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The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLBA)

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Summary

The Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLBA) are two of the most significant federal statutes relating to education. Although both have the goal of improving education — IDEA for children with disabilities and NCLBA for all children — the two statutes take different approaches. IDEA focuses on the individual child, with an emphasis on developing an individualized education program (IEP) and specific services for children with disabilities, while NCLBA takes a more global view, with an emphasis on closing gaps in achievement test scores and raising the aggregate scores of all demographic groups of pupils to specific levels.

On December 4, 2004, President Bush signed P.L. 108-446, which reauthorized and amended IDEA. Among other things, P.L. 108-446 was aimed at better coordinating special education with the requirements of NCLBA. Most of these changes to IDEA become effective on July 1, 2005, for school year 2005-2006.

The relationship of IDEA and NCLBA has become of increasing significance because of this recent reauthorization of IDEA and guidance from the U.S. Department of Education (ED) on NCLBA issues related to the education of children with disabilities. This report will provide a brief overview of IDEA and NCLBA, a discussion of the intersection of selected provisions of IDEA and NCLBA, and a discussion of ED regulations and guidance regarding IDEA and NCLBA. The report concludes with a discussion of possible issues related to the interaction of IDEA and NCLBA.

This report will be updated to reflect major congressional action or major regulatory actions by ED.

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The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLBA)

Introduction

The Individuals with Disabilities Education Act (IDEA)¹ and the No Child Left Behind Act (NCLBA)² are two of the most significant federal statutes relating to education. Although both have the goal of improving education — IDEA for children with disabilities and NCLBA for all children — the two statutes take different approaches. IDEA focuses on the individual child, with an emphasis on developing an individualized education program (IEP) and specific services for children with disabilities, while NCLBA takes a more global view, with an emphasis on closing gaps in achievement test scores and raising the aggregate scores of all demographic groups of pupils to specific levels.

On December 4, 2004, President Bush signed P.L. 108-446, which reauthorized and amended IDEA. Among other things, P.L. 108-446 was aimed at better coordinating special education with the requirements of NCLBA. Most of these changes to IDEA become effective on July 1, 2005, for school year 2005-2006.

The relationship of IDEA and NCLBA has become of increasing significance because of the recent reauthorization of IDEA and guidance from the U.S. Department of Education (ED) on NCLBA issues related to the education of children with disabilities. This report will provide a brief overview of IDEA and NCLBA, a discussion of the intersection of selected provisions of IDEA and NCLBA, and a discussion of ED regulations and guidance regarding IDEA and NCLBA. The report concludes with a discussion of possible issues related to the interaction of IDEA and NCLBA.

¹ 20 U.S.C. §1400 *et seq.*

² P.L. 107-110, codified in part at 20 U.S.C. §6301 *et seq.*, §6601 *et seq.*, §6801 *et seq.*, §7101 *et seq.*, §7201 *et seq.*, §7301 *et seq.*, §7401 *et seq.*, §7702, §7703, §7707, §7709, §7714, §7801 *et seq.*

Overview of Selected IDEA and NCLBA Provisions

IDEA is the major federal law dealing with the education of children with disabilities. In addition to authorizing funds to help states and local educational agencies (LEAs) provide special education and related services, IDEA requires the provision of a free appropriate public education (FAPE) for children with disabilities, specifying in some detail the provision of services for these children,³ and grants certain procedural rights to these children and their parents.

One of the major changes to IDEA resulting from the 1997 amendments (P.L. 105-17) involved a series of additions to the act aimed at improving the education of children with disabilities, as well as continuing to ensure their access to free appropriate public education. At the child level, this involved various requirements in the individualized education program linking each child's education to the general curriculum and to statewide and districtwide achievement test programs. In addition, various requirements were added for states and local educational agencies related to the educational performance of children with disabilities and to improving the quality and quantity of those who teach children with disabilities. P.L. 108-446 continued this approach and added provisions to align IDEA with NCLBA requirements.

The No Child Left Behind Act of 2001 (P.L. 107-110) reauthorized the Elementary and Secondary Education Act (ESEA) and, in doing so, added requirements aimed at improving the education of all public elementary and secondary school children, including those with disabilities. Although many of these requirements directly affect Title I-A of ESEA, aimed mainly at improving education for disadvantaged children, important requirements impact any state or LEA that receives Title I-A funds⁴ and apply to all children served by such states or LEAs.

In addition, NCLBA continues Title I schoolwide projects for schools serving relatively high percentages of children from low-income families. These projects allow for consolidation of federal education funds (including Title I-A and IDEA funds) to serve all children in a qualifying school. Thus some NCLBA requirements that might apply only to activities or individuals funded under Title I-A (for example, Title I teachers and paraprofessionals) can apply to all activities and individuals in schoolwide project schools (for example, all applicable teachers and paraprofessionals — including applicable special education teachers and paraprofessionals).⁵

³ Among the key requirements of services for children with disabilities are that each child must have an individualized education program (IEP) devised by a team, which includes both school personnel and the parents, and that children must be educated with their non-disabled peers “to the maximum extent appropriate.”

⁴ Currently all states and a vast majority of LEAs receive Title I-A funding.

⁵ For further information on NCLBA in general, see CRS Report RL31284, *K-12 Education: Highlights of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Wayne Riddle.

Overview of NCLBA and IDEA Assessment and Accountability Requirements

Overview. NCLBA requires that all states have in place a single state accountability system aimed at reducing achievement gaps between higher-achieving students and lower-achieving students, including those children with disabilities who are lower-achieving. NCLBA permits use of alternative standards-based assessments for children with disabilities for whom the statewide assessment is inappropriate. Final regulations, issued in December 2004, clarified that relatively small groups of the most severely cognitively disabled students (1% of all children tested) can meet the requirements of the statewide system based on alternative achievement standards. That is, their scores of “proficient” or “advanced,” based on alternative assessments and alternative achievement standards, may be counted as such in adequate yearly progress determination as discussed below. In April 2005, the Secretary of Education announced a new policy that would permit other children with disabilities who experience “persistent academic difficulties” (an additional 2% of those tested) to meet achievement requirements based on “modified achievement standards.” All other children with disabilities must be assessed based the same achievement standards that non-disabled children are assessed on (although some of these children with disabilities may be assessed with alternative assessments).

NCLBA Assessment and Accountability Requirements.⁶ NCLBA requires that all states receiving Title I-A funds (currently all states) must have in place by school year 2005-2006 standards-based assessments in reading and mathematics for all students in grades 3-8 and standards-based assessments in science by school year 2007-2008. For children with disabilities for whom these tests (even with accommodations) are inappropriate, states must provide one or more alternative assessments.

NCLBA requires that states have in place a statewide accountability system based on standards of adequate yearly progress (AYP) aimed at reducing achievement gaps between high-achieving and low-achieving students. These standards must be applied to specified groups, including children with disabilities,⁷ as well as to all students in each public school, LEA, and state as a whole. The ultimate goal of these state systems is that all students reach proficient or advanced levels of achievement by school year 2013-2014.

⁶ For further information on NCLBA testing and accountability requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*; CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*; *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, all by Wayne C. Riddle.

⁷ Other specified groups are economically disadvantaged pupils, limited English proficient (LEP) pupils, and pupils in major racial and ethnic groups.

AYP standards must be applied to all public schools⁸ and LEAs in states receiving ESEA Title I-A funds; however, certain actions — particularly the corrective actions described in the remainder of this paragraph — have to be applied only to schools and LEAs receiving Title I-A funds.⁹ Applicable schools that fail to meet AYP standards over two consecutive years must be identified as requiring improvement. Technical assistance is provided to those schools, and public school choice must be offered to pupils of such schools for the next school year. Choice of schools must only include those not identified for improvement.¹⁰ Following three consecutive years of failure to meet AYP, pupils from low-income families must be offered the opportunity to obtain supplementary services from approved providers, which could include public or private schools, as well as non-profit and for-profit

⁸ A school must assess at least 95% of relevant pupils — both all pupils and those in each identified subgroups — in order to meet AYP standards.

⁹ A large majority of LEAs receive funding under Title I-A. Only those LEAs with very few poor children (fewer than 10) or very low poverty rates (under 2%) do not qualify. However, even in LEAs receiving Title I-A funding, approximately 60% of all public schools qualify for Title I-A funding.

¹⁰ ED comments with respect to final NCLBA regulations specify the following regarding public school choice for children with disabilities:

Under the IDEA, a change in the location of delivery of services, in and of itself, does not trigger the “change of placement” procedures of the IDEA. The LEA can allow the school of choice either to implement the IEP that the prior school developed for the new school year, or convene an IEP team meeting and develop a new IEP that meets the student’s needs. If the LEA adopts the student’s existing IEP, none of the “change of placement” procedures apply. However, the school district must comply with the “change of placement” requirements of the IDEA if the new IEP will change either the services in the IEP or the extent to which the student will participate with nondisabled students in academic and nonacademic activities. Similar rules apply to students who are covered only by Section 504 and Title II of the ADA [the Americans with Disabilities Act].

LEAs are not required to offer students with disabilities the same choices of schools as are offered to nondisabled students, but may match the abilities and needs of a student with a disability, as indicated on the student’s IEP, to those schools that have the ability to provide FAPE to the student. However, school districts must offer students with disabilities and those eligible under Section 504 and Title II of the ADA the opportunity to be educated in an eligible school, namely, a school that has not been identified for school improvement, corrective action, or restructuring and that has not been identified by the State as persistently dangerous. Like other students, students with disabilities and those covered by Section 504 and Title II of the ADA must have the opportunity to express a preference among at least two eligible schools and that preference must be considered by the school district in making their assignment. 67 *Federal Register* 71756, Dec. 2, 2002.

See also the non-regulatory guidance issued by ED regarding public school choice, discussed *infra* at pp. 17-18.

providers.¹¹ Following five consecutive years of failure, the school must be subject to “restructuring.” For example, staff could be replaced, or the school could be converted to a charter school. Similar procedures apply to LEAs that fail to meet AYP standards. In addition to these corrective actions, states may reward schools that significantly close achievement gaps among various groups or exceed AYP for two or more consecutive years.¹²

With respect to children with disabilities (and other specified groups), each group must meet or exceed the state’s annual measurable objectives unless a particular group is of insufficient size to produce statistically valid results or if privacy rights would be violated.¹³ In addition, a school or LEA may still meet AYP standards even if some groups (such as children with disabilities) do not, if the percentage of the group that is below the proficient level declines by 10% or more compared to the previous year’s percentage and the group makes sufficient progress on at least one other indicator.

ED NCLBA Regulatory Requirements. On December 9, 2003, ED issued a final rule amending the regulations governing Title I of the Elementary and Secondary Education Act (ESEA) to clarify school accountability for the academic achievement of students with the most significant cognitive disabilities.¹⁴ The rule emphasizes that all students — including all children with disabilities — are to be assessed in relationship to the state’s established academic content standards. At the same time, students may be assessed by different means. Thus the rule clarifies that the achievement of most children with disabilities will be measured against a state’s grade-level achievement standards for accountability purposes, while only those with the most significant cognitive disabilities would be measured against alternative achievement standards aligned with the state’s academic content standards and

¹¹ ED notes that:

For a student with disabilities, the supplemental educational services agreement must include a statement of specific achievement goals for the student, a description of how the student’s progress will be measured, and a timetable for improving achievement, that are consistent with the student’s IEP.

In addition, ED notes that:

supplemental educational services [must] be “consistent” with IEPs and Section 504 services, but these services are provided in addition to the instruction and services provided during the school day under the IEP or Section 504 plan and are not considered part of IEPs or Section 504 plans. 67 *Federal Register* 71757, Dec. 2, 2002.

¹² See below for a discussion non-regulatory guidance regarding how public school choice and supplementary services apply to children with disabilities.

¹³ In states that set minimal group size at a relatively high level, there may be many schools in which the students-with-disabilities group is too small to actually be included in AYP determinations.

¹⁴ 68 *Federal Register* 68698, Dec. 9, 2003.

reflecting the professional judgment of the highest learning standards possible for the students.

The rule would allow states to use test scores based on alternative achievement standards for students with the most significant cognitive disabilities to calculate adequate yearly progress (AYP) as long as the percentage of these students at the school district or state level who are counted as “proficient” or “advanced” does not exceed 1% of all students assessed (or about 9% of all children with disabilities according to ED).¹⁵ However, if a school district or state can document that the number of students with the most significant cognitive impairments exceeds 1%, the district could be permitted to request an exception from the state or the state could request an exception from ED. The final rule provides some flexibility to states in defining children eligible for alternative assessments. The rule requires states to “establish and ensure implementation of clear and appropriate guidelines for individualized education program (IEP) teams to apply in determining when a child’s significant cognitive disability justifies assessment based on alternative academic achievement standards”¹⁶

Spring 2005 Policy Announcements. On April 7, 2005, the Secretary of Education announced additional flexibility in ED’s AYP policy.¹⁷ In addition to permitting up to 1% of tested students to meet AYP by achieving proficiency on alternative achievement standards, an additional 2% of tested students¹⁸ can meet AYP by achieving proficiency on “modified achievement standards.” ED released further specifics on May 10, 2005,¹⁹ which focused mainly on short-term options, and proposed regulations have been promised “in the near future,” which will focus more on long-term options.

In general, this policy is aimed at “students with persistent academic disabilities and served under the Individuals with Disabilities Education Act ... who are not likely to reach grade-level achievement because of their disability in the same timeframe as all other students, but who can make significant progress.” The Secretary reiterated that proficiency for all other children with disabilities (other than those who fall under the 1% and 2% caps) “will be measured against grade-level achievement standards.” In all cases, the individualized education program (IEP) teams (discussed below) will continue to make the decision about which children with disabilities will take which assessment.

¹⁵ The 1% cap does not apply to individual schools within a school district. If some schools exceed the cap, other schools would have to have lower caps so that the percentage of all students reaching proficiency based on alternative standards did not exceed 1% of all students tested within the LEA.

¹⁶ 68 *Federal Register* 68702, Dec. 9, 2003.

¹⁷ Summaries of the Secretary’s announcement may be found at [<http://www.ed.gov/news/pressreleases/2005/04/04072005.html>] for the press release, and [<http://www.ed.gov/policy/elsec/guid/raising/alt-assess-long.html>] for the “full version” of the policy.

¹⁸ As with the 1% cap, the 2% cap does not apply to individual schools.

¹⁹ See [<http://www.ed.gov/news/pressreleases/2005/05/05102005.html>].

The May 10 announcement provides short-term or transition options that states may use for this year only. The first transition option is for eligible states (see below for criteria) that have not developed modified achievement standards. These states can calculate “a proxy” percentage that then is added to the percentage of students with disabilities whose assessment scores were proficient or advanced. This approach can be applied only to schools or LEAs that failed to meet AYP due solely to scores of students with disabilities. (That is, all other subgroups of students and students as a whole did meet AYP.) If the proxy percentage, when added to the percentage of proficient/advanced students, reaches the current-year threshold for AYP (known as the annual measurable objective, or AMO), then the school or LEA is now deemed to have achieved AYP.

The second transition option is for eligible states that have establish modified achievement standards. This approach is similar to that followed for students assessed against alternative achievement standards. Up to 2% of the students tested may be deemed to have made AYP if their results as measured against the modified standards are proficient or advanced. The May 10th announcement explicitly states that “out-of-level assessments do not qualify as assessments based on modified achievement standards.”²⁰

States wishing to take advantage of the new policy “must develop modified achievement standards and improved alternative assessments as well as agree to several activities related to assessment, accountability, professional development, and training for IEP team members and teachers.” To be eligible for this flexibility in the short term, states must meet relevant Title I and IDEA assessment and instructional requirements. These include meeting or exceeding the 95% participation rate for students with disabilities in the AYP determination process; providing appropriate assessment accommodations for these students; providing alternative assessments for those students with disabilities for whom the regular assessment (even with accommodations) is inappropriate; and requiring that the minimum size of the subgroup for students with disabilities (for ensuring statistical precision and preserving confidentiality) is the same as that for other groups of students.

To assist states, ED plans to provide “needed resources to improve instruction, assessments, and accountability for all students with disabilities.” Reportedly, \$14 million has been set-aside for these purposes for assessment, instruction, and research.²¹

Summary of NCLBA Assessment Requirements. In general, the final rule together with the policy announcement in spring 2005 divides the assessment of children with disabilities into five groups:

- students assessed with regular assessments based on the grade-level achievement standards,

²⁰ See [<http://www.ed.gov/policy/elsec/guid/raising/disab-options.html>].

²¹ See [<http://www.ed.gov/policy/elsec/guid/raising/disability-alt-assess.html>].

- students assessed with regular assessments (with accommodations, such as testing in a quiet location) based on the grade-level achievement standards,
- students assessed with alternative assessments based on the grade-level achievement standards,
- students assessed with alternative assessments based on modified achievement standards (“proficient” or “advanced” scores on such tests limited to 2% of all children tested), and
- students assessed with alternative assessments based on alternative achievement standards (“proficient” or “advanced” scores on such tests limited to 1% of all children tested).

IDEA Assessment and Accountability Requirements

IDEA Assessment Requirements in the IEP. A key component of the provision of special education is the IEP, which is based on “a written statement for each child with a disability” developed, reviewed, and revised by the IEP team. In addition to specifying the special education and related services the child will receive, the IEP must peg the child’s educational goals to the LEA’s general educational goals for nondisabled students, presumably including AYP standards. The IEP must assess the child’s current level of educational and functional performance, including how the child’s disability impacts his or her “involvement and progress in the general educational curriculum.” The IEP must specify the child’s needs (and how those needs will be met) so that the child can be involved in and progress in the general school curriculum. Progression must be gauged in terms of annual measurable goals, presumably including progress in reaching proficiency on state standards. In addition to annual goals, short-term objectives and benchmarks are required **only** for those children with disabilities “who take alternate assessments aligned to alternate achievement standards.”²² Finally, parents must be regularly informed on the child’s progress (for example, by report cards) at least as frequently as other parents are informed of their children’s progress.

As discussed below, IDEA requires states and LEAs to ensure the involvement of children with disabilities in statewide and districtwide assessments. It is the IEP team that determines the extent to which the child requires accommodations²³ to participate in these assessments or, alternatively, determines and justifies why the child is to take an alternative assessment.²⁴

²² Presumably this refers to the severely cognitively disabled as discussed above with respect to NCLBA regulations.

²³ To accommodate a child’s disability, he or she might be allowed to take the assessment in an alternative, quiet location or might be read test questions and provide verbal responses, rather than marking an answer sheet.

²⁴ While each IEP team determines whether an individual child with a disability is to be assessed on modified or alternative achievement standards, such determinations do not influence how many children may demonstrate AYP based on modified or alternative standards. As discussed above, ED policy sets percentage caps on these AYP determinations.

Despite the various goals and measures required for the IEP, ED has clarified that the IEP does not guarantee educational progress.

It continues to be necessary to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency and the teacher that a child will progress at a specified rate. Despite this, public agencies and teachers have continuing obligations to make good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP, including those related to transition services.²⁵

IDEA State and Local Requirements on Student Achievement. IDEA requires states and LEAs to involve children with disabilities in statewide and districtwide assessment programs, with accommodations as appropriate. In addition, states (and LEAs with respect to districtwide assessments) are required to have guidelines for assessment accommodations and for alternative assessments for those unable to participate in such assessments. Alternative assessments must be “aligned with the State’s challenging academic content standards and challenging student academic achievement standards” as required by NCLBA.

States are required to report the numbers of children with disabilities participating in regular and in alternative assessments together with these children’s performance on such assessments (if so doing would be “statistically sound” and would not violate confidentiality requirements). These reports to the public are to be made “with the same frequency and in the same detail as [a state] reports on the assessment of nondisabled children.” IDEA requires LEAs to provide states with all information necessary for the state to comply with these requirements.

IDEA requires states to establish performance goals and indicators for children with disabilities. These goals and indicators are aimed at promoting the overall purposes of the Act. In addition, they must be the same as the state’s definition of AYP under ESEA, as discussed above and address dropout and graduation rates of children with disabilities, as well as other factors that the state might identify. States must report annually to the Secretary of Education and to the general public on progress towards meeting these goals. Such reporting requirements may be tied in with reporting requirements under ESEA.²⁶

NCLBA and IDEA Teacher Requirements

Overview. The ESEA, as amended by NCLBA, requires that each state educational agency (SEA) receiving ESEA Title I, Part A funding (compensatory education of disadvantaged students)²⁷ must have a plan to ensure that all public-school teachers teaching in **core academic subjects**²⁸ within the state will meet the

²⁵ 64 *Federal Register* 12598, Mar. 12, 1999.

²⁶ ESEA §1111(b)(2)(C)(v)(II)(cc).

²⁷ Recall that all states currently receive ESEA Title I-A grants.

²⁸ Core subjects are defined as “English, reading or language arts, mathematics, science, (continued...) ”

definition of a “highly qualified” teacher, by no later than the end of the 2005-2006 school year.²⁹

IDEA, as amended by P.L. 108-446, cross-references the ESEA “highly qualified” definition but makes several additions to the definition as it applies to special education teachers. The new IDEA definition requires that **all** special education teachers — not just those who teach core subjects — must meet certain requirements. In addition, P.L. 108-446 modifies the ESEA requirements with respect to two groups of special education teachers: those **who teach only the most severely disabled children** and those who **teach more than one core subject**.

NCLBA Requirements.³⁰ The NCLBA “highly qualified” definition applies to public school teachers who teach core subjects and differentiates between new and veteran teachers and between elementary and middle/secondary school teachers. To be highly qualified, a **public elementary or secondary school teacher** must meet the following requirements:

- **Every public elementary or secondary school teacher**, regardless of whether he or she is new or experienced, (1) must have full state certification (a charter school teacher must meet the requirements in the state charter school law), (2) must not have had any certification requirements waived on an emergency, temporary, or provisional basis, and (3) must have at least a baccalaureate degree.
- Each **new public elementary school teacher** must pass a rigorous state test demonstrating subject knowledge and teaching skills in reading, writing, math, and other basic elementary school curricular areas (such tests may include state certification exams in these areas).
- Each **new public middle or secondary school teacher** must demonstrate a high level of competency in all subjects taught by (1) passing rigorous state academic tests in those subjects (may include state certification exams in those subjects), **or** (2) completing an academic major (or equivalent course work), graduate degree, or advanced certification in each subject taught.
- Each **experienced public elementary, middle, or secondary school teacher** must meet (1) the requirements just described for a new teacher (depending upon his or her level of instruction), **or** (2)

²⁸ (...continued)

foreign languages, civics and government, economics, arts, history, and geography.” ESEA §9101(11).

²⁹ The relevant sections of ESEA are §1119 regarding qualifications for teachers and paraprofessionals, and §9101(23), the definition of “highly qualified.”

³⁰ This section was adopted from CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*, by James B. Stedman.

demonstrate competency in all subjects taught using a “high objective uniform state standard of evaluation” (HOUSSE).³¹

As part of this plan, each Title I-funded state must establish annual measurable objectives for each local educational agency (LEA) and school that, at a minimum, include annual increases in the percentage of highly qualified teachers at each LEA and school to ensure that the 2005-2006 deadline is met, and an annual increase in the percentage of teachers receiving high quality professional development.

Each LEA receiving Title I, Part A funding must have a plan to ensure that all of its teachers are highly qualified by the 2005-2006 deadline. In addition, beginning with the first day of the 2002-2003 school year, any LEA receiving Title I funding must ensure that all teachers hired after that date who are teaching in Title I-supported programs are highly qualified.

Questions have been raised about the scope of the application of these requirements, the meaning of some of the requirements, and the ability of different kinds of districts to meet them. The U.S. Department of Education (ED) has sought to address some of these concerns through regulation, non-regulatory guidance, and other means. Early in the implementation of these provisions some asked whether they apply to *all* teachers, including special education teachers, or those not teaching core academic subjects. Final regulations for the Title I program — published December 2, 2002, in the *Federal Register* — apply these requirements only to **core academic subject teachers**. ED noted that these requirements **would apply** to a special education teacher providing instruction in a core academic subject.

In March 2004, ED announced that additional flexibility could be applied in the implementation of these requirements with regard to teachers in small rural school districts, science teachers, and to teachers teaching multiple subjects.³²

- For small rural districts, ED now provides that teachers teaching core academic subjects who meet the highly qualified requirements in at least one of the subject areas they teach may have an additional three years to meet these requirements in the other subjects they might teach. States decide whether to offer this flexibility to eligible rural districts.
- For science teachers, states determine whether science teachers need to be highly qualified in each science field they teach (e.g., biology

³¹ Among requirements, the state-set HOUSSE must provide objective information about teachers’ content knowledge in all subjects taught; be aligned with challenging state academic and student achievement standards; be applied uniformly statewide to all teachers in the same subjects and grade levels; and consider, but not be based primarily on, time teaching those subjects. It may use multiple measures of teacher competency.

³² A two page fact sheet on these new policies is available at [<http://www.ed.gov/nclb/methods/teachers/hqtflexibility.html>]. A more detailed letter to each of the chief state school officers, dated Mar. 31, 2004, is available at [<http://www.ed.gov/policy/elsec/guid/secletter/040331.html>].

and chemistry) or highly qualified in science in general, based on how the state currently certifies teachers in these subject areas.

- For teachers of more than one core subject, ED allows states to design their HOUSSE procedures to allow a teacher to go through the process a single time to demonstrate competency in multiple subjects.

IDEA Requirements. P.L. 108-446 links its definition of “highly qualified” (§602(10)) to the definition in §9101(23) of the ESEA but modifies that definition as it applies to special education teachers. Most notably, it addresses concerns that have been raised about certain groups of special education teachers, such as those who teach more than one core academic subject.³³

As noted above, the ESEA definition of “highly qualified” applies only to teachers of core academic subjects and differentiates between new and veteran teachers and between those teaching at the elementary level and above the elementary level. Thus, under ESEA, the “highly qualified” definition would have applied only to those special education teachers who teach core subjects (albeit this is probably most special education teachers).

P.L. 108-446 provides additional requirements and options to the definition with respect to special education teachers.³⁴ (See **Table 1** below for a summary of these requirements.) First of all, to be highly qualified under IDEA, **all special education teachers** (whether they teach core subjects or not) must hold at least a bachelor’s degree and must obtain full state special education certification or equivalent licensure (§602(10)(B)). Special education teachers who have emergency, temporary, or provisional certification do not meet the IDEA definition. In addition, P.L. 108-446 modifies the ESEA requirements with respect to two groups of special education teachers: those **who teach only core subjects exclusively to the most severely disabled children** and those who **teach more than one core subject**. (If the teachers in these two groups meet the IDEA criteria, they are considered to have met the ESEA requirements.)

Both new and veteran special education teachers who teach core subjects exclusively to children with disabilities who are assessed against alternative achievement standards under ESEA (i.e., the most severely cognitively disabled)³⁵ can, of course, meet the definition of highly qualified by meeting their applicable ESEA standards.³⁶ Alternatively, new, as well as veteran, teachers of these students

³³ P.L. 108-446 cross-references the ESEA definition of “core subjects” (§602(4)).

³⁴ P.L. 108-446 does not amend the ESEA definition of “highly qualified.”

³⁵ As discussed above, the ESEA requires that nearly all students must be held to the same high state achievement standards. One exception with respect to children with disabilities is that those who are the most severely cognitively disabled can be held to alternative achievement standards.

³⁶ That is, special education teachers at the elementary level can passing a rigorous state subject matter and teaching skills test, and special education teachers at the middle school (continued...)

at **the elementary level** may meet the highly qualified definition by demonstrating “competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation” (i.e., HOUSSE).³⁷ Teachers of these students at **levels above elementary school** can meet the definition by demonstrating “subject matter knowledge appropriate to the level of instruction ... as determined by the State, needed to effectively teach to those standards [i.e., alternative achievement standards]” (§602(10)(C)(ii)).

New and veteran special education teachers **who teach two or more core subjects** exclusively to children with disabilities may qualify as highly qualified by meeting the requirements in each core subject taught under applicable ESEA provisions. Alternatively **veteran special education teachers** teaching two or more core subjects may also qualify as highly qualified based on the ESEA HOUSSE option (§602(10)(D)(ii)), which may include a single evaluation covering multiple subjects.³⁸ Finally, **newly hired special education teachers** teaching two or more core subjects who are already highly qualified in mathematics, language arts, or science are given two years from the date of employment to meet the highly qualified definition with respect to the other core subjects taught. This could occur through the HOUSSE option (§602(10)(D)(iii)). This two-year window is the only exception to the 2005-2006 deadline (ESEA, §1119(a)(2)),³⁹ explicitly applied to special education teachers, for meeting the “highly qualified” definition under either IDEA or ESEA.

Regarding other classifications of special education teachers, one can infer that those who do not teach core subjects would meet the IDEA definition if they meet the IDEA criteria for all special education teachers (full certification and at least a bachelor’s degree). With respect to special education teachers who provide only consultative services to other teachers, the Conference Report observes that:

a special education teacher who provides only consultative services to a highly qualified teacher ... should be considered a highly qualified special education teacher if such teacher meets the requirements of §602(10)(A).... Such consultative services do not include instruction in core academic subjects, but may include adjustments to the learning environment, modifications of instructional methods, adaptation of curricula, the use of positive behavioral

³⁶ (...continued)

and high school level can pass such a test or earn a degree or take a minimum number of courses in the relevant core subject or subjects.

³⁷ Under ESEA, the HOUSSE option is available only for veteran teachers (ESEA §9101(23)(C)(ii)).

³⁸ The Conference Report notes that the use of options, such as a single evaluation of multiple subjects “must not ... establish a lesser standard for the content knowledge requirements of special education teachers compared to the standards for general education teachers.” H.Rept 779, 108th Cong., 2nd sess. 171 (2004).

³⁹ See §612(a)(14)(C).

supports and interventions, or the use of appropriate accommodations to meet the needs of individual children.⁴⁰

The apparent intent is that consultative teachers who do not provide direct instruction in a core subject need only meet the requirements of having obtained at least a baccalaureate degree and be fully state certified as a special education teacher.

Other special education teachers who teach **only one** core subject would appear to have to meet the relevant criteria under the ESEA definition (in addition to the overarching IDEA certification and degree criteria) and would then also be considered highly qualified under IDEA.⁴¹ Finally, §602(10)(E) provides that the definition does not create a right of action based on an employee's failure to meet the "highly qualified" requirements of the act.

⁴⁰ H.Rept. 779, 108th Cong., 2nd sess. 171 (2004).

⁴¹ See H.Rept. 779, 108th Cong., 2nd sess. 171 (2004) regarding new and "not new" special education teachers teaching one core subject.

Table 1. Comparison of Definitions of “Highly Qualified” Teachers Under the Elementary and Secondary Education Act (ESEA) and Under the Individuals with Disabilities Education Act (IDEA)

Category of teachers	ESEA definition	IDEA definition
Covered teachers	All teachers of “core subjects” including special education teachers teaching “core subjects”	All special education teachers
All covered teachers	<p>Hold at least a baccalaureate degree</p> <p>Obtain full state certification or pass the state licensing exam or fulfill requirements in state’s charter school law for teachers in charter schools</p> <p>Cannot have an emergency or temporary certification</p>	<p>Hold at least a baccalaureate degree</p> <p>Obtain full state <i>special education</i> certification or pass the state licensing exam or fulfill requirements in state’s charter school law for teachers in charter schools</p> <p>Cannot have an emergency or temporary certification</p>
New elementary teachers	<p>In addition to general requirements for all covered teachers above:</p> <p>pass rigorous state tests on subject knowledge and teaching skills in reading, math, and other basic elementary curriculum</p>	<p>In addition to general requirements for all covered teachers above:</p> <p>for special education teachers teaching core subjects, same with two exceptions:</p> <p>1. elementary school special education teachers teaching one or more core academic subjects only to children with disabilities held to alternative academic standards (most severely cognitively disabled):</p> <p>may demonstrate academic subject competence through “a high objective uniform State standard of evaluation” (the HOUSSE process)</p>

Category of teachers	ESEA definition	IDEA definition
		<p>2. new special education teachers of two or more academic subjects who are highly qualified in either mathematics, language arts, or science:</p> <p>have two-year window in which to become highly qualified in the other core academic subjects and may do this through the HOUSSE process (including a single evaluation for all core academic subjects) baccalaureate degree</p>
New middle/high school teachers	<p>In addition to general requirements for all covered teachers above:</p> <p>demonstrate high level of competency in academic subject(s) taught by passing rigorous state tests or obtaining a degree or the equivalent in subject(s) taught</p>	<p>In addition to general requirements for all covered teachers above:</p> <p>for special education teachers teaching core subjects, same with two exceptions:</p> <p>1. new middle or high school teachers teaching one or more core academic subjects only to children with disabilities held to alternative academic standards (most severely cognitively disabled): may demonstrate “subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards”</p> <p>2. new special education teachers of two or more academic subjects who are highly qualified in either mathematics, language arts, or science:</p> <p>have two-year window in which to become highly qualified in the other core academic subjects and may do this through the HOUSSE process (including a single evaluation for all core academic subjects)</p>

Category of teachers	ESEA definition	IDEA definition
Veteran teachers at all levels	<p>In addition to the general requirements for all covered teachers above:</p> <p>meet new-teacher standards or demonstrate competence in academic subjects taught based on “high objective uniform state standards of evaluation” (HOUSSE)</p>	<p>In addition to the general requirements for all covered teachers above:</p> <p>for special education teachers teaching core subjects, same with certain modifications:</p> <p>1. veteran middle or high school teachers teaching one or more core academic subjects only to children with disabilities held to alternative academic standards (most severely cognitively disabled):</p> <p>may demonstrate “subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards”</p> <p>2. veteran teachers at any level who teach two or more core academic subjects only to children with disabilities:</p> <p>may demonstrate academic subject competence through the HOUSSE process (including a single evaluation for all core academic subjects)</p>
Teachers providing consultative services	If these teachers do not teach “core subjects,” they are not subject to ESEA requirement to be deemed “highly qualified”	Meet only the general requirements for all covered teachers above

Source: Congressional Research Service.

IDEA State and Local Personnel Requirements. IDEA requires that states ensure that personnel serving children with disabilities are “appropriately and adequately prepared and trained.” Regarding special education teachers, states must insure that all are “highly qualified” by the deadline specified in the ESEA.⁴² Regarding providers of related services (for example, speech pathologists and physical therapists), states must ensure that their qualifications “are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline” and that they “have not had certification or licensure requirements waived on an emergency,

⁴² See ESEA §1119(a)(2).

temporary, or provisional basis.” Regarding paraprofessionals, IDEA requires that states “are appropriately trained and supervised, in accordance with State law, regulation, or written policy.”⁴³

Department of Education Non-Regulatory Guidance Regarding IDEA and NCLBA

Public School Choice. Non-regulatory guidance was issued by ED relating to public school choice on February 6, 2004. This guidance provides that school districts must offer students with disabilities the same opportunity as children without disabilities to be educated in a school that has not been identified as in need of school improvement and has not been identified as persistently dangerous. “However, an LEA is not required to offer students with disabilities the same choices of schools as it offers to nondisabled students. In determining the choices available to such students, the LEA should match the abilities and needs of a student with disabilities with those schools that have the ability to provide the student FAPE. Such students still must be offered the opportunity to choose from among two or more schools.”⁴⁴ The draft guidance also noted that the movement of a child with a disability to a school of choice does not “in and of itself” trigger IDEA’s change in placement procedures. The new school can adopt the existing IEP and the change of placement procedures do not apply. However, “[t]he IDEA statute and implementing regulations contain specific requirements regarding ‘change of placement’ provisions, and LEAs must comply with these requirements when they are triggered.”⁴⁵

Supplemental Educational Services. ED has also issued non-regulatory guidance regarding supplemental educational services. Supplemental educational services are defined as additional academic instruction designed to increase the academic achievement of students in low-performing schools. ED’s draft guidance provides that “an SEA and each LEA that arranges for supplemental educational services must ensure that eligible students with disabilities and students covered under Section 504 may participate.”⁴⁶ Once parents select a provider for their child,

⁴³ NCLBA also aims to upgrade the qualifications of certain paraprofessionals. In “targeted assistance” Title I schools, only those paraprofessionals who provide instructional services (as opposed to those who provide computer support or personal-care services) and are paid by Title I-A funds are covered. However, all instructional paraprofessionals in schoolwide project schools are covered. In general, all covered paraprofessionals must have earned a high school diploma or a recognized equivalent. Those hired after Jan. 8, 2002, must have completed at least two years of higher education and obtained an associate’s degree or met “rigorous” state or local standards. Those hired before Jan. 8, 2002, must meet equivalent requirements by Jan. 8, 2006.

⁴⁴ [<http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.doc>].

⁴⁵ Ibid.

⁴⁶ Each provider of supplemental educational services does not necessarily need to be able to serve children with disabilities or children covered under Section 504. However, LEAs

(continued...)

the LEA must enter into an agreement with the provider that has certain provisions including a timetable for improving the student's achievement. In the case of a student with a disability, this timetable is to be consistent with the student's IEP.⁴⁷

Selected Issues and Litigation

The provisions of NCLBA emphasizing that all children (including children with disabilities) should be held to the same high standards to the maximum extent possible have given rise to numerous questions by commentators about its relationship with IDEA, with many of these questions arising from the different philosophical approaches taken to education in IDEA and NCLBA.⁴⁸ The 2004 IDEA reauthorization, the most recent ED regulations, and the recent enforcement flexibility announced by ED appear to address some of these concerns. However, several law suits are pending regarding NCLBA⁴⁹ with one specifically addressing the interaction between IDEA and NCLBA. In addition, the ED's new enforcement policy has itself generated some issues.

Exclusion of Children with Disabilities

One area of concern is that the inclusion of children with disabilities in the assessment and accountability requirements of NCLBA will lead to the exclusion of these children from the mainstream curriculum — a trend that federal special education legislation has aimed to thwart. As one commentator has noted, NCLBA requires annual tests and states that if a child with a disability is given an out-of-level test and the state reports these children as “below proficient,” it would be counted against the school's performance. “Such ties to testing could exacerbate a problem that parents often talk about — principals who try to push special education students

⁴⁶ (...continued)

must ensure that services with the necessary accommodations are available, and if no other provider makes them available, the LEA must do so itself or through contract. [<http://www.ed.gov/policy/elsec/guid/suppsvcguid.doc>].

⁴⁷ Ibid.

⁴⁸ The Council for Exceptional Children has published a detailed chart that takes sections of NCLBA and then looks at the implications for special education. Council for Exceptional Children, *No Child Left Behind Act of 2001: Implications for Special Education Policy and Practice*, Jan. 2003, [http://www.cec.sped.org/pp/side-by-side09_04_02.pdf].

⁴⁹ The National Education Association (NEA) and school districts in Michigan, Texas, and Vermont have filed suit in U.S. District Court for the Eastern District of Michigan asking for a judicial order prohibiting ED from threatening to withhold federal money if a state has to spend more to comply with the NCLBA than it receives from the federal government. Complaint for Declaratory and Injunctive Relief, *School District of the City of Pontiac et al. v. Spellings*, No. 2:05-CV7-1535 (filed Apr. 20, 2005). See Bess Keller, “NEA Files ‘No Child Left Behind’ Lawsuit,” *Education Week*, Apr. 20, 2005. For a discussion of the legal issues involved, see CRS General Distribution Memorandum, *A Legal Analysis of Section 9527(A) of the No Child Left Behind Act*, by Jody Feder.

out of their schools because they bring down their test scores.”⁵⁰ The December 9, 2003, regulations address this concern. First, the performance of the most severely cognitively disabled children would be judged on alternative achievement standards, with those performing at the proficient and advanced levels of these alternative standards counted toward achieving AYP. In addition, out-of-level assessments will meet the alternative achievement standards “if they are aligned with the State’s academic content standards, promote access to the general curriculum and reflect professional judgement of the highest achievement standards possible.”⁵¹ Finally, the 1% cap for including performance on alternative assessment standards for calculating AYP does not apply at the school level. The new Education Department enforcement policy which gives the states more freedom in how they test children with disabilities may also address this issue. Thus, there might be less incentive to segregate children with disabilities in separate schools or separate classrooms to ensure that school-level AYP is met.

Highly Qualified Teachers

Another area of concern is the application of NCLBA personnel standards to special education teachers. P.L. 108-446 specifically addresses this issue in its definition of “highly qualified” which was discussed previously. Although this helps to align IDEA with NCLBA, the definition has been criticized by some as leading to anomalous results such as long time, highly regarded special education teachers not being considered highly qualified.⁵² In addition, the more stringent requirements may exacerbate the existing shortage of special education teachers.⁵³ On the other hand, it could be argued that all children, especially children with disabilities, should have highly qualified teachers.

Litigation

Litigation is already pending concerning an alleged conflict between NCLBA and IDEA. On February 3, 2005, the Ottawa Illinois High School District 140 filed suit in U.S. district court alleging that the NCLBA’s special education subgroup goals conflict with IDEA’s requirement for an individualized education program. The complaint notes that the NCLBA requires school districts “to employ categorical and systemic change if they have not, or any school within the district has not, met or exceeded State standards within various subgroups, including a subgroup of special education students, as assessed by a standardized test administered to all

⁵⁰ Allison L. Bruce, “No Child Act Stirs Special ED Fears,” *The Post and Courier* (Charleston, SC), Feb. 17, 2003, p. 1B.

⁵¹ 34 C.F.R. Part 200; 68 *Federal Register* 68700, Dec. 9, 2003.

⁵² See, e.g., Christine Samuels, “Subject Qualification Vexing for Teachers in Special Education,” *educationweek.org*, Feb. 16, 2005, at [<http://www.edweek.org/agentk-12/articles/2005/02/16/23idea.h24.html>].

⁵³ See, e.g., Associated Press, “Special Education Teachers Needed, Officials Say,” *Indianapolis Star*, Mar. 28, 2005, at [<http://www2.indystar.com>]; Mike Sherry, “Law Could Drive Some Out of Special Education,” *Kansas City Star*, Mar. 22, 2005, at [<http://www.kansascity.com/>].

students within the district.”⁵⁴ The plaintiffs, which include special education students and their parents, allege that this requirement “does not allow for the individual differences of these groups, specifically the needs of students with disabilities....”⁵⁵ As one commentator observed, the suit describes the relationship between the two laws as placing school districts “between a rock and an IEP.”⁵⁶

Enforcement of the No Child Left Behind Act

What ED officials describe as their new approach to implementing NCLBA to allow states additional alternatives and flexibility if they can show they are raising student achievement has raised additional policy and legal issues. Due to the nature of the flexible standard, there is some ambiguity concerning what state actions would suffice to meet NCLBA requirements. A joint statement by Representatives Boehner and Miller stated that the Secretary’s approach “if carried out fairly and without favoritism, could help iron out some of the difficulties in implementing the law. We agree with her that every effort must be made to ensure smooth and effective implementation, but we firmly believe that the effort must be based on the law as it is written, not on a smorgasbord of different waivers for different states and districts.... If the law is implemented with too much variety from state to state, the progress we are making on boosting achievement and improving accountability with be cut short.... It is imperative that the Department assess flexibility requests evenly, objectively, and fairly.”⁵⁷

A recent report by the National Conference of State Legislatures described the relationship between IDEA and NCLBA as containing “inherent conflicts.”⁵⁸ The report contains a number of recommendations including providing states flexibility in determining the percentage of special education students who can be tested according to their ability, not their grade level. The Department of Education’s proposed changes, discussed previously, were described as “encouraging” by the National Conference’s executive director.⁵⁹

The relationship between IDEA and NCLBA has not been seen as problematic by all. Some disability groups view the assessment standards as a key civil rights issue for children with disabilities. In a letter to Secretary Spellings, the Center for

⁵⁴ Complaint, *Board of Education of Ottawa Township High School District 140 v. Spellings*, Case No. 05 C 0655 (N.D. Ill. filed Feb. 3, 2005).

⁵⁵ Ibid.

⁵⁶ Stew Magnuson, “Two Federal Lawsuits Against NCLB in Works: Illinois Districts to Challenge Law on Technical, Not Political, Grounds,” *Education Daily*, vol. 38, Jan. 18, 2005, p. 1.

⁵⁷ Statement of Rep. Boehner and Rep. Miller on Secretary Spellings’ Announcement on No Child Left Behind, Apr. 7, 2005 [<http://edworkforce.house.gov/press/press109/first/04apr/spellings040705.htm>].

⁵⁸ National Conference of State Legislatures, *Task Force on No Child Left Behind, Final Report* 26, Feb. 2005.

⁵⁹ “NCSL Statement on Department of Education’s Raising Achievement Initiative,” Apr. 7, 2005 at [<http://www.ncsl.org/programs/press/2005/pr050407.htm>].

Law and Education and other groups argued against providing flexibility regarding the calculation of annual yearly progress (AYP) under NCLBA. The letter stated in part:

The educational achievement of these students, particularly those with disabilities, who were previously denied participation in the general educational curriculum, cannot be expected to turn around overnight. States, LEAs and schools must be held accountable for accelerating the education of all these students who are capable of learning and making progress toward the standards set for all. Because some members of these protected student groups may not currently be functioning or receiving instruction at grade level is no excuse for failing to hold individual schools and school districts accountable to teach these students so they too may attain the same achievement standards expected of all other white, non-disabled, economically advantaged, English proficient students.⁶⁰

The letter also argued that any change in the AYP calculation should be subject to rulemaking procedures and that a change that results in teaching a student with a disability to lower standards, except for those with the most severe cognitive disabilities, violates Section 504 of the Rehabilitation Act,⁶¹ and the Americans with Disabilities Act (ADA).⁶²

⁶⁰ Letter to Secretary Spellings from the Center for Law and Education, the Advocacy Institute, the National Down Syndrome Congress, the National Coalition of Parent Centers, the National Council on Independent Living (NCIL), the National Down Syndrome Society, TASH, dated Mar. 23, 2005, reprinted at [http://www.advocacyinstitute.org/resources/Spellings_AA_CAP.pdf].

⁶¹ 29 U.S.C. §794. Section 504 prohibits discrimination against an individual with a disability in any program or activity that receives federal financial assistance, the executive agencies, and the U.S. Postal Service.

⁶² 42 U.S.C. §12101 *et seq.* The ADA prohibits discrimination in employment, public services, public accommodations and services operated by private entities, transportation and telecommunications. For a discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.