforts.

Section 429. Disclosure Requirements

This section, which contains certain disclosure requirements, applies to "educational organizations" that provide programs for a fee and that recruit students through means such as commercial media, direct mailings, or referrals, but the section does not apply to LEAs, SEAs, elementary or secondary schools as defined by the ESEA, IHEs as defined by the Higher Education Act (HEA), or other specified educational entities. Under this section, covered educational organizations must meet certain disclosure requirements prior to enrolling a minor and accepting funds for the cost of a minor's participation in an educational program (as defined in Section 429) operated by the organization. The disclosure must be made in writing to the minor or the minor's parents and must address the method by which participants were solicited and selected for participation in the program, as well as the cost of the program and information regarding the distribution of any enrollment fee. Each educational organization must include a "verifiable statement" in all of its recruitment or enrollment materials that the organization does not discriminate against any individual with respect to employment; exclude any student from participation in an educational program; discriminate against any student in providing program benefits; or subject any student to discrimination based on race, disability, or residence in a low-income area. The provisions of this section, however, do not entitle a student to participate in an educational program or receive a benefit associated with a program or to receive a waiver of any fee charged for participation or benefit. The section also includes enforcement provisions to enable the Secretary to enforce the requirements of this section.

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housing). For more information about the Impact Aid program, see CRS Report R40720, *Federal Impact Aid: Title VIII of the Elementary and Secondary Education Act*, by (name redacted).

Part C—General Requirements and Conditions Concerning the Operation and Administration of Education Programs

Part C is divided into four subparts. The first subpart addresses the general authority of the Secretary and includes Sections 430 through 435. Subpart two focuses on administrative requirements and limitations and includes Sections 436 through 439. The third subpart focuses on the administration of education programs and projects by states and LEAs. It includes Sections 440 through 442. The final subpart addresses records, privacy, and limitations on withholding federal funds. It includes Sections 443 through 447.

Section 430. Joint Funding of Programs

The Secretary is authorized to enter into arrangements with other federal agencies to jointly carry out projects, to transfer to such agencies funds appropriated under any applicable program, and to receive and use funds from such agencies for joint projects. Any funds transferred or received to support joint projects must be used in accordance with the statutes authorizing the funds. The project shall use the administering agency's procedures to award and administer grants, unless the agencies involved in the project agree to use another agency's procedures. If the Secretary and heads of other agencies participating in the joint project determine that the joint funding is needed to address a special need consistent with the purposes and authorized activities of each of the programs that provides funding for the project, a single set of criteria and single application may be used to select grantees. The Secretary must notify the House Committee on Education and Labor and Senate Committee on Labor and Human Resources[8] not later than 60 days after entering into a joint funding agreement with another agency.

The Secretary is also permitted to develop the criteria for and require the submission of joint applications under two or more applicable programs that award competitive grants and may jointly review and approve such applications separately from other applications submitted under the individual programs, if the Secretary determines that joint awards are needed to address a special need that is consistent with the purposes and authorized activities of each of the programs. Applicants for a joint award must meet the eligibility criteria of each program.

Section 431. Collection and Dissemination of Information

The Secretary is required to prepare and disseminate information about applicable programs to states, LEAs, and institutions and to cooperate with other federal officials who administer education-related programs in disseminating information about said programs. The Secretary must also inform the public about federally supported education programs. In addition, the Secretary is required to collect data and information on applicable programs for the purpose of obtaining objective measures of the effectiveness of such programs in achieving their intended purposes.

[8] See footnote 6.

Section 432. Review of Applications

This section establishes an appeals process to challenge certain SEA actions, including disapproval of an application, failure to provide funding in accordance with the law, an order to repay funds, or the termination of assistance. An applicant or recipient who is aggrieved by the final action of an SEA with respect to an applicable program under which aid is provided to or through the SEA may request a hearing within 30 days. The SEA must hold the hearing within 30 days of receiving such a request and issue a written ruling within 10 days after the hearing. If the SEA determines that the final action was contrary to federal law, state law, or the rules, regulations, and guidelines governing the applicable program, the final action must be rescinded. If the applicant or recipient is dissatisfied with the final SEA ruling, it may, within 20 days, appeal to the Secretary. On this appeal, findings of fact by the SEA will be considered final. The Secretary may also issue interim orders to SEAs that the Secretary deems "necessary and appropriate" pending resolution of the appeal or review. If the Secretary finds that the action of the SEA was contrary to federal law or the program rules, regulations, and guidelines, the Secretary shall order the SEA to modify its actions accordingly.

Each SEA is required to make available to each applicant or recipient all records that the SEA has that pertain to the review or appeal of such applicant or recipient, including the records of other applicants. If an SEA fails or refuses to comply with any of the requirements of this section, the Secretary shall terminate assistance to the SEA under the applicable program or issue other orders the Secretary deems appropriate to gain compliance.

Section 433. Technical Assistance

The Commissioner[9] is authorized, upon request, to provide advice, counsel, and technical assistance to SEAs, IHEs, and, with the approval of the appropriate SEA, elementary and secondary schools[10] to determine benefits available to them; prepare applications and meet program requirements; enhance the quality, increase the depth, or broaden the scope of activities under applicable programs; and encourage the simplification of administrative procedures.

In addition, the Commissioner shall permit LEAs to use organized and systemic approaches in determining cost allocation, collection, measurement, and reporting under any applicable program if such methods do not lessen the program's effectiveness and impact in achieving its intended effect, if they ensure adequate program evaluation, and if they are consistent with audit criteria prescribed by the Comptroller General of the United States.

In awarding contracts and grants for the development of curricula or institutional materials, the Commissioner and the Director of the National Institute of Education[11] shall encourage dissemination of these materials; permit applicants to include provisions for reasonable consultation fees or planning costs; and ensure that grants for publication and dissemination of materials are awarded competitively to those who assure that the materials will reach the target populations for which they were developed.

[9] Statutory language for this section references the Commissioner of Education rather than the Secretary of Education. This appears to be an oversight that may have occurred when the statute was amended to create ED.

[10] Statutory language does not reference LEAs.

[11] This appears to be an oversight that may have occurred when the statute was amended to create ED.

Section 434. Parental Involvement and Dissemination

Regulations promulgated by the Secretary for an applicable program shall encourage parental participation in the program whenever the Secretary determines that this participation would increase the effectiveness of the program. If the program for which such a determination is made provides payments to LEAs, the applications for such payments must do the following:

- set forth the policies and procedures to ensure that parents of the children to be served in the program will be consulted and involved in the planning, development, and operation of the program;
- be submitted with an assurance that such parents have had an opportunity to present their views of the application; and
- set forth policies and procedures for dissemination of the program plans and evaluations to such parents and the public.

Section 435. Use of Funds Withheld

If an LEA becomes ineligible for federal assistance under any applicable program due to a failure to comply with certain federal laws that prohibit discrimination in federally funded programs or activities on the basis of race, color, national origin, sex, disability, or age,[12] the allotment or reallotment of funds under said program to that state shall be proportionately reduced. Any funds not allotted to a state because of the application of this provision may be used for the following purposes: (1) to increase the allotments or reallotments of LEAs in that state that are not ineligible to receive federal assistance as described above or to increase the allotments or reallotments of all states in accordance with the federal law governing the program; or (2) for grants to LEAs of that state for service training "in dealing with problems incident to desegregation"[13] or for any other program administered by ED that is designed to enhance equity in education or redress discrimination on the basis of race, color, national origin, sex, age, or disability.

Section 436. Applications

The Secretary is authorized to provide that applications for assistance under an applicable program are effective for more than one fiscal year. To the extent practicable, the Secretary is required to establish uniform dates for the submission and approval of applications under all applicable programs. In addition, to the extent practicable, the Secretary is required to develop and require the use of common applications for grants to LEAs for each of the following three types of programs:

- formula grant programs administered by SEAs;
- competitive or discretionary grant programs administered by SEAs; and
- grant programs directly administered by the Secretary.

[12] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 et seq; or the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 et seq.

[13] 42 U.S.C. 2000c-4.

For each of these three types of programs, the common application is required to be used as the single application for as many of such programs as possible.

Section 437. Regulations

For the purposes of this section, a regulation is defined as "any generally applicable rule, regulation, guideline, interpretation, or other requirement" that is prescribed by the Secretary or ED and that is legally binding with respect to an applicable program. Regulations must contain citations to the particular section of statutory law or other legal authority upon which relevant provisions are based, and all regulations must be uniformly applied and enforced in all 50 states. Although the Administrative Procedure Act, which establishes the process that agencies must follow when enacting regulations, contains an exemption for matters pertaining to public property, loans, grants, and benefits,[14] GEPA specifies that this exemption shall apply only to regulations that govern the first grant competition under a new or substantially revised program or if the Secretary determines that the requirements of this subsection will cause "extreme hardship" to the program beneficiaries affected by the regulations.

Within 60 days after the date of enactment of any act (or portion of an act) affecting the administration of any applicable program, the Secretary is required to submit to the House Committee on Education and Labor and Senate Committee on Labor and Human Resources[15] a schedule of when the Secretary plans to promulgate final regulations that the Secretary determines are necessary to implement the act. All final regulations must be promulgated within 360 days after the date of enactment of such act. The Secretary is required to submit a copy of the final regulations to the Speaker of the House of the House of Representatives and the President pro tempore of the Senate concurrently with the publication of such regulations.

Section 438. Prohibition Against Federal Control of Education

This section clarifies that no provision of any applicable program is intended to authorize the federal government to exercise any "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system," or over the selection of "library resources, textbooks, or other printed or published instructional materials by any educational institution or school system." Additionally, no provision of any applicable program shall be construed to authorize the federal government to require "the assignment or transportation of students or teachers in order to overcome racial imbalance."

Section 439. Labor Standards

All laborers and mechanics employed in construction projects and minor remodeling projects assisted under any applicable program shall be paid at wage rates not less than those prevailing in the locality for similar work as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended.[16]

[14] 5 U.S.C. § 553(a)(2).

[15] See footnote 6.

[16] 40 U.S.C. §§ 276a et seq. For more information about the Davis-Bacon Act, see CRS Report R40663, *The Davis-*
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Section 440. State Agency Monitoring and Enforcement

This section establishes a mechanism for monitoring local agencies' compliance with federal education laws. The Secretary may require states to submit a plan for monitoring such compliance with federal education program requirements for programs in which federal funds are made available to local agencies through or under the supervision of a state board or agency. The Secretary may require the state plan to provide for periodic visits by state personnel to programs administered by local agencies to assess their compliance with federal requirements and periodic audits of expenditures. In addition, the Secretary may require the state plan to provide that the state investigate and resolve all complaints received by the state or referred to the state by the Secretary with respect to program administration. In order to enforce federal requirements under an applicable program, a state may withhold approval of an application by an LEA for assistance under the program or suspend or withhold payments in whole or in part until the local agency complies with the relevant federal requirements.[17] The withholding of payments may continue until the local agency no longer fails to substantially comply with the federal requirements.

Section 441. Single State Application

For all applicable programs under which federal funds are provided to LEAs through SEAs, a state shall submit a general application containing various assurances. The SEA has the option of submitting the application jointly for all programs covered by the application, or it may submit separately for each program or groups of programs. The general application must include the following assurances:

- each program will be administered in accordance with applicable statutes, regulations, program plans, and applications;
- control of funds and property acquired using program funds will be maintained and administered by the appropriate public or nonprofit private agencies;
- specified methods of administering each program will be adopted and used;
- the effectiveness of each program in meeting its statutory objectives will be evaluated at least once every three years, and the state will cooperate in carrying out any evaluation of each program conducted by the federal government;
- fiscal control and fund accounting procedures will be used to ensure proper disbursement of, and accounting for, federal funds;
- The state will make reports on the results of program evaluations as may be needed by the Secretary to perform his duties under each program, and each state

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Bacon Act and Changes in Prevailing Wage Rates, 2000 to 2008, by (name redacted).

[17] The state may not disapprove an application unless the local agency has had an opportunity for a hearing and the hearing finds that there has been "substantial failure" by the local agency in complying with any of the federal requirements. Likewise, the state cannot suspend payments until 15 days after providing the local agency with an opportunity to demonstrate why such an action should not be taken. Suspensions are limited to 60 days unless the state provides a notice for a hearing within that 60-day period. Payments may be withheld if the state finds, after reasonable notice and the opportunity for a hearing, that the local agency has "failed substantially" to comply with any of the federal requirements.

will maintain records (as required in Section 443) and provide access to these records as the Secretary deems necessary to carry out his responsibilities;

- the state will provide opportunities for the participation in, planning for, and operation of each program by interested local agencies, institutions, organizations, and individuals, including consulting with relevant committees, local agencies, groups, and professionals in the development of program plans required by statute and publishing each proposed plan at least 60 days prior to the day on which the plan will be submitted to the Secretary or becomes effective (whichever occurs earlier), allowing at least 30 days for public comments on the plan; and
- none of the funds expended under any applicable program will be used to acquire equipment if such acquisition results in a direct financial benefit to any organization representing the interests of the purchasing entity or its employees.

Such general application will be in effect for the entire duration of each program covered, unless there are substantial changes in relevant federal or state law or "other significant changes in the circumstances affecting an assurance in that application."

Section 442. Single LEA Application

As with state applications to the Secretary addressed by Section 441, LEAs are required to submit to state agencies a general application containing assurances required for all programs under which federal aid is administered through a state agency. The application is required to cover all such programs in which the LEA participates. Similar to the state applications, the LEA application must include the following assurances:

- each program will be administered in accordance with applicable statutes, regulations, program plans, and applications;
- control of funds and property acquired using program funds will be maintained and administered by the appropriate public agency;
- fiscal control and fund accounting procedures will be used to ensure proper disbursement of, and accounting for, federal funds;
- the LEA will make reports to the state agency or board and to the Secretary as may be needed for the state agency or board and the Secretary to perform their duties under each program, and each LEA will maintain records (as required in Section 443) and provide access to those records as the state board or agency Secretary deems necessary to carry out their responsibilities;
- the LEA will provide opportunities for the participation in, planning for, and operation of each program by teachers, parents, and other interested agencies, organizations, and individuals;
- applications, evaluations, plans, or reports related to each program will be made available to parents and the public;
- facilities constructed under any program will be consistent with overall state construction plans and standards and with the requirements of Section 504 of the

Rehabilitation Act of 1973 in order to ensure that the facilities are accessible to and usable by individuals with disabilities;[18]

- the LEA has adopted effective procedures for acquiring and disseminating information and research regarding the programs and for adopting, where appropriate, promising educational practices to teachers and administrators participating in each program; and
- none of the funds expended under any applicable program will be used to acquire equipment if such acquisition results in a direct financial benefit to any organization representing the interests of the purchasing entity or its employees.

Such general application will be in effect for the entire duration of each program covered, unless there are substantial changes in relevant federal or state law or "other significant change [sic] in the circumstances affecting an assurance in that application."

Section 443. Records

This section imposes record-keeping requirements on recipients of federal education funds. Each recipient shall maintain records that fully disclose the amount and disposition of such funds, the total cost of the activity for which the funds are used, the share of that cost provided from other sources, and other records that contribute to an effective financial or programmatic audit. Records must be maintained for three years after the completion of the activity for which the funds are used. Any records maintained by the recipient that are related to, or pertinent to, the program shall be made accessible to the Secretary and the Comptroller General of the United States or their representatives for the purpose of audit examination.

Section 444. Protection of the Rights and Privacy of Parents and Students

This section establishes the Family Educational Rights and Privacy Act (FERPA). The act, sometimes referred to as the Buckley Amendment, guarantees parental access to student education records, while limiting the disclosure of those records to third parties. Specifically, educational agencies and institutions that receive federal funds must provide parents with access to the educational records of their children. Likewise, FERPA prohibits educational agencies or institutions that receive federal funds from having a policy or practice of releasing the education records of a student without the written consent of his parents, although consent is not required for the release of education records to certain individuals and organizations. For more information on the detailed privacy protections, requirements, and exceptions contained in FERPA, see CRS Report RS22341, *The Family Educational Rights and Privacy Act (FERPA): A Legal Overview*, by (name redacted).

Section 445. Protection of Pupil Rights[19]

This section provides that instructional materials that are used as part of any applicable program must be available for inspection by the parents or guardians of the children.

[18] 29 U.S.C. § 794.

[19] This section does not supersede Section 444, Protection of the Rights and Privacy of Parents and Students.

No student can be required, as part of any applicable program, to participate in a survey, analysis, or evaluation that reveals information concerning political affiliations or beliefs; mental or psychological problems; sex behavior or attitudes; illegal, anti-social, self-incriminating, or demeaning behavior; critical appraisals of family members; legally recognized privileged or analogous relationships (e.g., relationships with lawyers, physicians, and ministers); religious practices, affiliations, or beliefs; or income without the prior consent of the student (if the student is an adult or emancipated minor) or the prior written consent of the parent.

Except as previously discussed, an LEA that receives funds under any applicable program is required to develop and adopt policies, in consultation with parents, regarding the following:[20]

- the right of a parent to inspect a survey created by a third party prior to the distribution or administration of the survey, and procedures for granting a parent's request for inspection within a reasonable time period;
- arrangements to protect student privacy that are provided by the LEA in the event that a survey is distributed or administered that contains any of the previously discussed items requiring prior parent consent (or student consent, as appropriate);
- the right of a parent of a student to inspect any instructional material used as part of the educational curriculum for the student, and procedures for granting a parent's request for inspection within a reasonable time period;
- the administration of physical examinations or screenings that the school or LEA may administer;[21]
- the collection, disclosure, or use of students' personal information that will be used for marketing or be sold (or provided to others for those purposes); and
- the right of a parent of a student to inspect any instrument used in the collection of the aforementioned personal information prior to the distribution or administration of the instrument, and procedures for granting a parent's request for inspection within a reasonable time period.

The LEA is required to notify parents about the aforementioned policies at least annually and within a reasonable period of time following a substantive change to such policies. The LEA must allow parents (or students, if of an appropriate age) to opt the student out of any activities requiring notification (discussed below). The LEA is required to notify the parent of a student at least annually at the beginning of the school year of the dates during the school year when activities requiring notification are scheduled or expected to be scheduled.

The following activities require notification:

- activities involving the collection, disclosure, or use of students' personal information that will be used for marketing or be sold (or provided to others for those purposes);

[20] An LEA is not required to develop and adopt new policies if the SEA or LEA had relevant policies in place on the date of enactment of the No Child Left Behind Act of 2001 (P.L. 107-110).

[21] This provision does not apply to a survey administered to a student in accordance with the Individuals with Disabilities Education Act (IDEA).

- the administration of any survey that reveals the aforementioned information (e.g., political affiliation, religious affiliation); and
- any nonemergency, invasive physical examination or screening that is required for students to attend school, is administered by the school and scheduled in advance, and is not necessary to protect the immediate health and safety of the student or other students.

The requirement that a policy be developed related to the collection, disclosure, or use of students' personal information does not apply if the information is used for the exclusive purpose of developing, evaluating, or providing educational products or services for, or to, students or educational institutions, such as college or other postsecondary education or military recruitment; programs providing access to low-cost literacy products; curriculum and instructional materials used in elementary and secondary schools; tests and assessments used by elementary and secondary schools to provide "cognitive, evaluative, diagnostic, aptitude, or achievement" data about students and the subsequent analysis and public release of aggregated data; or student fundraisers for school-related or education-related activities.

The provisions related to the development of policies are not intended to preempt applicable provisions of state law requiring parental notification and do not apply to any physical examination or screening that is permitted or required by state law. The rights provided to parents under this section transfer to a student when a student turns 18 years old or is considered an emancipated minor under state law.

The Secretary is required to annually inform each SEA and each LEA of the agency's obligations under Section 444 and 445. Educational agencies and institutions are required to give parents and students notice of their rights under Section 445. An SEA or LEA may use funds provided under Title V-A of the ESEA to enhance parental involvement affecting the in-school privacy of students.[22]

The Secretary is authorized to take any action the Secretary deems necessary to enforce the provisions of this section, except that the Secretary may only terminate assistance provided under an applicable program if the Secretary determines there has been failure to comply with the requirements of Section 445 and compliance with the requirements cannot be obtained voluntarily. In addition, the Secretary is required to establish or designate an office and review board at ED to investigate, process, review, and adjudicate violations of the rights established under this section.

Section 446. Limitation on Withholding Federal Funds

The refusal of an SEA, LEA, IHE, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families to any federal entity or other third party on the grounds that it violates the right to privacy and confidentiality of students or their parents shall not constitute grounds for a suspension or termination of federal assistance.[23] Such a refusal may not result in a denial of,

[22] Title V-A last received appropriations in FY2007.

[23] The provisions apply except as provided in subsection (b)(1)(D) of FERPA (Section 444).

refusal to consider, or delay in the consideration of funding for such a recipient in subsequent fiscal years.

Similarly, no assistance to an LEA may be limited, deferred, or terminated by the Secretary on the grounds of noncompliance with Title VI of the Civil Rights Act of 1964 or any other nondiscrimination provision of federal law without due process of law,[24] and it is unlawful for the Secretary to limit or defer any financial assistance on the basis of a failure to comply with any quotas on student admissions by an IHE or community college receiving federal financial assistance.

Section 447. Prohibition on Federally Sponsored Testing

Notwithstanding any other provision of law (except as discussed below), no funds provided to ED or to an applicable program may be used to "pilot test, field test, implement, administer or distribute in any way any federally sponsored national test in reading, mathematics, or any other subject that is not specifically and explicitly provided for in authoring legislation enacted into law."[25] The exceptions to this provision include the Third International Mathematics and Science Study (TIMSS)[26] or other international comparative assessments that are administered to a sample of students in the United States and foreign countries and developed under the authority of Section 153(a)(6) of the Education Sciences Reform Act of 2002 (ESRA).[27]

Part D—Enforcement

Part D of GEPA contains 10 sections, all of which pertain to enforcement.

Section 451. Office of Administrative Law Judges

This section, which establishes an Office of Administrative Law Judges in ED, provides a mechanism for challenging agency actions. Specifically, the Secretary is required to establish such an office for the purpose of conducting hearings on the recovery of funds, withholding of funds, cease and desist orders, or other proceedings that may be designated by the Secretary. The judges shall be officers or employees of ED; must be appointed by the Secretary in accordance with the Administrative Procedure Act (APA); and must meet the requirements for administrative

[24] This provision requires at least 30-days prior written notice to the agency regarding the programs the Secretary finds to be operating in noncompliance with a specific provision of federal law; the opportunity for a hearing before an administrative law judge within 60 days; the conclusion of such hearing and the rendering of a decision within 90 days from the commencement of such hearing, unless the judge finds that a decision cannot be rendered within that time period, in which case the judge may extend such period for up to 60 days; the limitation of any deferral of federal financial assistance to a period not to exceed 15 days after the rendering of the decision unless there was a finding that the LEA failed to comply with any federal nondiscrimination requirements; and procedures established by the Secretary to ensure the availability of sufficient funds (without regard to any fiscal year limitations) to comply with the decision of such judge.

[25] For example, the National Assessment of Educational Progress (NAEP) is specifically provided for in authorizing legislation (Section 303 of the Education Sciences Reform Act of 2002).

[26] This assessment is now known as the Trends in International Mathematics and Science Study.

[27] Section 153(a)(6) of ESRA specifically authorizes ED to acquire and disseminate data on educational activities and student achievement in the United States compared with foreign countries. The provision also references TIMSS.

law judges set forth in the APA,[28] which establishes uniform procedures that federal agencies must follow when engaging in rulemaking, adjudication, or other actions.[29] In selecting judges, the Secretary is required to give "favorable consideration" to candidates with experience in SEAs or LEAs and their knowledge of the administration of federal education programs in these agencies. The Secretary is also required to designate one of the judges as the chief judge.

The chief judge shall assign a judge to each case or class of cases, although no judge may preside over a case in which the judge has a conflict of interest with respect to the case. Each judge shall review and may require that "evidence be taken on the sufficiency of the preliminary departmental decision" as established in Section 452. The proceedings must be conducted according to rules established by the Secretary through regulation that conform with hearing rules under the APA.[30] Likewise, costs and fees of parties are subject to the provisions of the APA.[31]

If the judge determines that discovery may produce relevant information with respect to the case, the judge may order a party to produce relevant documents, answer relevant written interrogatories, and have depositions taken. The discovery period is limited to 90 days but may be extended by the judge for good cause shown. If requested by any party, the judge may establish a schedule for the discovery process. The judge is authorized to issue subpoenas and apply to the appropriate U.S. court for enforcement of the subpoena.

Meanwhile, the Secretary is required to establish a process for the voluntary mediation of disputes. All parties involved in mediation must agree to the mediation, and the mediator must be independent of the parties to the dispute. Mediation is limited to 120 days, although the mediator may grant extensions of this time period.

Finally, the Secretary is required to employ, assign, or transfer sufficient professional personnel to ensure that all matters may be addressed in a timely manner.

Section 452. Recovery of Funds

This section establishes procedures that govern the recovery of funds from recipients. Whenever the Secretary determines that a recipient of a grant or cooperative agreement under an applicable program must return funds because the recipient has made an expenditure of funds that is not allowable or has otherwise failed to account properly for such funds, the Secretary shall give the recipient written notice of a preliminary departmental decision and notify the recipient of its right to have that decision reviewed and to request mediation. In a preliminary departmental decision, the Secretary bears the burden of establishing the prima facie case for the recovery of funds. The facts to serve as the basis of the preliminary departmental decision may come from an audit report, an investigative report, a monitoring report, or other evidence, and the amount of funds to be recovered must be determined on the basis of Section 453. The failure by a recipient to maintain records required by law, or to allow the Secretary access to such records, automatically constitutes a prima facie case.

[28] 5 U.S.C. § 3105.

[29] 5 U.S.C. §§ 500 et seq.

[30] 5 U.S.C. §§ 554, 555, 557.

[31] 5 U.S.C. § 504.

If a recipient receives written notice of a preliminary departmental decision and wants a review of that decision, the recipient must submit to the Office of Administrative Law Judges (hereafter referred to as the Office) an application for review not later than 60 days after receiving the notice. The application must be in the form and contain the information specified by the Office. If the Office determines that the Secretary has failed to establish a prima facie case for the recovery of funds, the Office must notify the Secretary as expeditiously as possible so that the Secretary can take appropriate action.

If a preliminary departmental decision requests a recovery of funds from a state recipient, the state may not recover funds from an affected LEA unless that state recipient has transmitted a copy of the preliminary departmental decision to any affected subrecipient within 10 days of receiving such written notice and has consulted with each affected subrecipient to determine whether the state should seek review by the Office.

In any proceeding before the Office, it is the recipient who bears the burden of demonstrating that it should not be required to return the amount of funds for which recovery is sought in a preliminary departmental decision. Hearings before the Office must occur within 90 days after receipt of a request for review of a preliminary departmental decision, although this requirement may be waived at the discretion of the judge for good cause. After the Office issues a decision, parties to the proceeding have 30 days to seek review by the Secretary. Although the Secretary may review a decision, he cannot alter the Office's findings of fact if those findings are supported by substantial evidence.[32] However, the Secretary, for good cause, may remand the case to the Office to take further evidence, and the Office may subsequently make new or modified findings of fact and may modify its previous action accordingly. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

If a recipient submits a timely application for review of a preliminary departmental decision, the Secretary may not take any collection action until a decision of the Office upholding ED's preliminary decision in whole or in part becomes final agency action, which occurs 60 days after the recipient receives written notice of the Office's decision, with several exceptions. If the Secretary modifies or sets aside the decision, the decision of the Secretary becomes final agency action when the recipient receives written notice of the Secretary's action. Alternatively, the Secretary may remand the decision to the Office, in which case no final agency action has occurred. The Secretary must publish decisions that have become final agency action in the *Federal Register* or another appropriate publication within 60 days.

The Secretary is also prohibited from taking collection action if a recipient seeks judicial review under Section 458 and that judicial review has not been completed. However, judicial review does not affect the authority of the Secretary to take any other adverse action against a recipient.

The Secretary may collect from a recipient either the amount specified in a preliminary decision for which review was not sought or the amount sustained in a decision by the Office or the Secretary that becomes final agency action. However, the Secretary may compromise any preliminary departmental decision that does not exceed the amount agreed to be returned by more than $200,000, if the Secretary determines that the collection of any or all of the amount would not be practical or be in the public interest and that the practice which resulted in the preliminary

[32] During this review, any ex parte contact between the Secretary and individuals representing ED or the recipient is prohibited.

departmental decision has been corrected and will not recur. The Secretary is required to publish in the *Federal Register* a notice of intention to compromise at least 45 days prior to doing so, and such notice must provide interested persons an opportunity to comment on any proposed action.

Finally, recipients are not liable to return funds that were expended in an unauthorized manner more than five years before the recipient received written notice of a preliminary departmental decision, and no interest that arises during the administrative review process may be charged.

Section 453. Measure of Recovery

This section sets forth requirements that determine the amount of funds that may be recovered from recipients. If a recipient makes an unallowable expenditure or otherwise fails to account properly for funds, the recipient is required to return funds in an amount that is "proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the award." Identifiable federal interests include, but are not limited to serving only eligible beneficiaries; providing only authorized services or benefits; complying with expenditure requirements and conditions; preserving the integrity of planning, application, recordkeeping, and reporting requirements; and maintaining accountability for the use of funds.

In addition, the amount of funds that may be recovered must be reduced by an amount that is "proportionate to the extent the mitigating circumstances caused the violation." Where mitigating circumstances warrant, a judge is authorized to determine that no recovery is justified. SEAs and LEAs bear the burden of demonstrating the existence of such mitigating circumstances, which are deemed to exist only when it would be unjust to compel the recovery of funds because the SEA or LEA: actually and reasonably relied upon erroneous written guidance provided by ED; made an expenditure or engaged in a practice after the SEA or LEA submitted a written request for guidance to ED with respect to the expenditure or practice at issue and ED failed to respond within 90 days;[33] or actually and reasonably relied upon a judicial decree issued to the recipient.

An SEA or LEA seeking to demonstrate the existence of mitigating circumstances must show the following: the written request for guidance accurately described the proposed expenditure or practice and included the facts necessary for a determination of its legality; the request contained a certification by the chief legal officer of the SEA that such officer had examined the proposed expenditure or practice and believed the proposed expenditure or practice was permissible under applicable state and federal law; and the SEA or LEA reasonably believed that the proposed expenditure or practice was permissible under applicable state and federal law.

When ED's response to requests for guidance contain significant interpretations of applicable law or policy, ED must disseminate such responses to SEAs. The Secretary is also required to periodically review written requests for guidance to determine the need for new or supplementary regulatory or other guidance under applicable programs.

[33] If ED responds after 90 days, the SEA or LEA that submitted the request must comply with the guidance received at the earliest practicable time.

Section 454. Remedies for Existing Violations

This section establishes ED's broad enforcement powers, which are set forth in more detail in subsequent sections. If the Secretary has reason to believe that the recipient of funds under any applicable program is failing to comply substantially with any legal requirement applicable to the funds, the Secretary may withhold further payments; issue a complaint to compel compliance through a cease and desist order; enter into a compliance agreement with the recipient; or take any other action authorized by law. Regardless of whether the Secretary takes action under this section, the Secretary shall not be precluded from seeking a recovery of funds under Section 452.

Section 455. Withholding

If the Secretary has reason to believe that the recipient of funds under any applicable program is failing to comply substantially with any legal requirement applicable to the funds, the Secretary may withhold from a recipient further payments (including payments for administrative costs). Before withholding payments, the Secretary must notify the recipient in writing of the intent to withhold payments, of the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a legal requirement, and of an opportunity for a hearing to be held at least 30 days after the notification has been sent to the recipient.

The hearing must be held before the Office of Administrative Law Judges and conducted in accordance with provisions in Section 451. Pending the outcome of the hearing and after the recipient has been given reasonable notice and an opportunity to show cause why the suspensions should not occur, the Secretary may suspend payments to the recipient, suspend the authority of the recipient to obligate federal funds, or both. If the decision of the judge is supported by substantial evidence, it shall be considered conclusive. The Secretary, however, for good cause shown, may remand the case to the Office to collect additional evidence. Based on the new evidence, the Office may make new or modified findings of fact and modify its previous action. These new or modified findings shall be considered conclusive if supported by substantial evidence. The decision of the Office in any hearing conducted under this section shall become final agency action 60 days after the recipient receives written notification of the decision unless the Secretary modifies or sets aside the decision (in which case the Secretary's action shall become final action when the recipient receives written notification of the action) or the Secretary remands the decision to the Office.

Section 456. Cease and Desist Orders

Rather than withholding funds, as provided under Section 455, the Secretary may issue a complaint that describes the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a legal requirement and may offer an opportunity for a hearing to be held at least 30 days after the complaint has been served. The recipient has the right to appear before the Office of Administrative Law Judges and show cause why an order to cease and desist from the violation of law charged in the complaint should not be issued. Following the hearing, if the Office is of the opinion that the recipient is in violation of any legal requirements as charged in the complaint, the Office must prepare a report stating its findings and issue an order requiring the recipient to cease and desist from the practice, policy, or procedure that led to the violation. The report and order become the final agency action when they are received by the recipient. The Secretary may enforce a final order that becomes final agency action by

withholding any portion of the funds payable to the recipient under the applicable program or certify the facts to the Attorney General, who shall take measures to enforce the order.

Section 457. Compliance Agreements

If the Secretary believes that a recipient of funds has failed to comply substantially with a legal requirement, the Secretary may enter into a compliance agreement with the recipient. The goal of the agreement is to bring the recipient into full compliance as quickly as possible and is not to "excuse or remedy past violations" of legal requirements. Before entering into a compliance agreement, the Secretary is required to hold a hearing at which the recipient has the burden of making the case that full compliance cannot occur immediately. If the Secretary agrees, the Secretary is required to state this finding in writing and publish the findings and the compliance agreement in the *Federal Register*. The compliance agreement may not exceed three years from the date of the Secretary's written findings and must contain the terms and conditions with which the recipient will comply until full compliance is achieved. If the recipient fails to meet the terms of the compliance agreement, the Secretary may determine that the agreement is no longer in effect and take another action authorized by law.

Section 458. Judicial Review

This section clarifies that recipients who are aggrieved by certain agency actions are entitled to judicial review. Specifically, a recipient of funds under an applicable program that would be adversely affected by the recovery of funds, fund withholding, or a "cease and desist" order and any state entitled to receive funds under a program covered by a single state application (Section 441) whose application is denied by the Secretary may submit a petition for review of such action to the U.S. Court of Appeals (hereafter referred to as the Court) in the relevant jurisdiction. The Court shall consider the findings of fact by the Office of Administrative Law Judges to be conclusive, if supported by substantial evidence. For good cause shown, the Court may remand the case to the Office to take further evidence. Based on this evidence, the Office may make new or modified findings of fact and may modify its previous action. These new or modified findings of fact will also be considered to be conclusive, if supported by substantial evidence. The judgment of the court is reviewable by the U.S. Supreme Court.

Section 459. Use of Recovered Funds

When funds obligated under an applicable program are recovered by the Secretary because the recipient made a non-allowable expenditure of funds or failed to properly account for funds, up to 75% of the amount recovered may be returned to the affected recipient if the Secretary determines that the following conditions are met:

- the practices or procedures that led to the recovery of funds have been corrected and the recipient is compliant with all other requirements of the program, provided that the recipient was notified of any noncompliance with such requirements and given a reasonable amount of time to correct the noncompliance;
- the recipient has submitted a plan to the Secretary for the use of the returned funds under the requirements of the program and, to the extent possible, for the

benefit of the population adversely affected by the earlier failure to comply with such requirements; and

- the use of the returned funds in accordance with the recipient's plan would serve the purposes of the program for which the funds were originally provided.

Any payment made under this section shall be subject to terms and conditions that the Secretary considers necessary to accomplish the affected programs' purposes, including the submission of periodic reports on the use of funds and consultation by the recipient with representatives of the population that will benefit from the payment.

The payments provided under this section shall remain available for expenditure for a period of time established by the Secretary, but not to exceed more than three fiscal years following the later of the fiscal year in which final agency action is taken if the parties filed a petition for a review of a decision to recover funds (Section 452) or, if a recipient files a petition for judicial review, the fiscal year in which final judicial action was taken under Section 458.

The Secretary is required to publish a notice of intent to use recovered funds for the aforementioned purpose in the *Federal Register* at least 30 days before entering into such an arrangement. The notice must specify the terms and conditions under which the payments will be made, and a period of at least 30 days must be provided for public comment.

Section 460. Definitions

This section defines the terms "recipient" and "applicable program" for the purposes of Part D of GEPA. The term "recipient" is defined to mean a recipient of a grant or cooperative agreement under an applicable program. In contrast to the general definition of "applicable program," however, Part D defines the term to exclude programs authorized by the HEA and assistance programs provided under the Act of September 30, 1950 (P.L. 81-874), and the Act of September 23, 1950 (P.L. 81-815); both P.L. 81-874 and P.L. 81-815 have been repealed. As a result, although many of the Secretary's powers and responsibilities under GEPA are applicable to higher education programs, the Secretary's enforcement authority under GEPA does not extend to the HEA, which contains its own program-specific enforcement provisions.[34]

Issues

This section discusses the practical application of several GEPA provisions and issues related to these provisions.

Forward Funding and Advance Appropriations

Most appropriations are available for obligation during the federal fiscal year of the appropriations bill. For example, most FY2010 appropriations will be available for obligation from October 1, 2009, through September 30, 2010. Several applicable programs have authorization or appropriations provisions that allow funding flexibility for program years that

[34] See, for example, 20 U.S.C. § 1082.

differ from the federal fiscal year. For example, many of the elementary and secondary education formula grant programs receive appropriations that become available for obligation to the states on July 1 of the same year as the appropriations, and remain available for 15 months through the end of the following fiscal year. That is, FY2010 appropriations for some programs will become available for obligation to the states on July 1, 2010, and will remain available until September 30, 2011.[35] This budgetary procedure is popularly known as "forward" or "multi-year" funding, and is accomplished through funding provisions in the annual Labor, Health and Human Services, and Education, and Related Agencies (L-HHS-ED) appropriations bill.

Forward funding in the case of elementary and secondary education programs was designed to allow additional time for school officials to develop budgets in advance of the beginning of the school year. For Pell Grants for undergraduates, however, aggregate program costs for individual students applying for postsecondary educational assistance cannot be known with certainty ahead of time. Appropriations from one fiscal year primarily support Pell Grants during the following academic year; that is, the FY2010 appropriations will be used primarily to support grants for the 2010-2011 academic year. Unlike funding for elementary and secondary education programs, however, the funds for Pell Grants remain available for obligation for two full fiscal years.

An *advance appropriation*, as authorized by Section 421 of GEPA, occurs when the appropriation is provided for a fiscal year beyond the fiscal year for which the appropriation was enacted. For example, funds for obligation and expenditure in FY2011 are appropriated in the FY2010 L-HHS-ED act. In the case of FY2010 appropriations, funds normally would have become available October 1, 2009, under regular funding provisions, but may not become available for some programs until July 1, 2010, under the forward funding provisions discussed above. However, if the July 1, 2010, forward funding date for obligation was to be postponed by three months—until October 1, 2010—the appropriation would be reclassified as an advance appropriation since the funds would become available *only in a subsequent fiscal year*, FY2011. Like forward funding provisions, these advance appropriations are specified through provisions in the annual appropriations bill.

At the appropriations level, there is no difference between forward funded and advance appropriations except for the period available for obligation. At the program or service level, relatively little is changed by the three-month delay in the availability of funds, since most expenditures for a standard school year occur after October 1. At the scorekeeping level, however, a significant technical difference occurs because forward funding is counted as part of the current fiscal year, and is therefore fully included in the current 302(b) allocation for discretionary appropriations.[36] Under federal budget scorekeeping rules, an advance appropriation is not counted in the 302(b) allocation until the following year. In essence, a three-month change from forward funding to an advance appropriation for a given program allows a one-time shift from the current year to the next year in the scoring of discretionary appropriations.[37] Thus, Congress is able to provide funding for education and other programs in the appropriations for

[35] As discussed previously and below, Section 421 of GEPA provides a one-year extension for the obligation and expenditure of funds for applicable programs.

[36] The 302(b) allocation for discretionary appropriations is the limit on discretionary appropriations set for each of the appropriations bills by the House and Senate Committees on Appropriations. The House and Senate do not have to set the same 302(b) allocations.

[37] For more information about advance appropriations and forward funding, see CRS Report RS20441, *Advance Appropriations, Forward Funding, and Advance Funding*, by (name redacted).

one fiscal year without having it count against the total amount available for discretionary appropriations in that fiscal year.

Extension of the Period of Availability of Appropriations

Section 421 of GEPA extends the period of availability of appropriations by one fiscal year for applicable programs. In practice, this section extends the period of obligation and expenditure of funds for applicable programs from 12 or 15 months to 24 or 27 months, respectively, depending on whether the program is forward funded. For example, if funds were made available on July 1, 2010, these funds would generally be available for obligation and expenditure until September 30, 2011. However, GEPA would extend the period for obligation and expenditure of these funds until September 30, 2012. Thus, if funds are appropriated for FY2010, they would generally be available for obligation and expenditure through September 30, 2010. While this provision may be useful to SEAs and LEAs in program planning and budgeting, it may also have the effect of providing additional time for funds to be expended in situations where the goal is to have funds expended as quickly as possible. Under these circumstances, statutory language would need to include provisions to override Section 421 of GEPA. For example, while funds made available under the American Recovery and Reinvestment Act (ARRA, P.L. 111-5) for existing education programs administered by ED were authorized for obligation and expenditure through FY2010, Section 421 of GEPA automatically extended the period of obligation and expenditure for these funds. If the intention of providing the funds was to have them be obligated and expended in the year in which they were appropriated (i.e., FY2009), statutory language would have needed to be included in ARRA to state that Section 421 of GEPA did not apply.

Automatic Extension of Program Authorizations for One Year

Section 422 of GEPA provides for the automatic extension of program authorizations for one year under the conditions specified in the section. In practice, this provision has been used to extend education programs authorized by major pieces of legislation, such as the Elementary and Secondary Education Act and Higher Education Act, by one year. GEPA, however, only provides for a one-year extension of program authorizations. If Congress does not act to reauthorize a program within the one-year extension period granted by GEPA, the program is technically no longer authorized. This does not mean, however, that a program that is no longer authorized may cease to operate. In practice, as long as a program continues to receive appropriations, the program is considered to be implicitly authorized.

For example, all current ESEA program authorizations expired after FY2007. These authorizations were automatically extended, however, for one additional year under section 422 of GEPA. Thus, the authorization period for current ESEA programs was extended through September 30, 2008. Section 422 of GEPA also specifies that the amount authorized to be appropriated for a program during the extension shall be the amount that was authorized to be appropriated for the program during the terminal fiscal year of the program. Thus, in the case of the five ESEA programs with specific authorization levels for FY2007,[38] those authorizations remained the same for FY2008. While current ESEA programs are no longer authorized under

[38] These programs include Title I, Part A Grants to Local Educational Agencies (LEAs); 21st Century Community Learning Centers (21CCLC); State Grants for Innovative Programs; Voluntary Public School Choice; and the Fund for the Improvement of Education.

specific statutory provisions, they are considered to be implicitly authorized, as the programs have continued to receive appropriations.[39]

Prohibition on Federal Control of Education

Section 438 of GEPA explicitly states that no provision included in an applicable program is intended to authorize the federal government to exercise control over curriculum, instructional programs, administration, or school personnel or in the selection of printed material, or in the assignment of transportation of students or teachers to overcome a racial imbalance. These prohibitions, which are designed to maintain state and local control over education, are particularly relevant to elementary and secondary education programs. While the federal government provides funding to support education at the state and local levels, this support cannot be conditioned on state educational agencies, local educational agencies, or schools adopting specific curricula or instructional programs. [40] Thus, for example, the federal government can require recipients accepting funds under a program designed to improve the English language acquisition and proficiency of English language learners to implement instructional programs that meet these goals, but the federal government is prohibited from specifying which instructional programs or curricula must be used to meet these goals.

FERPA

Section 444 of GEPA, otherwise known as the Family Educational Rights and Privacy Act, contains privacy requirements regarding access to and release of educational records. In practice, most of the debate surrounding FERPA focuses on striking a balance between protecting student privacy while simultaneously allowing schools to release educational records under special circumstances. For example, FERPA does allow schools to release education records without consent in connection with an emergency if the records are necessary to protect the health or safety of the student or other persons. In the wake of the shootings at Virginia Tech in April 2007, there have been several attempts to clarify FERPA's health or safety exception. Indeed, under recent amendments to the HEA, the Secretary is required to provide guidance clarifying rules regarding disclosure when a "student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault." Such guidance must clarify that institutions that disclose such information in good faith are not liable for the disclosure.[41] In addition, ED issued new regulations that contain similar clarifications regarding disclosure requirements in the event of a threat to health or safety.[42]

Meanwhile, because FERPA allows, but does not require, postsecondary institutions to disclose the final results of any disciplinary proceeding involving a crime of violence or a nonforcible sex offense, similar efforts to expand disclosure by requiring the release of such records have periodically been proposed. Indeed, recent amendments to the HEA essentially override FERPA's optional disclosure rule by requiring IHEs to disclose to the alleged victim of any crime of violence or a nonforcible sex offense the results of any disciplinary proceeding conducted by the

[39] United States General Accounting Office, *Principles of Federal Appropriations Law*, Third Edition, Volume I, January 2004, pp. 2-69 through 2-71, http://www.gao.gov/special.pubs/d04261sp.pdf.

[40] Similar prohibitions are included in the ESEA. See, for example, Sections 1905 and 9526(b).

[41] P.L. 110-315, § 825.

[42] Department of Education, Family Educational Rights and Privacy, 73 FR 74806 (December 9, 2008).

institution against a student who is the alleged perpetrator of such a crime or offense. If the alleged victim is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of disclosure.[43]

Prohibition on the Use of Funds to Support a National Test

Section 447 of GEPA contains a specific prohibition on the use of funds provided to ED or to an applicable program being used to develop, implement, administer, or distribute a federally sponsored national test in any subject, including reading or math, unless the test is specifically provided for in enacted authorizing legislation. Thus, unless Congress acts to support a federally sponsored national test in a subject area, the Secretary is prohibited from using funds for this purpose. While the Secretary is prohibited from using funding to develop such tests, the Secretary is not prohibited from providing federal funds to support or incentivize non-federally sponsored efforts to develop a national or common test. For example, the Secretary has already indicated that a portion of the competitive grant funds made available under Race to the Top, authorized by Section 14006 of the American Recovery and Reinvestment Act (ARRA, P.L. 111-5), will be used to support consortia of states working to develop new assessments linked to a set of common standards.[44] The largest effort being conducted in this area currently is a project being led by the National Governors Association and the Council of Chief State School Officers to develop common standards and assessments in reading and math.[45]

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[43] P.L. 110-315, § 493.

[44] For more information, see http://www2.ed.gov/news/pressreleases/2009/10/10202009.html and http://www2.ed.gov/programs/racetothetop-assessment/index.html.

[45] For more information, see http://www.corestandards.org/ and http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnextoid=87f7ad9817745210VgnVCM1000005e00100aRCRD.