



# Educational Accountability and Secretarial Waiver Authority Under Section 9401 of the Elementary and Secondary Education Act

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## Summary

Section 9401 of the Elementary and Secondary Education Act (ESEA) provides the Secretary of Education with broad waiver authority with respect to programs authorized under the act. The Secretary has used the authority provided under Section 9401 to grant numerous waivers over time, including waivers of accountability and general administrative provisions. On September 23, 2011, President Obama and the Secretary announced the availability of an ESEA flexibility package for states and described the principles that states must meet to obtain the included waivers. The waivers would apply to school years 2011-2012, 2012-2013, and 2013-2014. States would have the option to apply for a one-year waiver extension for the 2014-2015 school year.

The following waivers are included in the ESEA flexibility package:

1. Flexibility regarding the 2013-2014 timeline for determining adequate yearly progress
2. Flexibility in implementation of school improvement requirements
3. Flexibility in implementation of local educational agencies (LEAs) improvement requirement
4. Flexibility for rural LEAs
5. Flexibility for schoolwide programs
6. Flexibility to support school improvement
7. Flexibility for Reward Schools
8. Flexibility regarding highly qualified teacher (HQT) improvement plans
9. Flexibility to transfer certain funds
10. Flexibility in the use of School Improvement Grant funds to support priority schools

The waivers would exempt states from various academic accountability requirements, teacher qualification-related requirements, and funding flexibility requirements that were enacted through the No Child Left Behind Act of 2001 (NCLB; P.L. 107-110). State educational agencies (SEAs) could also apply for an optional waiver related to the 21<sup>st</sup> Century Community Learning Centers program. However, in order to receive the waivers, SEAs must agree to meet four principles established by ED for “improving student academic achievement and increasing the quality of instruction.” The four principles, as stated by ED, are as follows: (1) college- and career-ready expectations for all students; (2) state-developed differentiated recognition, accountability, and support; (3) supporting effective instruction and leadership; and (4) reducing duplication and unnecessary burden.

Taken collectively, the waivers and principles included in the ESEA flexibility package amount to a fundamental redesign by the Administration of the accountability and teacher-related requirements included in current law. Given that most states have applied for, or signaled an intent to apply for, the waivers, the ESEA flexibility package may be in effect in many states by the end of the current school year. If Congress continues to work on ESEA reauthorization during the 112<sup>th</sup> Congress, it is possible that provisions included in any final bill may be similar to or override the waivers and principles established by the Administration.

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## Overview

Section 9401 of the Elementary and Secondary Education Act (ESEA) provides the Secretary of Education (hereinafter referred to as the Secretary) with broad waiver authority with respect to programs authorized under the act. While this waiver authority is limited in some respects, such as its applicability to fiscal accountability and civil rights requirements, at the request of specified entities, the Secretary may choose to grant a waiver of various ESEA requirements, including those related to academic accountability. The decision to grant the waiver is left to the Secretary's discretion.

This broad waiver authority was initially included in the ESEA through the Improving America's Schools Act (P.L. 103-382). The authority was retained through enactment of the No Child Left Behind Act of 2001 (NCLB; P.L. 107-110), the most recent amendments to the ESEA. The Secretary has used the authority provided under Section 9401 to grant numerous waivers over time, including waivers of accountability and general administrative requirements. For example, since the enactment of NCLB, the Secretary has granted waivers of various ESEA requirements in response to the Gulf Coast hurricanes of 2005 and to address issues raised by the American Recovery and Reinvestment Act (ARRA; P.L. 111-5).

On June 13, 2011, the Secretary announced that he might begin to use the authority provided under Section 9401 to issue broad sweeping waivers if Congress fails to reauthorize the ESEA. Subsequently, on August 8, 2011, it was announced at a White House press briefing that President Obama had directed the Secretary to "move forward with plans to provide flexibility to states."<sup>1</sup> On September 23, 2011, President Obama and the Secretary of Education formally announced the availability of an ESEA flexibility package for states that included 11 waivers of ESEA requirements, as well as four principles for "improving student academic achievement and increasing the quality of instruction" that must be met to receive the waivers. With the exception of one optional waiver, state educational agencies (SEAs) applying for the ESEA flexibility must apply for all 10 waivers and must agree to implement all four principles related to receiving the waivers. The waivers would apply to school years 2011-2012, 2012-2013, and 2013-2014. States would have the option to apply for a one-year waiver extension for the 2014-2015 school year.

The Administration has argued that the ESEA flexibility package is needed because Congress has failed to reauthorize the ESEA. The ESEA was authorized through FY2008; however, ESEA programs continue to receive annual appropriations. The Administration has suggested that this lack of congressional action is particularly an issue as there are requirements contained in the ESEA, including academic accountability requirements, that have become problematic for state educational agencies, local educational agencies (LEAs), and schools to implement, and various states have sought waivers of these provisions. A commonly cited problem is that under the performance-based accountability provisions enacted in NCLB, all students are expected to perform at a proficient level on state administered reading/language arts and mathematics assessments by the end of the 2013-2014 school year. As this deadline approaches, and performance expectations under the law increase, an increasing share of the nation's schools are failing to meet adequate yearly progress (AYP)—the measure that determines whether a school is

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<sup>1</sup> To read a transcript of the entire White House briefing that includes comments from the Secretary, see <http://www.whitehouse.gov/the-press-office/2011/08/08/press-briefing-press-secretary-jay-carney-domestic-policy-council-direct>.

or is not meeting the academic accountability requirements. There is broad concern that states and LEAs may become increasingly taxed with regard to their ability to undertake required activities to help schools that fail to make AYP.

This report begins with a general discussion of the ESEA flexibility package and current congressional efforts to reauthorize the ESEA. Also included is an update on state applications for the ESEA flexibility package. Following these brief discussions, the report examines the waiver authority provided to the Secretary under Section 9401, beginning with a brief history of the provisions, followed by a discussion of how waiver requests are granted and limitations on the Secretary's waiver authority. The next section of the report provides an examination of how the Secretary has used waiver authority in the past and a legal analysis of the scope of the Secretary's waiver authority and the Secretary's authority to grant a waiver in exchange for another action. The next part of the report focuses on describing and analyzing the waivers and related principles that collectively comprise the Administration's ESEA flexibility package.

## **General Discussion of the ESEA Flexibility Package<sup>2</sup>**

Taken together, the waivers and accompanying principles included in the ESEA flexibility package being offered to SEAs could be viewed as a fundamental redesign of key elements of the ESEA. Through the use of secretarial authority to waive various ESEA provisions, the ESEA flexibility package being offered by ED would alter the existing accountability requirements under Title I-A in such a way that they would have little resemblance to the accountability requirements included in statute. For example, requisite adoption of college- and career-ready standards that are either common to a "significant" number of states or that have been approved by a state network of institutions of higher education (IHES) is not in current law. Rather, this is a new condition that would be placed on SEAs by the Administration. Under current law, states are required to implement accountability systems that establish content and performance standards in reading/language arts and mathematics and include aligned assessments that are administered annually in grades 3-8 and once in grades 10-12. States are also required to have content and performance standards and aligned assessments in science that are administered once in grades 3-5, 6-9, and 10-12. In meeting these requirements, states have the latitude to independently select their own content and performance standards and assessments. There are no requirements that the standards be "college- and career-ready" standards or be approved by a state network of IHES.

The ESEA flexibility package would also eliminate the requirement that *all* schools receiving Title I-A funds that fail to make AYP for at least two consecutive years be required to implement a series of increasingly severe outcome accountability requirements. Rather, prescribed interventions would be limited to the lowest performing 5% of schools (priority schools) and some type of intervention would be required in the next lowest performing 10% of schools (focus schools). The outcome accountability requirements that currently apply to all Title I-A schools that fail to meet AYP would be replaced by more prescriptive requirements for priority schools and a requirement for non-specified interventions to be implemented in focus schools. The mechanisms used to identify schools in need of intervention would no longer be based solely on whether the school made AYP. Rather, other measures could be taken into account in making these decisions. Finally, the identification of schools as priority schools would be based on the performance of all students in the school or student graduation rates rather than the performance

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<sup>2</sup> The ESEA flexibility package is discussed in detail later in this report.

of individual subgroups. Under current law, the performance of all students, the performance of subgroups of students, and graduation rates are taken into account in determining AYP.

The ESEA flexibility package would also substantially alter accountability requirements applicable to educators. While current law focuses on having highly qualified teachers, the ESEA flexibility package would alter existing teacher requirements to focus on teacher (and school leader) effectiveness, determined, in part, based on student achievement. To date, no provisions in the ESEA address how teachers and school leaders should be evaluated.

The 112<sup>th</sup> Congress continues to work on ESEA reauthorization. The Senate Health, Education, Labor, and Pensions (HELP) Committee has ordered reported an ESEA reauthorization bill that would incorporate some of the changes included in the ESEA flexibility package being offered by the Administration.<sup>3</sup> The chairman of the House Education and Workforce Committee has released two draft ESEA reauthorization bills that would collectively provide for a comprehensive reauthorization of the ESEA.<sup>4</sup> It is difficult to gauge at this stage in the process whether the 112<sup>th</sup> Congress will pass a bill to reauthorize the ESEA, and whether Congress would include provisions similar to those of the ESEA flexibility package in a final bill. Most states have either applied for the ESEA flexibility package or have indicated an intention to do so. If those packages are approved by ED, they may be in effect in many states by the end of the current school year if ESEA reauthorization does not occur prior to that time. If the ESEA flexibility package is implemented by numerous states prior to reauthorization, it may complicate an eventual reauthorization, as the ESEA flexibility package may become the de facto ESEA law under which many states are operating. If Congress does not take this into account in its reauthorization process, states and LEAs may have to retool their accountability systems to comply with a new round of requirements from the federal government. Alternatively, states that have received the ESEA flexibility package could be permitted to continue to operate under waivers and principles similar to those included in the ESEA flexibility package, while other states could be required to comply with new ESEA requirements, thus creating two different systems of accountability under which states would be operating.

## **States Applying for the ESEA Flexibility Package**

Following the announcement of the ESEA flexibility package, 39 states, the District of Columbia, and Puerto Rico indicated that they intended to apply for it. Eleven states applied for the ESEA flexibility package by the first deadline of November 14, 2011.<sup>5</sup> On February 26, 2012, 26 additional states and the District of Columbia submitted applications for the flexibility package.<sup>6</sup> The next deadline for the submission of applications is September 6, 2012.<sup>7</sup>

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<sup>3</sup> Information about the bill is available at <http://www.help.senate.gov/hearings/hearing/?id=b4d24a56-5056-9502-5d73-a45a120b096b>.

<sup>4</sup> The text of the draft bills is available at <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=275449>.

<sup>5</sup> The following states submitted an application by the November 14, 2011, deadline: Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Mexico, Oklahoma, and Tennessee. A copy of each state's application is available at <http://www.ed.gov/eSEA/flexibility/requests>.

<sup>6</sup> The following states submitted an application on February 28, 2012: Arkansas, Arizona, Connecticut, Delaware, Iowa, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, Mississippi, North Carolina, Nevada, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wisconsin. (continued...)

On February 9, 2012, the Administration announced that it was granting flexibility to 10 of the 11 states that applied in the first round for the ESEA flexibility package.<sup>8</sup> These states include Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, Oklahoma, and Tennessee. New Mexico was not approved to receive the ESEA flexibility package.<sup>9</sup> Of these states, Florida, Georgia, and Oklahoma received conditional approval of their requests for flexibility.<sup>10</sup> Each of these states is required to make additional amendments to their requests based on a prescribed timeline in order to receive the ESEA flexibility package through the 2013-2014 school year.<sup>11</sup> ED subsequently announced on February 15, 2012, that New Mexico had received approval of its application.<sup>12</sup>

On May 29, 2012, ED announced the approval of eight state applications from the second round of applications for the ESEA flexibility package.<sup>13</sup> The states receiving approval include Connecticut, Delaware, Louisiana, Maryland, New York, North Carolina, Ohio, and Rhode Island. Among these states, New York received short-term approval for its use of a growth model<sup>14</sup> in its accountability system. ED will conduct a separate review of New York's growth model in the next few months.<sup>15</sup> Ohio received conditional approval of its request for flexibility and is required to study and refine its "A-F grading system" in order to receive the ESEA

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(...continued)

(U.S. Department of Education, "26 More States and D.C. Seek Flexibility from NCLB to Drive Education Reforms in Second Round of Requests," press release, February 29, 2012, <http://www.ed.gov/news/press-releases/26-more-states-and-dc-seek-flexibility-nclb-drive-education-reforms-second-round>.) A copy of each state's application and the District of Columbia's application is available at <http://www.ed.gov/esea/flexibility/requests>.

<sup>7</sup> U.S. Department of Education, "26 More States and D.C. Seek Flexibility from NCLB to Drive Education Reforms in Second Round of Requests," press release, February 29, 2012, <http://www.ed.gov/news/press-releases/26-more-states-and-dc-seek-flexibility-nclb-drive-education-reforms-second-round>.

<sup>8</sup> U.S. Department of Education, "President Obama: Our Children Can't Wait for Congress to Fix No Child Left Behind, Announces Flexibility in Exchange for Reform for Ten States," press release, February 9, 2012, <http://www.ed.gov/news/press-releases/president-obama-our-children-cant-wait-congress-fix-no-child-left-behind-announce>.

<sup>9</sup> While New Mexico's application for the ESEA flexibility package was not approved, the Administration indicated that it will continue to work with New Mexico on its application. Thus, New Mexico could be granted flexibility at a later time.

<sup>10</sup> The conditions that each state must meet are detailed in letters from the Secretary to the states. These letters, as well as the approval letters for the seven other states, are available online at <http://www.ed.gov/esea/flexibility/requests>.

<sup>11</sup> Florida must address issues related to its implementation of the School Improvement Grant program and change its accountability system inclusion policies related to English language learners and students with disabilities. Georgia must evaluate and refine its College-and Career-Ready Performance Index. Oklahoma must finalize administrative rules for its "A-F grading system." (For more information, see the approved state applications available online at <http://www.ed.gov/esea/flexibility/requests>.)

<sup>12</sup> U.S. Department of Education, "Department of Education Approves New Mexico's Request for Flexibility from No Child Left Behind," press release, February 15, 2012, <http://www.ed.gov/news/press-releases/department-education-approves-new-mexicos-request-flexibility-no-child-left-behi>.

<sup>13</sup> U.S. Department of Education, "Obama Administration Approves Eight More States for NCLB Waivers," press release, May 29, 2012, <http://www.ed.gov/news/press-releases/obama-administration-approves-eight-more-states-nclb-waivers>.

<sup>14</sup> Under growth models, the achievement of the same pupils is tracked from year-to-year. This type of model is not explicitly mentioned in the NCLB statute; however, it is authorized in regulations promulgated by ED. Using waiver authority available to the Secretary under ESEA section 9401, the Secretary is able to approve state's use of growth models. To date, 15 states (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Michigan, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas) have been approved to use growth models.

<sup>15</sup> The requirement that New York must meet is detailed in a letter from the Secretary to the state. It is available online at <http://www.ed.gov/esea/flexibility/requests>.



flexibility package through the 2013-2014 school year.<sup>16</sup> ED will continue to review the remaining applications received in February.

## **Current Law and Secretarial Waiver Authority**

Since the announcement of the ESEA flexibility package, there has been substantial congressional interest in waiver provisions and the extent to which they may be coupled with accompanying conditions. This part of the report examines the history of waiver authority under the ESEA. This is followed by a detailed description of the broad waiver authority currently provided to the Secretary under Section 9401 of the ESEA. Following these discussions, an analysis of waivers that the Secretary has granted under this authority is provided, as well as a legal analysis of the Secretary's authority under Section 9401.

### **Brief History of Waiver Authority Under the ESEA**

Prior to the 1994 reauthorization of the ESEA by the Improving America's Schools Act (IASA; P.L. 103-382), the Secretary had only specific, program-based waiver authority. For example, the Secretary was permitted to waive specific program requirements under certain circumstances<sup>17</sup> or waive maintenance of effort (MOE) requirements as they applied to specific programs due to exceptional or uncontrollable circumstances or a precipitous decline in the financial resources of a state.<sup>18</sup>

As Congress worked on what would ultimately be known as the IASA, both the House and Senate supported broadening the Secretary's waiver authority. For example, both the House and Senate reports that accompanied their respective versions of the IASA stated:

The Committee recognizes the need for greater local flexibility in the administration of Federal education programs and supports the use [of] waivers for the purpose of improving services and student performance. Administrative ease is not, in and of itself, a sufficient justification for a waiver of Federal requirements.<sup>19</sup>

The result of the reauthorization process was the inclusion of broad waiver authority for the Secretary that was accompanied by specified prohibitions on the use of this authority.<sup>20</sup> For example, the Secretary was prohibited from waving maintenance of effort requirements, equitable participation of private school students and teachers, and applicable civil rights requirements.

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<sup>16</sup> The condition that Ohio must meet is detailed in a letter from the Secretary to the state. It is available online at <http://www.ed.gov/esea/flexibility/requests>.

<sup>17</sup> For example, under P.L. 100-297 (1988 amendments to the ESEA), the Secretary was permitted to waive the limitation on the percentage of funds available for state programs that could be used for state administration under Part A-2 of the Federal, State, and Local Partnership for Improvement program for states meeting specific requirements.

<sup>18</sup> For example, under P.L. 100-297, this waiver provision applied to the Title I, Chapter 2-C, General Administrative Provisions.

<sup>19</sup> U.S. Congress, House Committee on Education and Labor, *Improving America's Schools Act of 1994*, Report to accompany H.R. 6, 103<sup>rd</sup> Cong., 2<sup>nd</sup> sess., February 16, 1994, H.Rept. 103-425 (Washington: GPO, 1994), p. 39. U.S. Congress, Senate Committee on Labor and Human Resources, *Improving America's Schools Act of 1994*, Report to accompany S. 1513, 103<sup>rd</sup> Cong., June 24, 1994, S.Rept. 103-292 (Washington: GPO, 1994), p. 47.

<sup>20</sup> Section 14401.

The subsequent reauthorization of the ESEA by the No Child Left Behind Act of 2001 (NCLB; P.L. 107-110) retained the Secretary's broad waiver authority while making a few changes to the existing authority. For example, under NCLB new prohibitions on the Secretary's waiver authority with respect to waiving general prohibitions contained in Title IX of the ESEA<sup>21</sup> and the selection of school attendance areas or schools under Title I-A were added. A detailed discussion of the Secretary's current waiver authority under Section 9401 of the ESEA is provided below.

## **Current Secretarial Case-by-Case Waiver Authority Under Section 9401 of the ESEA**

Section 9401 grants the Secretary the authority to issue waivers of any statutory or regulatory requirement of the ESEA for an SEA, LEA, Indian tribe, or school (through an LEA) that receives funds under an ESEA program and requests a waiver.<sup>22</sup> A waiver request must

- identify the federal programs affected by the requested waiver;
- describe the statutory or regulatory requirements to be waived and how the waiving of these requirements will increase the quality of student instruction and improve student academic achievement;
- describe for each school year the "specific, measurable education goals" in accordance with ESEA, Section 1111(b),<sup>23</sup> for the SEA and for each LEA, Indian tribe, or school that would be affected by the waiver and the methods that would be used to measure annual progress toward meeting such goals and outcomes;
- explain how the waiver will assist the SEA and each affected LEA, Indian tribe, or school in reaching the state goals; and
- describe "how schools will continue to provide assistance to the same populations served by programs for which waivers are requested."

The Secretary is prohibited from waiving any statutory or regulatory requirement related to the following requirements:

- allocation of funds to states or LEAs (or other grant recipients);
- MOE requirements for LEAs or SEAs to maintain their level of spending for specified educational services;
- comparability of services (requires states and LEAs to provide a level of state and local funding that is comparable in all schools of an LEA);
- the use of federal aid only to supplement, and not supplant, state and local funds for specified purposes;
- equitable participation of private school students and teachers (§9501);

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<sup>21</sup> These general prohibitions address activities such as the distribution of materials that promote or encourage sexual activity or the operation of a program that distributes contraceptives in schools.

<sup>22</sup> 20 U.S.C. §7861. See also, U.S. Department of Education, *Non-Regulatory Guidance on Title I, Part A Waivers*, January 2009.

<sup>23</sup> For more information on these provisions, see CRS Report R41533, *Accountability Issues and Reauthorization of the Elementary and Secondary Education Act*, by Rebecca R. Skinner and Erin D. Lomax.

- parental participation and involvement;
- applicable civil rights requirements;
- the requirement for a charter school under the Public Charter Schools program (Title V-B-1);
- prohibitions against consideration of ESEA funds in state school finance programs (§9522);
- prohibitions against use of funds for religious worship or instruction (§9505);
- certain prohibitions against use of funds for sex education (§9526); and
- certain ESEA Title I-A school selection requirements.

A waiver granted under the authority of Section 9401 may not exceed four years, except that it may be extended if the Secretary determines that the waiver has contributed to improved student achievement and is in the public interest. In contrast, a waiver is to be terminated if the Secretary determines that student performance or other outcomes are inadequate to justify continuation of the waivers, or if the waiver is no longer necessary to achieve its original purposes. The Secretary is required to publish a notice of the decision to grant a waiver in the *Federal Register*.<sup>24</sup> The Secretary is also required to submit to Congress annual reports on the effects and effectiveness of waivers that have been granted, beginning in FY2002.<sup>25</sup>

## **Current Use of Waiver Authority Under Section 9401**

From the enactment of NCLB in calendar year 2002 through calendar year 2009 (the most recent year for which data are available), the Secretary has granted a total of 634 waivers of ESEA requirements. As shown in **Table 1**, ED has provided waivers related to academic accountability provisions, Title I-A provisions, general administrative provisions, natural disasters, and funds received under the American Recovery and Reinvestment Act (ARRA; P.L. 111-5). Based on a review of the *Federal Register* documents announcing the waivers, only 5 of the 634 waivers granted specified any conditions to receive the waivers. In each of the five instances, however, the conditions specified were statutory requirements that the entity had to meet regardless of the receipt of the waiver. That is, none of the states that were granted waivers were required to take any actions beyond what was already required by law in order to receive the waiver. Below is a summary of the waivers and the associated conditions:<sup>26</sup>

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<sup>24</sup> See, for example, U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended,” 74 *Federal Register* 22909-22913, May 15, 2009. Waiver requests that are denied by the Secretary are not included in the *Federal Register* announcement.

<sup>25</sup> See, for example, U.S. Department of Education, The U.S. Department of Education’s Report to Congress on Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act During Calendar Year 2009, December 2010, <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters/2010waiverreport.pdf>.

<sup>26</sup> Information on the waivers granted to the relevant states is available from U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended,” 72 *Federal Register* 10990-10996, March 12, 2007 (North Carolina, Arkansas, and Florida); U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended,” 73 *Federal Register* 19056-19058, April 8, 2008 (Ohio); U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended,” 74 *Federal Register* 22909-22913, May 15, 2009 (Missouri).

- North Carolina: The state was approved to implement a growth model conditioned on receiving full approval of its state accountability system by July 2006.<sup>27</sup>
- Arkansas: The state was approved to implement a growth model conditioned on receiving approval of its standards and assessments system by the end of the 2006-2007 school year.
- Florida: Same as Arkansas.
- Ohio: The state was approved to implement a growth-based accountability model beginning in the 2006-2007 school year, conditioned on the state adopting a uniform minimum group size for all students in the state, including students with disabilities and limited English proficient students.
- Missouri: Similar to Ohio beginning with the 2007-2008 school year.

Generally, waivers have been requested by eligible entities based on their particular needs. ED has also solicited waiver requests for Administration priorities, such as the use of growth models and differentiated accountability systems to meet the accountability requirements under Title I-A.<sup>28</sup>

**Table 1. Number of Waivers Provided by the Secretary of Education Using Waiver Authority Granted Under Section 9401 of the ESEA: Calendar Years 2002-2009**

| <b>Waiver Category and Summary of Waivers Provided</b>   | <b>2002-2006<sup>a</sup></b> | <b>2007</b> | <b>2008</b> | <b>2009</b> | <b>Total</b> |
|--|------------------------------|-------------|-------------|-------------|--------------|
| <b>Accountability provisions</b>   |                              |             |             |             |              |
| Allow the use of growth models   | 5                            | 4           | 11          | 4           | 24           |
| Permit the switching of the order in which choice and supplemental educational services (SES) must be offered  | 6                            | 4           | 7           | 0           | 17           |
| Allow LEAs to offer SES and public school choice to schools identified for the first year of “school improvement” and count funds used for both toward the required 20% set-aside at the LEA level | 0                            | 0           | 0           | 31          | 31           |
| Allow LEAs identified for improvement to be SES providers  | 6                            | 4           | 5           | 28          | 43           |
| Modify public school choice notification requirements  | 0                            | 1           | 0           | 23          | 24           |

<sup>27</sup> Under growth models, the achievement of the same pupils is tracked from year-to-year. This type of model is not explicitly mentioned in the NCLB statute; however, it is authorized in regulations promulgated by ED. Using waiver authority available to the Secretary under Section 9401, the Secretary is able to approve state’s use of growth models. To date, 15 states (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Michigan, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas) have been approved to use growth models.

<sup>28</sup> For more information about accountability requirements under Title I-A of the ESEA, see CRS Report R41533, *Accountability Issues and Reauthorization of the Elementary and Secondary Education Act*, by Rebecca R. Skinner and Erin D. Lomax.

| <b>Waiver Category and Summary of Waivers Provided</b>   | <b>2002-2006<sup>a</sup></b> | <b>2007</b> | <b>2008</b> | <b>2009</b> | <b>Total</b> |
|--|------------------------------|-------------|-------------|-------------|--------------|
| Modify requirement for LEAs identified for improvement to spend 10% of Title I-A funds on professional development | 0                            | 0           | 0           | 19          | 19           |
| Allow the use of a differentiated accountability system  | 0                            | 0           | 6           | 3           | 9            |
| Allow the use of substitute assessments  | 0                            | 2           | 0           | 1           | 3            |
| Allow the delayed release of assessment results  | 0                            | 0           | 0           | 4           | 4            |
| Allow changes to adequate yearly progress determinations   | 0                            | 0           | 0           | 2           | 2            |
| <b>Title I-A provisions not related to accountability</b>  |                              |             |             |             |              |
| Permit changes to within LEA allocation requirements under Title I-A   | 0                            | 1           | 1           | 2           | 4            |
| Alter eligibility requirements to operate a schoolwide program   | 0                            | 1           | 1           | 0           | 2            |
| Waive Title I-A carryover of funds limitation  | 0                            | 0           | 0           | 1           | 1            |
| <b>General administrative provisions</b>   |                              |             |             |             |              |
| Allow general programmatic waivers   | 10                           | 0           | 0           | 0           | 10           |
| Provide an extension of the time period in which states and LEAs were permitted to obligate funds                  | 24                           | 0           | 0           | 30          | 54           |
| Waive the administrative cost limitation that applies to Indian Education funds                                    | 128                          | 13          | 10          | 4           | 155          |
| Provide additional transferability flexibility with respect to the use of funds                                    | 0                            | 1           | 1           | 1           | 3            |
| Waive certain eligibility requirements to participate in the Local Flex program (Title VI-A-2-B)                   | 0                            | 0           | 1           | 0           | 1            |
| Waive Insular Areas consolidated grant restrictions  | 0                            | 0           | 4           | 0           | 4            |
| <b>Natural disasters</b>   |                              |             |             |             |              |
| Provide various waivers in response to Hurricanes Katrina and Rita   | 18                           | 4           | 4           | 2           | 28           |
| <b>American Recovery and Reinvestment Act (ARRA)</b>   |                              |             |             |             |              |
| Provide ARRA-related waivers of various ESEA provisions  | 0                            | 0           | 0           | 196         | 196          |
| <b>TOTAL</b>   | <b>197</b>                   | <b>35</b>   | <b>51</b>   | <b>351</b>  | <b>634</b>   |

**Source:** Table prepared by CRS, October 2011, based on CRS examination of U.S. Department of Education, "Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended," 72 *Federal Register* 10990-10996, March 12, 2007; U.S. Department of Education, "Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended," 73 *Federal Register* 19056-19058, April 8, 2008; U.S. Department of Education, "Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended," 74 *Federal Register* 22909-22913, May 15, 2009; and U.S.

Department of Education, "Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended," 75 *Federal Register* 56833-56856, September 16, 2010; as well as reports submitted to Congress on the waivers granted under Section 9401 that were submitted in April 2007, April 2008, June 2009, and December 2010; available at <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters/index.html>.

- a. This covers the time period from the enactment of NCLB through calendar year 2006.

## Legal Analysis

As noted above, the Secretary may waive "any statutory or regulatory requirement" of the ESEA. The statute sets forth a waiver request process and specifies provisions that are not subject to waiver, but the waiver authority otherwise appears to be very broad. It is important to note, however, that ED's waiver authority is discretionary, not mandatory. This discretionary authority was upheld by a federal district court in a 2006 case in which the court rejected a state's challenge to ED's denial of its waiver request.<sup>29</sup> According to the court, "the language of the provision governing waivers grants the Secretary broad discretion to deny states' waiver requests."<sup>30</sup>

Less judicial guidance is available regarding the full reach of the Secretary's authority to grant statutory waivers.<sup>31</sup> The starting point in interpreting a statute is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is plain and unambiguous, it must be applied according to its terms.<sup>32</sup> Based on the plain language of the statute, the scope of ED's waiver authority appears to be quite broad, suggesting that ED may indeed have the authority to waive the various requirements of the ESEA specified in its flexibility proposal. This interpretation is bolstered by the fact that, although the ESEA previously contained similar waiver authority, Congress expressly enacted the current waiver provisions as part of the No Child Left Behind Act amendments to the ESEA, signaling that Congress clearly understood and intended for ED to waive the requirements of that act when appropriate. However, this analysis does not end the inquiry, given that ED may face other legal challenges to its use of such authority, especially in light of the conditional nature of its waiver proposal.

Thus far, there do not appear to have been legal challenges to ED's authority to waive statutory requirements under the ESEA. Because there are no federal court cases that provide guidance regarding the scope of the Secretary's waiver authority, it is useful to examine similar challenges involving the use of statutory waiver authority by other federal agencies to see if the courts have placed any limits on such authority.

In one prominent case, several environmental groups challenged the constitutionality of Section 102 of the REAL ID Act of 2005, which provides the Secretary of Homeland Security with "the authority to waive all legal requirements" he deems necessary for the expeditious construction of barriers along the Mexican border.<sup>33</sup> Specifically, the plaintiffs argued that the waiver authority violates separation of powers principles because it was an unconstitutional delegation of

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<sup>29</sup> *State of Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

<sup>30</sup> *Id.* at 495.

<sup>31</sup> This report does not address the Secretary's regulatory waiver authority. For more on agency regulatory waiver authority, see U.S. General Accounting Office, *Principles of Federal Appropriations Law, Third Edition, Volume I*, January 2004, pp. 3-20, <http://www.gao.gov/special.pubs/d04261sp.pdf>.

<sup>32</sup> See, for example, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>33</sup> P.L. 109-13, codified at 8 U.S.C. §1103 note.

legislative power to the executive branch. In upholding the waiver provision, the federal district court noted that “the Supreme Court has widely permitted the Congress to delegate its legislative authority to the other branches, so long as the delegation is accompanied by sufficient guidance.”<sup>34</sup> Waiver authorities under other federal statutes have withstood similar “nondelegation doctrine” challenges.<sup>35</sup> In general, all that is required is that Congress provide an “intelligible principle” to guide the agency in exercising its delegated authority. This requirement appears to be satisfied by Section 9401, which requires waiver requests to describe, among other things, how the waiver will “increase the quality of instruction for students” and “improve the academic achievement of students.” Thus, it appears that ED’s waiver authority would be likely to survive a constitutional challenge based on the nondelegation doctrine.

Another example of statutory waiver authority occurs under the Age Discrimination in Employment Act, which permits the Equal Employment Opportunity Commission (EEOC) to establish “reasonable exemptions” to the statute as the agency “may find necessary and proper in the public interest.”<sup>36</sup> When the EEOC issued an exemption to permit the practice of coordinating employer-provided retiree health coverage with eligibility for Medicare, the regulation was challenged in court. Initially, a federal district court struck down the exemption, ruling that the EEOC’s overly broad interpretation of its waiver authority had violated congressional intent and the plain language of the statute.<sup>37</sup> Based on a subsequent Supreme Court decision regarding judicial deference to agency interpretations, the district court later reversed itself and upheld the EEOC’s waiver.<sup>38</sup> In affirming, the court of appeals held that the regulation did fall within the EEOC’s waiver authority. According to the court, because “the power to grant exemptions provides an agency with authority to permit certain actions at variance with the express provisions of the statute in question ... Congress made plain its intent to allow limited practices not otherwise permitted under the statute, so long as they are ‘reasonable’ and ‘necessary and proper in the public interest.’”<sup>39</sup> As the initial district court ruling demonstrates, it is possible for a court to find grounds for invalidating an agency’s exercise of its statutory waiver authority. However, the EEOC ultimately prevailed in court, suggesting that agencies such as ED may face few restrictions on the use of statutory waiver authority as long as they comply with the statutory requirements regarding the granting of such waivers.

Also instructive are legal challenges to Section 1115 of the Social Security Act, which authorizes the Secretary of Health and Human Services to waive compliance with certain statutory requirements when conducting demonstration or pilot programs that are likely to promote specified statutory objectives.<sup>40</sup> In general, the courts have been unwilling to circumscribe the Secretary’s authority to approve experimental projects under Section 1115 and have rejected

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<sup>34</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 126 (D.D.C. 2007) (citations omitted).

<sup>35</sup> See, for example, *Smith v. FRB*, 280 F. Supp. 2d 314 (S.D.N.Y. 2003) (upholding a waiver provision in the Emergency Wartime Supplemental Appropriations Act, P.L. 108-11, against a nondelegation challenge); *AARP v. EEOC*, 390 F. Supp. 2d 437 (E.D. Pa. 2005) (avoiding the constitutional nondelegation doctrine question to uphold the waiver on statutory grounds).

<sup>36</sup> 29 U.S.C. §628.

<sup>37</sup> *AARP v. EEOC*, 383 F. Supp. 2d 705 (E.D. Pa. 2005).

<sup>38</sup> *AARP v. EEOC*, 390 F. Supp. 2d 437 (E.D. Pa. 2005).

<sup>39</sup> *AARP v. EEOC*, 489 F.3d 558, 563 (3d Cir. 2007). For more information, see CRS Report RS21845, *Final Equal Employment Opportunity Commission (EEOC) Rules on Retiree Health Plans and the Age Discrimination in Employment Act (ADEA)*, by Jody Feder.

<sup>40</sup> 42 U.S.C. §1315.

challenges to such waivers on numerous occasions.<sup>41</sup> However, judicial deference to the Secretary's broad authority is not without limits. Reviewing courts have cited the Administrative Procedure Act (APA) as affording judicial authority to invalidate waivers found to be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>42</sup> While the APA does not allow a court to substitute its judgment for that of the Secretary when making the deferential arbitrary and capricious inquiry, the court may find a waiver decision arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>43</sup> Indeed, in one of the very few successful challenges to a Section 1115 waiver, the court held that the Secretary had violated both the APA and Section 1115 by granting a statutory waiver without conducting sufficient review or making adequate findings regarding the merits of the waiver.<sup>44</sup>

Taken together, the above cases indicate that, although individual waivers may face legal challenges and may even be struck down on occasion, the courts will generally uphold an agency's exercise of its statutory waiver authority so long as the agency develops an adequate record regarding its decision to grant a waiver and ensures that the waiver is granted consistent with the statutory purposes and procedures set forth in the section authorizing such waivers. As a result, it appears that ED does have the authority to waive ESEA statutory requirements related to issues such as academic standards and assessments; accountability requirements, including the timeline by which all students are to be proficient in reading/language arts and mathematics; school improvement, corrective action, and restructuring requirements; and public school choice and supplemental educational services, as long as ED develops the aforementioned adequate record and ensures that the waiver is granted consistent with the statutory purposes and procedures set forth in Section 9401.

It is important to note that the cases described above involve agency waivers that appear to be unconditional, while the waivers in ED's flexibility plan would be granted only on the condition that states meet multiple new standards established by the department. It is not uncommon for agencies to impose new conditions when they grant waivers, and several courts have upheld waivers that contain agency-imposed conditions.<sup>45</sup> Moreover, such conditions may not necessarily be considered to be requirements, given that a state's compliance would be purely voluntary, and any state that did not want to submit to such conditions could simply forgo seeking a waiver on that basis or initiate a separate request for an unconditional waiver of the same requirements. However, the proposed ED waivers and corresponding conditions appear to be significantly broader in scope than previous waivers considered by the courts, a feature that may distinguish ED's flexibility plan from other conditional waivers that have survived legal challenge.

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<sup>41</sup> See, for example, *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973); *C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. N.J. 1996); *C. K. v. Shalala*, 883 F. Supp. 991 (D.C. N.J. 1995); *Georgia Hospital Ass'n v. Dept. of Medical Assistance*, 528 F. Supp. 1348 (N.D. Ga. 1982); *Crane v. Matthews*, 417 F. Supp. 532 (N.D. Ga. 1976).

<sup>42</sup> 5 U.S.C. §706(2)(A).

<sup>43</sup> *Beno v. Shalala*, 30 F.3d 1057, 1073 (9<sup>th</sup> Cir. 1994) (quoting *Motor Vehicle Mfr. Ass'n v. State Farm Ins.*, 463 U.S. 29, 44 (1983)).

<sup>44</sup> *Id.*

<sup>45</sup> See, for example, *AT&T Wireless Servs. v. FCC*, 270 F.3d 959 (D.C. Cir. 2001); *C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996).



## **Overview of Waivers Included in the Administration's ESEA Flexibility Package**

As previously mentioned, on September 23, 2011, President Obama and the Secretary formally announced the availability of a package of 10 waivers and one optional waiver of ESEA requirements for states and the four principles that states must meet to obtain the waivers.<sup>46</sup> Below is a list of the 10 waivers. The waivers are discussed thematically in this report, and the parenthetical information refers to the section in which the waiver is discussed in this report.

1. Flexibility regarding the 2013-2014 timeline for determining adequate yearly progress (waiver of existing accountability provisions)
2. Flexibility in implementation of school improvement requirements (waiver of existing accountability provisions)
3. Flexibility in implementation of LEA improvement requirements (waiver of existing accountability provisions)
4. Flexibility for rural LEAs (waiver providing flexibility in the use of federal funds)
5. Flexibility for schoolwide programs (waiver providing flexibility in the use of federal funds to support new accountability provisions)
6. Flexibility to support school improvement (waiver of an existing School Improvement Grant (SIG) program provision to support new accountability provisions)
7. Flexibility for Reward Schools (waiver of an existing accountability provision)
8. Flexibility regarding highly qualified teacher (HQT) improvement plans (waiver of teacher-related provisions)
9. Flexibility to transfer certain funds (waiver providing flexibility in the use of federal funds)
10. Flexibility in the use of SIG funds to support priority schools (waiver of current SIG program requirements to support new accountability provisions)

The optional waiver is described as flexibility in the use of the 21<sup>st</sup> Century Community Learning Centers (21<sup>st</sup> CCLC) program funds.

ED has announced two dates by which states can apply for the ESEA flexibility package to be effective for the 2011-2012 school year. The first application deadline was November 14, 2011. These applications were to be reviewed in December with decisions on which states will receive waivers made by mid-January 2012. The next date by which states may submit applications is February 21, 2012, for peer review in spring 2012.

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<sup>46</sup> Information regarding the ESEA waivers being provided to states, the application process to receive a waiver, and other information related to the waivers was provided by the U.S. Department of Education; see <http://www.ed.gov/esea/flexibility>.

With the exception of the optional waiver, SEAs may not apply for only some of the 10 waivers or only implement some of the principles related to receiving the waivers.<sup>47</sup> However, nothing precludes an SEA from submitting a separate request for similar or additional waivers under ESEA Section 9401. ESEA requirements that are not specifically waived by the Secretary will continue to apply. In addition, if an SEA chooses not to implement a specific waiver included in the ESEA flexibility package, it must continue to meet the requirements of current law.<sup>48</sup>

The next sections of the report discuss each of the 10 individual waivers included in a single package that ED is making available to states, as well as the one optional waiver related to the 21<sup>st</sup> CCLC program. In general, the 10 waivers included in the package affect existing academic accountability, teacher, and funding flexibility provisions. Rather than analyzing the waivers in the order in which they are presented in the ED ESEA flexibility package, this section of the report examines the waivers thematically based on the types of current law provisions they would affect (i.e., accountability, teachers, or funding flexibility). For each waiver, a discussion of the flexibility being offered by the Administration and how this differs from current law requirements is included. There has been substantial interest in the extent to which the package of waivers and accompanying requisite principles reflect the priorities identified in the Administration's ESEA reauthorization blueprint (the Blueprint). To the extent that it is relevant, each discussion includes an examination of whether the Administration has proposed or provided similar flexibility either in its Blueprint<sup>49</sup> or through implementation of the Race to the Top (RTTT) program. Each waiver analysis concludes with a general discussion about the waiver and possible issues that could arise through the granting of the waiver. The optional waiver related to the 21<sup>st</sup> CCLC program is discussed after the waivers included in the package of 10 waivers.

It should be noted that the focus of this report is on actions at the state level. Only SEAs are currently permitted to apply for the ESEA flexibility package. LEAs in the states that receive the waivers will receive increased flexibility with respect to the waivers, but also increased responsibilities in terms of complying with the conditions associated with receiving the waivers.<sup>50</sup> Similar to SEAs, however, nothing precludes an LEA, including an LEA in a state that does not apply for or does not receive the ESEA flexibility package, from applying separately to the Secretary under ESEA Section 9401 to obtain any desired waivers.

## Waivers Related to Accountability

Under the provisions enacted in NCLB, SEAs receiving ESEA funding must agree to adopt and implement specific accountability requirements. Key features of such systems include the development of content and performance standards and aligned assessments in reading/language arts, mathematics, and science; annual testing of students in grades 3-8 and once in high school to

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<sup>47</sup> U.S. Department of Education, *ESEA Flexibility: Frequently Asked Questions*, October 3, 2011, Item A-3, <http://www.ed.gov/esea/flexibility>. (This document is hereinafter referred to as ED, *Flexibility FAQs*.)

<sup>48</sup> Even if an SEA chooses not to implement a particular waiver, it must still meet all four principles established by ED as a condition of receiving the waivers.

<sup>49</sup> U.S. Department of Education, *A Blueprint for Reform: Reauthorization of the Elementary and Secondary Education Act*, March 2010, <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>. (Hereinafter referred to as the Blueprint.) For an analysis of the Blueprint, see CRS Report R41355, *Administration's Proposal to Reauthorize the Elementary and Secondary Education Act: Comparison to Current Law*, by Rebecca R. Skinner et al.

<sup>50</sup> ED has summarized the flexibility and other benefits, as well as the responsibilities, that LEAs would receive if their SEA receives the waiver package. For more information, see ED, *Flexibility FAQs*, pp. 39-40.

gauge students' progress toward meeting standards in reading/language arts and mathematics; and implementation of outcome accountability consequences for schools and LEAs receiving Title I-A funds that fail to demonstrate a requisite level of academic performance. This section discusses each of the six waivers related to accountability. Collectively, these waivers would provide alternative approaches for meeting current law academic accountability requirements. While the discussion includes some information regarding current ESEA accountability requirements pertinent to each waiver, for more detailed information about current requirements, see CRS Report R41533, *Accountability Issues and Reauthorization of the Elementary and Secondary Education Act*, by Rebecca R. Skinner and Erin D. Lomax.

In its description of the ESEA flexibility package, ED notes that many states are already developing new accountability systems that (1) include student growth and school progress, (2) “align accountability determinations with support and capacity-building efforts, and [3] provide for systemic, context-specific interventions that focus on the lowest-performing schools and schools with the largest achievement gaps.”<sup>51</sup> The waivers, according to ED, would enable SEAs and LEAs to implement their new systems without being bound by the school and LEA improvement requirements contained in current law.

## **1. Flexibility Regarding the 2013-2014 Timeline for Determining Adequate Yearly Progress**

Under this waiver, an SEA would no longer need to establish annual measurable objectives (AMOs) for student performance on state reading/language arts and mathematics assessments to use in making AYP determinations. AMOs under current law (1) are established separately for reading/language arts and mathematics assessments, (2) are the same for all schools and LEAs, (3) identify a single minimum percentage of students who must meet or exceed the proficient level on the assessments that applies to the all-students group and each subgroup for which data are disaggregated, and (4) must ensure that all students will meet or exceed the state's proficient level of achievement on the assessments based on a timeline established by the state. The timeline must incorporate concrete movement toward meeting an ultimate goal of *all* students reaching a proficient or higher level of achievement by the end of the 2013-2014 school year. Instead, under the waiver an SEA would be permitted to develop “new ambitious but achievable” AMOs in reading/language arts and mathematics. The new AMOs would be used to guide improvement at the state, LEA, school, and student subgroup levels.

The ESEA flexibility package application would give a state three options for establishing the new AMOs. Under the first option, the state could set AMOs in annual equal increments to meet the goal of reducing by half the percentage of students in the all students group and in each of the subgroups who are not proficient within six years. The second option would be for a state to establish AMOs that increase in equal increments and result in 100% of students achieving proficiency no later than the end of the 2019-2020 school year. The third option would allow a state to set its AMOs based on an “educationally sound rationale.” The baseline for establishing the AMOs under the first two options would be the proficiency rates based on the 2010-2011 school year assessments. No baseline is prescribed for the third option.<sup>52</sup>

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<sup>51</sup> U.S. Department of Education, *ESEA Flexibility*, September 23, 2011, p. 3, <http://www.ed.gov/esea/flexibility>. (This document is hereinafter referred to as ED, *ESEA Flexibility*.)

<sup>52</sup> While substantial differentiation in AMO targets would be permitted under all three options, the new AMOs will (continued...)

This new flexibility is somewhat similar to flexibility that the Administration discussed in its Blueprint for ESEA reauthorization. Under the Blueprint, the goal of having all students proficient in reading/language arts and mathematics by the end of the 2013-2014 school year would have been replaced with the goal that all students be on track to graduate high school “college- and career-ready” by 2020, which has some similarities to the second option available to states under the ESEA flexibility package.

## **Discussion and Possible Issues**

It should be noted that under each of the three options, an SEA would be permitted to set AMOs that differ by LEA, school, or subgroup. That is, a state could allow one school to have completely different performance targets for its subgroups than another school, even among schools in the same LEA. Thus, there would no longer be a single target in reading/language arts and mathematics that all students in a state were trying to reach, regardless of subgroup, school, or LEA. For example, AMOs may differ by school, using the school’s current performance as the means to establish the AMOs, provided that the AMOs require greater gains for schools that are further behind in terms of the percentage of students who are proficient.<sup>53</sup> This differentiation of performance targets is not generally permitted under current law. As previously discussed, the AMOs established by the SEA under current law must be the same for all LEAs, schools, and subgroups.

SEAs receiving the ESEA flexibility package will actually have two opportunities to reset their AMOs. They may reset their AMOs based on the aforementioned requirements to take effect as early as the 2011-2012 school year. Once the SEA adopts new performance standards that are aligned with its college- and career-ready standards, it may reset its AMOs a second time based on the percentage of students who are, or who are on track to be, college- and career-ready.<sup>54</sup>

## **2. Flexibility in Implementation of School Improvement Requirements**

LEAs would no longer be required to identify Title I-A schools that fail to make AYP for two consecutive years or more for improvement, corrective action, or restructuring. Neither the LEA nor its schools would be required to implement currently required improvement actions (e.g., a school that was identified for restructuring based on assessment results from the 2010-2011 school year would no longer have to implement these actions). However, the SEA could still require or permit an LEA to take such actions. An LEA would also be exempt from all administrative and reporting requirements related to school improvement. This is similar to suggested changes included in the Administration’s Blueprint.

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(...continued)

only be peer reviewed under the third option. ED staff will review the new AMOs that would be established under the first two options. (ED, *ESEA Flexibility*, Item B-3.)

<sup>53</sup> ED, *Flexibility FAQs*, Item B-7.

<sup>54</sup> ED, *Flexibility FAQs*, Item B-2.

## Discussion and Possible Issues

As discussed in a subsequent section, states, LEAs, and schools would have to continue to focus on low-performing schools; however, required consequences would only have to be applied to a subset of schools known as “priority” and “focus” schools under the waiver provisions, rather than to all schools failing to meet AYP. There appears to be general consensus that the current one-size-fits-all system of outcome accountability is no longer an appropriate approach to addressing the needs of low-performing schools. Under the ESEA flexibility package, “priority” and “focus” schools are defined as follows.<sup>55</sup>

- **Priority school.** A priority school is a school that has been identified as being among the lowest-performing schools in the state. A priority school must be (1) among the lowest 5% of Title I-A schools in the state based on the performance of the all-students group on state assessments over a number of years; (2) a Title I-participating or Title I-eligible high school with a graduation rate of less than 60% over a number of years; OR (3) a Tier I or Tier II school under the School Improvement Grant (SIG) program<sup>56</sup> that is receiving SIG funds to implement a school intervention model.<sup>57</sup> The number of schools identified as priority schools in the state must be equal to at least 5% of the Title I schools in the state.<sup>58</sup>
- **Focus school.** A focus school is a Title I school in the state that is “contributing to the achievement gap” in the state. It is either a school that (1) has the largest within-school gaps between the highest- and lowest-achieving subgroups, or at the high school level has the largest within-school gaps in graduation rates; or (2) is a school that has at least one subgroup with low achievement or, at the high school level, low graduation rates. Title I high schools that have had a graduation rate of less than 60% over a number of years that have not been identified as priority schools may be identified as focus schools. The number of schools identified as focus schools must equal at least 10% of the Title I schools in the state.<sup>59</sup>

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<sup>55</sup> While a school may meet the definition of both a priority school and a focus school, the SEA may only identify a school as either a priority or focus school. (ED, *Flexibility FAQs*, Item C-23b.)

<sup>56</sup> For more information about the SIG program, see the subsequent discussion on the waiver related to SIG.

<sup>57</sup> SEAs are not required to identify priority schools in each of the three categories. SEAs may identify non-Title I schools as priority schools. However, all Title I schools must be included in the pool from which priority schools are selected. (ED, *Flexibility FAQs*, Items C-23 and C-26a.)

<sup>58</sup> While all of the schools identified do not have to be Title I schools, SEAs and LEAs cannot use their Title I funds to serve non-Title I schools identified as priority schools. (ED, *Flexibility FAQs*, Item C-23.) However, if an SEA identifies a Title I-eligible high school as a priority school, but the school’s poverty rate is not sufficient for the school to receive Title I-A funds, the SEA may request an additional waiver of ESEA Section 1113(a)(3)-(4) and (c)(1) to allow the LEA to provide Title I-A funds to the school. This would then make the school a Title I-participating school, and Title I-A funds could be used to support interventions in the school. (U.S. Department of Education, *ESEA Flexibility: Frequently Asked Questions Addendum #2*, January 5, 2012, Item C-23d, <http://www.ed.gov/esea/flexibility>. [This document is hereinafter referred to as ED, *Flexibility FAQs Addendum #2*].) It should be noted, however, that under the authority granted to the Secretary under Section 9401, the Secretary may only grant this waiver if the percentage of children from low-income families in the non-Title I participating school is not more than 10 percentage points below the lowest percentage of those children for any school in the LEA that meets the requirements of Section 1113(a) and (b). For more information on these requirements, see CRS Report R40672, *Education for the Disadvantaged: Analysis of Issues for the ESEA Title I-A Allocation Formulas*, by Rebecca R. Skinner.

<sup>59</sup> SEAs may identify non-Title I schools as focus schools. However, all Title I participating schools must be included in the pool from which focus schools are selected. (ED, *Flexibility FAQs*, Items C-23 and C-26a.)

Under the waivers, AMOs must still be used to determine AYP and must continue to be reported on state and local report cards. However, SEAs do not have to use only these assessment results to identify schools for interventions, as is done under current law to identify schools for improvement, corrective action, or restructuring or to identify schools for rewards. However, ED expects that the SEA will give “significant weight” to the results of the reading/language arts and mathematics assessments in making these decisions.<sup>60</sup>

For Title I schools that are not identified as reward,<sup>61</sup> priority, or focus schools, the AMOs have to be used as a factor in determining how the SEA will provide incentives and supports to ensure continuous improvement in these schools. They must also be used to assist the SEA or LEA in determining whether it needs to take action in these schools.<sup>62</sup> Thus, meeting or failing to meet the AMOs may no longer be a driving factor in determining whether a school is required to take specific actions as a result of its performance on state assessments.

In addition, with the elimination of the identification of schools for improvement, corrective action, and restructuring, and the associated required actions, LEAs will no longer have to reserve an amount equal to 20% of their Title I-A funds for public school choice and supplemental educational services (SES). SES are educational activities, such as tutoring, that are provided outside of normal school hours and designed to augment or enhance the educational services provided during regular periods of instruction. While LEAs can choose to continue to support these activities, funds do not have to be reserved for these purposes. Under current law, Title I-A funds reserved for these purposes are not subject to the equitable participation of private school student requirements that apply to other Title I-A funding. If an LEA uses the funds specifically for interventions in priority and focus schools, then the equitable participation requirements would still not apply.<sup>63</sup> However, if the LEA used funds for other uses, such as professional development, then the equitable participation requirements would apply to the funds. Thus, more Title I-A funds could be available to support eligible students attending private schools.

### **3. Flexibility in Implementation of LEA Improvement Requirements**

An SEA would no longer be required to identify LEAs that have failed to make AYP for two consecutive years or more for improvement or corrective action. Neither the SEA nor the LEA would be required to implement currently required improvement actions. An LEA would also be exempt from all administrative and reporting requirements related to LEA improvement. The Administration’s Blueprint for ESEA reauthorization would make similar changes.

#### **Discussion and Possible Issues**

As previously discussed, under the ESEA flexibility package LEAs will no longer be required to identify schools for improvement, corrective action, or restructuring. This is a parallel waiver

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<sup>60</sup> ED, *Flexibility FAQs*, Item C-24.

<sup>61</sup> For more information about reward schools, see the subsequent discussion on flexibility for reward schools.

<sup>62</sup> ED, *Flexibility FAQs*, Item B-11.

<sup>63</sup> U.S. Department of Education, *ESEA Flexibility: Frequently Asked Questions Addendum*, November 10, 2011, <http://www.ed.gov/esea/flexibility>. (This document is hereinafter referred to as ED, *Flexibility FAQs Addendum*.)

under which SEAs will no longer be required to identify LEAs for improvement or corrective action.

#### **4. Flexibility to Support School Improvement**

One of the waivers included in the ESEA flexibility package would permit an SEA to allocate Title I-A funds reserved at the state level for school improvement to an LEA in order to serve any priority or focus school, if the SEA determines such schools are most in need of additional support. Under current law, states are to reserve 4% of their total Title I-A LEA grants for school improvement activities. In reserving these funds, SEAs may not reduce any LEA's grant below its previous year level. As a result, in some years, a number of states may have been unable to reserve the full 4% of state total LEA grants for this purpose.<sup>64</sup>

Under current law, of the funds reserved by the SEA for school improvement activities, the SEA must allocate not less than 95% of that amount to LEAs for schools identified for school improvement, corrective action, and restructuring for activities related to not making AYP for two or more consecutive years.<sup>65</sup> In providing funds to LEAs, the SEA must give priority to LEAs that serve the lowest-achieving schools, demonstrate the greatest need for such funds, and demonstrate the strongest commitment to ensuring that the funds are used to enable the lowest-achieving schools to meet the goals included in their school improvement plans.

Under the Blueprint, states and LEAs would be permitted to reserve funds from their Title I-A allocation to build their capacity to support schools, school leaders, teachers, and students. The amount of the reservation was not specified. It is unclear how similar this provision would be to the waiver actually being offered as the Blueprint does not provide any additional details related to this topic.

#### **Discussion and Possible Issues**

The waiver would preserve the current process by which SEAs reserve funds for school improvement and the requirement that 95% of the funds reserved must be provided to the local level. The waiver would change, however, the focus of the schools served with these school improvement funds. Current law requires funds to be used in schools that have been identified for improvement, corrective action, or restructuring. Other waivers included in the ESEA flexibility package would eliminate these designations.

The waiver related to school improvement funds reserved by SEAs would require funds to be targeted on priority and focus schools. Based on ED's definitions of these types of schools, school improvement funds would continue to be used in schools that meet the current law priority that funds be provided to LEAs that serve the lowest performing schools. It is possible, however, that the specific schools that benefit from these funds may be somewhat different than those benefitting under current law due to the new focus on priority and focus schools.

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<sup>64</sup> U.S. Department of Education, *Justifications of Appropriation Estimates to the Congress: Fiscal Year 2007*, February 2006, pp. A-27 – A-29.

<sup>65</sup> With the approval of the LEA, the SEA may provide for these activities directly or arrange for the provision of services through other entities.

## 5. Flexibility for Reward Schools

Under ESEA Section 1117, each state participating in ESEA Title I-A is required to establish an Academic Achievement Awards Program for purposes of making academic achievement awards to schools that have either significantly closed academic achievement gaps between student subgroups or exceeded their AYP requirements for two or more consecutive years. States may also give awards to LEAs that have exceeded their AYP requirements for two or more consecutive years.

Under the ESEA flexibility package, an SEA would be permitted to use funds reserved under ESEA Section 1117(c)(2)(A) to provide financial rewards to any reward school, if the SEA determines such schools are most appropriate to receive financial reward, regardless of whether the school meets the aforementioned criteria. For the purposes of the ESEA flexibility package, the Administration has defined a “reward school” as a Title I school that is either a “highest-performing school” or a “high-progress school.” These terms are defined as follows:<sup>66</sup>

- A **highest-performing school** is defined as “a Title I school among the Title I schools in the State that have the highest absolute performance over a number of years for the ‘all students’ group and for all subgroups, on the statewide assessments that are part of the SEA’s differentiated recognition, accountability, and support system, combined, and, at the high school level, is also among the Title I schools with the highest graduation rates. A highest-performing school must be making AYP for the ‘all students’ group and all of its subgroups. A school may not be classified as a ‘highest-performing school’ if there are significant achievement gaps across subgroups that are not closing in the school.”
- A **high-progress school** is defined as a “Title I school among the ten percent of Title I schools in the State that are making the most progress in improving the performance of the ‘all students’ group over a number of years on the statewide assessments that are part of the SEA’s differentiated recognition, accountability, and support system, and, at the high school level, is also among the Title I schools in the State that are making the most progress in increasing graduation rates. A school may not be classified as a ‘high-progress school’ if there are significant achievement gaps across the subgroups that are not closing in the school.”

The Administration’s Blueprint also would increase the focus on rewarding schools, LEAs, and states that reached their performance targets, “significantly” increased student performance for all students, closed achievement gaps, and turned around the lowest-performing schools. Under the Blueprint, states would receive funds to design innovative programs to reward schools and LEAs, including providing financial rewards and flexibility in the use of ESEA funds. Competitive preference in federal grant competitions could have been provided to specific schools, LEAs, and states identified for rewards. In addition, LEAs identified as reward LEAs would be provided with flexibility in implementing interventions in their lowest-performing schools.

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<sup>66</sup> ED, *ESEA Flexibility*, p. 8.



## **Discussion and Possible Issues**

The provision of rewards to the highest-performing schools and high-progress schools would be at a state's discretion. As previously discussed, under Section 1117(c)(2)(A), states may reserve up to 5% of any Title I-A funding that is in excess of the state's prior year allocation. The increase in appropriations for Title I-A from FY2011 to FY2012 was \$73.5 million. Of this increase, 5% of the funds would be about \$3.7 million. While not all LEAs that receive Title I-A funds will receive increased funding in FY2012, those that do, may not receive substantial increases. Thus, there may not be much funding to provide financial rewards to schools identified as reward schools.

It should be noted that in its FY2012 budget request, the Administration requested \$300 million to support "reward schools." FY2012 appropriations as enacted did not include funding for this purpose.

## **6. Flexibility to Use School Improvement Grant Funds to Support Priority Schools**

Prior to discussing the waiver being offered with respect to SIG, this discussion begins with an overview of how funds are currently being awarded and used under the program based on current law and regulations. This is followed by an explanation of the waiver and related issues.

### **Current Law**

Title I-A authorizes the appropriation of such sums as may be necessary for grants to states under Section 1003(g) for School Improvement Grants. States are eligible to apply for these formula grants, and must use at least 95% of the funds received to make subgrants to LEAs. Subgrants made to LEAs must be between \$50,000 and \$500,000 for each school identified for improvement, corrective action, or restructuring that will be served through the grant, and must be renewable for up to two additional years if schools meet the goals of their school improvement plans. Subgrants must be used by LEAs to support school improvement. In the awarding of subgrants, priority must be given to LEAs with the lowest-achieving schools and the greatest commitment to ensuring that such funds are used to provide "adequate resources" to enable the lowest-achieving schools to meet the goals under school and LEA improvement plans.

Through appropriations acts and regulations, the requirements of the program have been modified.<sup>67</sup> For example, through regulations, ED has defined the lowest-performing schools using two tiers. A Tier I school is a Title I-A school that has been identified for improvement, corrective action, or restructuring and is among the lowest achieving 5% of all such schools or has a high school graduation rate that is less than 60%. A Tier II school is any secondary school that is eligible for, but does not receive, Title I-A funding and has been identified for improvement, corrective action, or restructuring and is among the lowest achieving 5% of all such schools or has a high school graduation rate that is less than 60%. LEAs using funds for a Tier I or Tier II school must select from four school intervention models prescribed by ED for each school.

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<sup>67</sup> For more information about the SIG program, see CRS Report RL33960, *The Elementary and Secondary Education Act, as Amended by the No Child Left Behind Act: A Primer*, by Rebecca R. Skinner.

A brief description of the key components of the four school improvement models that Tier I and Tier II schools must implement is provided below.<sup>68</sup>

- **Turnaround model:** This model requires the LEA to replace the school principal and provide the new principal with greater flexibility (including in the areas of staffing and budget); screen all staff and rehire no more than 50% of existing staff; provide “ongoing, high-quality, job-embedded professional development”; adopt a new governance structure (e.g., hiring a “turnaround leader”); implement a research-based instructional program; continuously use data to differentiate instruction to meet the needs of individual students; increase learning time; and provide social-emotional and community-oriented student services and supports.
- **Restart model:** This model requires the LEA to convert a school or close and reopen a school under a charter school operator, a charter management organization (CMO), or an education management organization.<sup>69</sup> The operator or organization assuming control of the school must have been selected through a “rigorous review process.”
- **School closure model:** This model requires an LEA to close a school and enroll the students who attended it in other schools in the LEA that have higher achievement. This could include enrollment in charter schools.
- **Transformation model:**<sup>70</sup> This model requires an LEA to implement several strategies. For example, the LEA must implement strategies to increase teacher and school leader effectiveness, including replacing the principal and using teacher and school leader evaluation systems that take student growth into account as a significant factor. It must also implement a research-based instructional program and continuously use data to differentiate instruction to meet the needs of individual students. The LEA must also increase learning time and create community-oriented schools.

## Waiver

Under the ESEA flexibility package, an SEA would be able to award SIG funds (§1003(g)) to an LEA to implement one of the four current SIG models in any priority school even if the school had not been identified for improvement under ESEA Section 1116. As previously discussed, many of the current requirements related to the SIG program were established by ED through regulations and through appropriations acts. This waiver would continue to require the implementation of the four school improvement models specified in regulations. The change made by the waiver focuses on which schools would be eligible for SIG funding. Under the Administration’s Blueprint for ESEA reauthorization, SIG grants and the associated models also would have been retained.

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<sup>68</sup> For more information about these models or SIG program requirements, see <http://www2.ed.gov/programs/sif/index.html>.

<sup>69</sup> A CMO is defined as a “non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools.” An EMO is defined as a “for-profit or non-profit organization that provides ‘whole-school operation’ services to an LEA.”

<sup>70</sup> If an LEA has nine or more Tier I and Tier II schools, the LEA is prohibited from implementing the transformation model in more than 50% of those schools.

## **Discussion and Possible Issues**

As previously discussed, under current law and regulations, there are three tiers of schools that may be eligible to receive SIG funding. ED anticipates that most of the schools on an SEA's persistently lowest-achieving (PLA) schools list currently used to determine school eligibility for SIG grants will also be among the lowest 5% of all Title I schools in the state. It is possible, however, that a school identified as a priority school may not be identified as a PLA school, so implementation of the waiver could alter which schools receive SIG grants.<sup>71</sup>

Priority schools that receive SIG funds are required to implement one of the aforementioned school improvement models. Priority schools that do not receive SIG funds are not required to implement one of these four models, but must adhere to the turnaround principles included in the Administration's ESEA flexibility package. While these turnaround principles<sup>72</sup> share similarities with the four school improvement models used under SIG, there are differences. For example, under the turnaround principles, the performance of the current principal must be reviewed. Based on this review, the principal must be changed if it is found that it is necessary to do so to "ensure strong and effective leadership" or it must be demonstrated to the SEA that the principal has the track record and ability to lead the turnaround. This is different than both the transformation and turnaround models used under the SIG program which both require the replacement of the principal. Thus, a priority school that participates in SIG may have access to more resources, but the models that the school has to implement may provide less flexibility than if the priority school did not receive SIG funding.

## **ESEA Flexibility Package: Waivers Related to Teachers**

Under the provisions enacted in NCLB, SEAs receiving ESEA funds were required to develop and implement a plan for ensuring that all teachers in core academic subjects<sup>73</sup> are highly qualified. The ESEA flexibility package includes only one waiver related to teachers. In practice, as discussed below, this waiver would have little effect on how SEAs and LEAs are currently implementing provisions related to highly qualified teachers (HQT). However, one of the four principles with which states must comply in order to receive the ESEA flexibility package would require substantial changes to be made with respect to teacher-related accountability requirements, placing additional emphasis on evaluating teacher performance, based in part on student performance, and less emphasis on qualifications (see subsequent discussion on conditions).

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<sup>71</sup> ED, *Flexibility FAQs*, Item C-27.

<sup>72</sup> See ED, *ESEA Flexibility*, p. 9, for a definition of these principles.

<sup>73</sup> Core academic subjects include English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

## **Current Law**

Under current law, each SEA that accepts Title I-A funds must ensure that all public school teachers teaching in core academic subjects are highly qualified.<sup>74</sup> In order to be considered highly qualified, a teacher must have full state certification, a baccalaureate degree, and demonstrated subject matter expertise.<sup>75</sup> All SEAs were required to develop a plan to ensure that all teachers teaching in core academic subjects were highly qualified no later than the 2005-2006 school year. The plan had to establish annual measurable objectives for each LEA that included an annual increase in the percentage of HQTs at each LEA and school to ensure that the overall goal would be met, an annual increase in the percentage of teachers receiving high-quality professional development, and other measures as determined by the SEA.

If after the second year of implementation of such plan, the SEA determined that an LEA had failed to make progress in meeting its annual measurable objectives for two consecutive years, it had to require the LEA to develop an improvement plan. The SEA was required to provide technical assistance to the LEA as it developed its plan. After the third year of implementation of the HQT plan, if an SEA determined that an LEA had failed to make progress toward its annual measurable objectives and had failed to make AYP for three consecutive years, the SEA was required to enter into an agreement with the LEA on the use of the LEA's funds under Title II-A. As part of the agreement, the SEA was required to work with the LEA to develop strategies and activities to enable the LEA to meet its HQT annual measurable objectives and require the LEA to implement such strategies and activities and generally prohibit the LEA from using Title I-A funds to fund any paraprofessional hired after the date such determination is made.<sup>76</sup>

## **Waiver**

Under the ESEA flexibility package, an LEA that failed to meet its targets for HQTs under Title I-A would no longer be required to develop an improvement plan under Section 2141 and would retain flexibility in how it uses its Title I and Title II funds. Commensurately, an SEA would be exempt from the requirements regarding its role in the implementation of these improvement plans, including the requirements that it enter into agreements with LEAs regarding the use of funds and that it provide technical assistance to LEAs on their plans. According to ED, this flexibility “would allow SEAs and LEAs to focus on developing and implementing more meaningful evaluation and support systems.”

While failure to meet HQT targets would no longer result in the need for LEAs to write improvement plans, the description of the waiver clearly states that SEAs would continue to be held responsible for the equitable distribution of such teachers. That is, SEAs would continue to be required to ensure that poor and minority children are not taught at higher rates than other

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<sup>74</sup> For more information about highly qualified teacher requirements, see CRS Report R41267, *Elementary and Secondary School Teachers: Policy Context, Federal Programs, and ESEA Reauthorization Issues*, by Jeffrey J. Kuenzi.

<sup>75</sup> The way in which a teacher demonstrates subject matter expertise depends on what level the teacher teaches (i.e., elementary or secondary) and whether the teacher is a new or veteran teacher.

<sup>76</sup> Exceptions are permitted to the paraprofessional rule. For example, the LEA may use Title I-A funds to hire a paraprofessional after the date such determination is made if the LEA can demonstrate that the hiring is to fill a vacancy created by the departure of another paraprofessional funded under Title I and the new paraprofessional meets specific requirements.

children by inexperienced, unqualified, or out-of-field teachers.<sup>77</sup> However, ED indicated that once an SEA develops the performance evaluation and support systems required to align with ED's principles for reform and improvement (see below), the results of the new systems may be used to meet this requirement.<sup>78</sup>

Under the Administration's Blueprint, the HQT requirements would have been eliminated. In addition, under the Race to the Top program, the Administration changed the focus from highly qualified teachers to highly effective teachers. States applying for RTTT funds that indicated in their applications that they planned to implement, or were already implementing, teacher and school leader evaluation systems that evaluated performance, in part, based on student performance were awarded additional points in the grant competition.<sup>79</sup>

## **Discussion and Possible Issues**

Prior to the present offer of flexibility under the ESEA flexibility package, ED's latest statement on HQT policy announced that all but one state had its revised HQT plan approved and reiterated that no penalties would be imposed on states making a good-faith effort to reach the 100% HQT goal.<sup>80</sup> Thus, eliminating the HQT improvement plans may not actually provide a new level of flexibility for states, as states do not appear to have problems meeting the HQT requirements. Rather, the provision of this waiver appears to be more closely tied to the Administration's interest in having states move away from the HQT requirements toward teacher evaluation systems that meet various requirements established by ED (see subsequent discussion of supporting effective instruction and leadership).

## **ESEA Flexibility Package: Waivers Related to Funding Flexibility**

The ESEA flexibility package includes three waivers related to funding flexibility. Each of the waivers is discussed below.

### **1. Flexibility for Rural LEAs**

LEAs that receive a grant under either the Small, Rural School Achievement Program (Title VI-B-1) or the Rural and Low-Income School Program (Title VI-B-2) would be provided with flexibility under Section 6213(b) and 6224(e) to use the funds for any authorized purpose under the program regardless of the LEA's AYP status.<sup>81</sup> Under current law, if an LEA that receives funds under the aforementioned programs fails to make AYP after its third year of participation,

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<sup>77</sup> ESEA, Section 1111(b)(8)(C).

<sup>78</sup> ED, *ESEA Flexibility*, p. 5.

<sup>79</sup> For more information, see the technical review score sheet used to evaluate the first round of RTTT grants, at <http://www2.ed.gov/programs/racetothetop/tier1-technical-review.pdf>.

<sup>80</sup> The Secretary's letter to chief state school officers on July 23, 2007, is available at <http://www2.ed.gov/policy/elsec/guid/secletter/070723.html>.

<sup>81</sup> For more information about the rural education programs, see CRS Report R40853, *The Rural Education Achievement Program: Title VI-B of the Elementary and Secondary Education Act*, by Jeffrey J. Kuenzi.

the LEA is required to use its program funds only to carry out the requirements of ESEA Section 1116 (i.e., improvement, corrective action, and restructuring).

## **Discussion**

As other waivers included in the ESEA flexibility package would eliminate the need to determine an LEA's AYP status, this waiver eliminates a requirement that restricts an LEA's use of funds based on that status. The elimination of this provision will provide rural LEAs that have failed to make AYP with more flexibility in their use of funds than is available under current law.

## **2. Flexibility for Schoolwide Programs**

One of the waivers included in the package would waive eligibility requirements to operate a schoolwide program under Title I-A to support the implementation of new accountability measures. Prior to discussing the waiver, a brief overview of current law is presented to provide context for the changes made by the waiver.

Under current law, schools participating in the ESEA Title I-A program at which 40% or more of the students are from low-income families are eligible to conduct schoolwide programs with a broad and substantial degree of flexibility in the use of funds under almost all federal education programs. In addition, federal funds may be combined with state and local funds without the need for separate accounting. In a schoolwide program, federal aid provided under Title I-A plus many other federal K-12 education programs may be used to improve services to all students, rather than limiting services to particular students deemed to be the most disadvantaged. If they meet the intent and purposes of Title I-A and the other federal programs, and address the needs of the programs' intended beneficiaries, schoolwide programs are exempted from a variety of regulations under Title I-A and most other programs. Prior to the release of the current ESEA flexibility package, the Secretary had already used available waiver authority to waive the 40% poverty threshold to operate a schoolwide program (see **Table 1**).

Under the ESEA flexibility package, an LEA would be permitted to operate a schoolwide program in a Title I-A school that does not meet the 40% poverty threshold required under current law, if two conditions are met.

1. The SEA has identified the school as a priority or focus school.
2. The LEA is implementing interventions that are consistent with the turnaround principles defined in the ESEA flexibility package materials<sup>82</sup> or interventions that are based on the needs of the students in the school and are designed to enhance the entire educational program in the school.

The Administration's Blueprint for ESEA reauthorization did not specifically address this issue.

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<sup>82</sup> The turnaround principles focus on seven areas: (1) school leadership; (2) effective teachers; (3) redesign of the school day, week, or year to provide additional time for student learning and teacher collaboration; (4) strengthening the school's instructional program; (5) use of data to inform instruction and continuous improvement; (6) school environment; and (7) family and community engagement.

## **Discussion and Possible Issues**

The rationale for providing schoolwide program authority to relatively high poverty schools is that (a) in such schools, all students are disadvantaged, so most students are in need of special assistance, and it seems less equitable to select only the lowest-achieving individual students to receive Title I-A services, and (b) the level of Title I-A grants should be sufficient to meaningfully affect overall school services in high poverty schools, since these funds are allocated on the basis of the (relatively large) number of low-income students in these schools. The waiver would allow schools with lower levels of poverty to operate a schoolwide program. However, an LEA could only take advantage of this waiver if it was implementing interventions consistent with the ED-defined turnaround principles or interventions that would enhance the entire educational program in the school. In both cases, the focus would be on implementing changes that benefit the whole school, which is more closely aligned with the goals of schoolwide programs rather than those of targeted assistance programs. In addition, as previously mentioned, the Secretary has acted in the past to waive the requirement that schools operating schoolwide program have a poverty rate of 40%.

## **3. Flexibility to Transfer Certain Funds**

Under the waiver, an SEA and its LEAs would have the flexibility to transfer up to 100% of the funds received under selected ESEA programs among those programs and into Title I-A.<sup>83</sup> In order to minimize reporting burdens, the SEA would no longer have to notify ED prior to transferring funds, and LEAs would no longer have to notify their SEA prior to transferring funds. This is substantially different from the requirements under current law.

Title VI, Part A, Subpart 2 of the ESEA allows most LEAs to transfer up to 50% of their formula grants among two currently funded ESEA programs: Teacher and Principal Training and Recruiting Fund (Title II-A) and Enhancing Education through Technology Grants (Ed-Tech; Title II-D-1).<sup>84</sup> The funds may also be transferred into, but not from, ESEA Title I-A. LEAs which have been identified as failing to meet AYP are able to transfer only 30% of their grants under these programs, and only to activities intended to address the failure to meet AYP standards. Further, according to guidance from ED, LEAs subject to corrective actions under Title I-A may not exercise this authority at all. While LEAs do not need permission from their SEA to exercise their transferability authority, they are required to inform their SEA that they are using this authority, and the LEA's plan must be modified to reflect the transfer of funds. All program requirements of the programs into which funds are transferred apply to the transferred funds.

Under current law, states may transfer up to 50% of the relatively limited amount of program funds over which they have authority, except for administrative funds, among the aforementioned programs plus the 21<sup>st</sup> Century Community Learning Centers program. Thus, states could not transfer either any of the funds they are required to suballocate to LEAs or funds reserved for state administration, so the significance of this transferability authority for states is limited. While

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<sup>83</sup> This only applies to non-administrative funds for SEAs. ESEA Section 9201 allows an SEA to consolidate its administrative funds under certain programs.

<sup>84</sup> While the Ed-Tech program did not receive funding for FY2011 or FY2012, in its *Flexibility FAQs*, ED indicates that the program is currently operating (Item B-19). It should be noted that if they were funded, transferability authority would also apply to the Safe and Drug Free Schools and Communities program (Title IV-A-1), and the Innovative Programs block grant program (Title V-A).

an SEA does not need permission from ED to exercise its transferability authority, it is required to inform ED that it is using this authority, and the SEA's state plan must be modified to reflect the transfer of funds. All program requirements of the programs into which funds are transferred apply to the transferred funds.

While not as specific as the individual waiver included in the current ESEA flexibility package, under the Blueprint, ED would provide states and LEAs with additional flexibility in how they spend "federal dollars" to improve student outcomes. States and LEAs would be given the flexibility to use most federal administrative funds and reservations to build their capacity to support "reform and improvement." Most LEAs would also be provided with flexibility in how they spent more of their ESEA program funds, as long as they complied with the requirements associated with the funds and were improving student outcomes. These provisions bear some similarity to the aforementioned waiver.

### **Discussion and Possible Issues**

The waiver substantially increases an LEA's and an SEA's ability to transfer funds among a limited number of programs. Under current law, only 50% of funds received for specific purposes may be transferred. The waiver would allow all funds received for specific purposes to be transferred. As most of the programs to which transferability applies that are referenced in current law are no longer funded, this new flexibility may be more limited than it would have been if it had been provided several years ago. However, as previously mentioned, both LEAs and SEAs can transfer funds into Title I-A, which would give them more flexibility in the use of their funds than is available under most ESEA programs. It should be noted that while the waiver also provides more flexibility to SEAs with respect to the use of their funds, SEAs tend to have a relatively limited amount of program funds over which they have authority, as they are often directed by law to provide most of the funds they receive to local grantees.

Other waivers included in the ESEA flexibility package would eliminate the need to designate an LEA as being in need of improvement or corrective action and the need to take the required actions associated with these designations. This waiver, in part, modifies existing requirements that place restrictions on LEAs based on their status of being in need or improvement or in corrective action.

## **Optional Waiver for the 21<sup>st</sup> CCLC Program<sup>85</sup>**

In addition to the package of 10 waivers that ED is offering to states, ED is offering one optional waiver that would provide flexibility in the use of 21<sup>st</sup> CCLC funds to support expanded learning time programs. The 21<sup>st</sup> CCLC program, authorized by Title IV-B of the ESEA, supports activities provided during nonschool hours that offer learning opportunities for school-aged children. Formula grants are made to states, which subsequently make grants to local entities (e.g., LEAs, community-based organizations) on a competitive basis for a period of three to five years. Eligible entities are to serve primarily students who attend schools eligible for schoolwide programs under Title I-A and the families of these students. Eligible entities may use funds for before- and after-school activities that advance student academic achievement. The program's

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<sup>85</sup> This section was prepared by Gail McCallion. Please contact her at 7-7758 for more information.



focus, however, is currently on providing after-school activities for children and youth, and literacy-related activities for their families.

Currently, expanded learning time programs that operate during the school day are not an authorized activity under the 21<sup>st</sup> CCLC. The definition of a “Community Learning Center” contained in the law specifies that funded activities are to occur: “during non-school hours or periods when school is not in session (such as before and after school or during summer recess).”<sup>86</sup>

## **Waiver**

Under the optional waiver, an SEA can allow community learning centers receiving funds under the program to use those funds to support expanded learning time during the school day in addition to activities during non-school hours or periods when school is not in session. This is similar to what the Administration proposed in its Blueprint for ESEA reauthorization, as well as in its FY2011 and FY2012 budget requests.

## **Discussion and Possible Issues**

Expanded learning time programs are typically expensive to implement, although estimates of costs vary considerably.<sup>87</sup> If a large number of new 21<sup>st</sup> CCLC grantees opt to fund expanded learning time programs, absent an increase in program funding,<sup>88</sup> the result would be a reduction in funds available for the out of school time activities originally authorized by the ESEA.

## **Four Principles that Must Be Met to Receive the ESEA Flexibility Package**

In order to receive the ESEA flexibility package, SEAs would have to meet the Administration’s four “principles for improving student academic achievement and increasing the quality of instruction.” The four principles, as stated by ED, are as follows:

1. college- and career-ready expectations for all students;
2. state-developed differentiated recognition, accountability, and support;
3. supporting effective instruction and leadership; and
4. reducing duplication and unnecessary burden.

Similar to the discussion of the waivers, each of the principles is examined below, including an overview of the condition, relevant requirements in current law, and connections between the principle and the Administration’s Blueprint for ESEA reauthorization or the Race to the Top program.

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<sup>86</sup> ESEA, Section 4201(b)(1).

<sup>87</sup> For more information, see CRS Report R40568, *Analysis of Issues Concerning Extended Learning Time*, by Rebecca R. Skinner.

<sup>88</sup> Program funding from FY2011 to FY2012 decreased from \$1.154 billion to \$1.152 billion.

## **1. College- and Career-Ready Expectations for All Students**

To receive the ESEA flexibility package, an SEA must do the following:

- demonstrate that it has college- and career-ready expectations for all students by adopting college- and career-ready standards in reading/language arts and mathematics, at a minimum;
- implement such standards for all students and schools;
- develop and administer “annual, statewide, aligned, high-quality assessments” and corresponding academic achievement standards, that measure student growth in grades 3-8 and once in high school;
- commit to adopting English language proficiency (ELP) standards that “correspond” to its college- and career-ready standards and that address the academic language skills needed to meet the new college- and career-ready standards;
- commit to developing and administering ELP assessments aligned with the ELP standards; and
- report annually to the public on college-going and college credit-accumulation rates for all students and student subgroups in each LEA and each high school.<sup>89</sup>

While the Administration’s Blueprint for ESEA reauthorization would also allow states to develop new accountability systems that include additional assessments, it should be noted that under current law, states are already permitted to include other assessments and science assessments in their accountability systems. The more assessments included under current law, however, the more ways a school or LEA could be found to be failing to make AYP. With respect to measuring student performance, the Blueprint emphasizes that performance would not be judged only on absolute performance and proficiency at a single point in time as is done under current law, and that individual student growth and school progress over time would be taken into account in evaluating performance. This is similar to what the Administration is including in its ESEA flexibility package. The Blueprint, like the ESEA flexibility package, would also require states to develop and adopt statewide English language proficiency standards that are aligned with the new college- and career-readiness standards states would be required to develop so that they “reflect the academic language necessary to master the state’s content standards.”<sup>90</sup>

### **College- and Career-Ready Standards: Discussion and Possible Issues**

Under the provisions of NCLB, states have had the flexibility to select their own content and performance standards which has led to the development of different accountability systems in each state. Concerns about the diversity of accountability systems across the nation have spurred a grassroots movement led by the National Governors Association (NGA) and the Council of

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<sup>89</sup> ED states that the provision of this information would ensure that college- and career-ready standards are aligned with postsecondary expectations and would provide families with information about the “college-readiness rates” of local schools. (ED, *ESEA Flexibility*, p. 3).

<sup>90</sup> For a discussion of the meaning of “academic language,” see footnote 7 in the *Framework for High-Quality English Language Proficiency Standards and Assessments: Brief*, available at [http://www.aacompcenter.org/pdf/ELPFramework\\_Brief\\_Jan2009\\_AACC.pdf](http://www.aacompcenter.org/pdf/ELPFramework_Brief_Jan2009_AACC.pdf).

Chief State School Officers (CCSSO) to develop common standards for reading/language arts and mathematics in grades K-12 (referred to as the common core standards) and upon which common assessments could be created to test student knowledge of the standards. Adoption and implementation of the standards and assessments is optional. Currently, 44 states and the District of Columbia have adopted the standards.<sup>91</sup> It remains to be seen how many of these states will ultimately implement the standards and implement the standards as they were developed. In addition, 44 states and the District of Columbia have joined at least one of two groups currently working on developing common assessments for use by the 2014-2015 school year.<sup>92</sup> A decision to participate in the development process, however, does not necessarily translate into eventual adoption and use of the assessments.

The movement toward common standards and common assessments is not a federally led effort, per se. However, the movement clearly has the support of the Obama Administration. In its Blueprint for the reauthorization of the ESEA, the Administration proposes requiring states to adopt and implement common standards, presumably the aforementioned standards, or to have their standards vetted by a local university system. In addition, the Administration provided additional points to states competing for Race to the Top (RTTT) grants authorized by the ARRA if they adopted the common standards by a certain date. This incentive may have resulted in more states agreeing to adopt the standards than would have otherwise occurred. The requirement to adopt and implement standards that are common to a significant number of states (or alternatively adopting standards vetted by a state network of IHEs) in order to receive the ESEA flexibility package may help ensure that states that agreed to adopt the standards but did not win a RTTT grant will continue to move forward with implementation.

With respect to the adoption of college- and career-ready standards, states have to select from two options when completing the ESEA flexibility package application. A state can either adopt reading/language arts and mathematics standards that are common to a “significant number” of states (presumably the Common Core State Standards) or the state may adopt college- and career-ready standards in reading/language arts and mathematics that have been approved and certified by a state network of IHEs. The state is required to transition to and implement its new standards no later than the 2013-2014 school year. This is similar to what the Administration proposed in its Blueprint for ESEA reauthorization.

For the purposes of the ESEA flexibility package, “college- and career-ready standards” are defined as follows:

content standards for kindergarten through 12<sup>th</sup> grade that build towards college and career readiness by the time of high school graduation. A State’s college- and career-ready standards must be either (1) standards that are common to a significant number of States; or (2) standards that are approved by a State network of institutions of higher education,<sup>93</sup>

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<sup>91</sup> The following states have not adopted the common standards: Alaska, Maine, Montana, Nebraska, North Dakota, Texas, and Virginia. Minnesota only adopted the common standards for reading/language arts. For more information, see <http://www.corestandards.org/in-the-states>.

<sup>92</sup> The following states did not join one of the two groups working on common assessments: Alaska, Minnesota, Nebraska, Texas, Virginia, and Wyoming. For more information, see U.S. Department of Education, “U.S. Secretary of Education Duncan Announces Winners of Competition to Improve Student Assessments,” press release, September 2, 2010, at <http://www.ed.gov/news/press-releases/us-secretary-education-duncan-announces-winners-competition-improve-student-asse>.

<sup>93</sup> A state network of institutions of higher education (IHEs) means a system of four-year public IHEs that collectively enroll at least 50% of the students in the state who attend the state’s four-year public IHEs.

which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

It should be noted that common to a “significant number” of states is not defined; however, this appears to be a reference to the common core standards which have already been adopted by 44 states and the District of Columbia. In addition, it appears that college ready means that a student would not require remedial coursework at the postsecondary level. There does not appear to be a comparable definition of “career ready.” This term was not defined in the Administration’s Blueprint for ESEA reauthorization either.

Despite these grassroots efforts and actions by the Obama Administration to support the efforts, the end result will not yield a single set of national standards in reading/language arts and mathematics nor a single set of assessments in these subject areas. For example, states that adopt the common core standards are permitted to add additional standards of their own choosing to the common core standards.<sup>94</sup> Thus, each state adopting and implementing the common core standards could continue to have a unique set of state standards that share common elements with other adopting states. As a result of the RTTT common assessment competition, there will be at least two different assessments linked to the common core standards. It is unclear how the common assessments would accommodate any additional standards that states choose to add to the common core standards. Presumably, if states added additional standards to the common core standards, they would also want to determine how well students are mastering those standards. In addition, it is possible that multiple states could choose to use the same assessments to measure student performance but select different levels of performance on the assessments as indicating proficiency (e.g., one state could say that students must get 75% of the questions correct on the common assessment to be considered proficient, while another state could set the bar at 50%).

It is important to note that neither the common core standards movement nor the assessments movement is proposing a common curriculum. Decisions regarding how standards are taught to students and how students are prepared for assessments would remain a state and local decision. However, if enough states that adopted the common core standards actually implement the standards, it is possible that states could work together to develop, or textbook publishers and other organizations that develop materials for classroom use may develop, materials that are clearly aligned with the common core standards; thus, these entities could possibly contribute to a de facto national curriculum.

### **High-Quality Assessments: Discussion and Possible Issues<sup>95</sup>**

To receive a waiver, an SEA must develop and administer, “annual, statewide, aligned, high-quality assessments, and corresponding academic achievement standards, that measure student growth in at least grades 3-8 and once in high school.”<sup>96</sup> Among other requirements, “high-quality assessments” must meet the following requirements:

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<sup>94</sup> States adopting the common core standards are required to adopt all of the standards but may add an additional 15% of their own materials to the standards. For more information, see PowerPoint presentation dated March 2010, at <http://www.corestandards.org/about-the-standards>.

<sup>95</sup> This section was prepared by Erin Lomax. Please contact her at 7-9447 for more information. For general information about student assessment, see CRS Report R40514, *Assessment in Elementary and Secondary Education: A Primer*, by Erin D. Lomax.

<sup>96</sup> See *ESEA Flexibility*, pg. 3; <http://www.ed.gov/esea/flexibility>.

- produce student achievement data and student growth data that can be used to determine whether individual students are college and career ready or on track to being college and career ready;
- assess all students, including English Learners and students with disabilities;
- provide for alternate assessments based on grade-level academic achievement standards or alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities, consistent with 34 C.F.R. §200.6(a)(2); and
- produce data that can be used to inform determinations of school effectiveness for the purposes of accountability; determinations of individual and principal teacher effectiveness for purposes of evaluation; determinations of principal and teacher professional development and support needs; and teaching, learning, and program improvement.<sup>97</sup>

The ESEA flexibility request lists three options for SEAs to demonstrate compliance with the “high-quality assessments” requirements: (1) the SEA is participating in a state consortium funded by RTTT;<sup>98</sup> (2) the SEA is not participating in a state consortium funded by RTTT but plans to develop and administer “high-quality assessments” by school year 2014-2015; and (3) the SEA has developed and begun administering “high-quality assessments” independent of the state consortia funded by RTTT.<sup>99</sup>

The requirements listed in the definition of “high-quality assessments” may be difficult for SEAs to fully satisfy. First, assessments are required to measure whether students are college and career ready or on track to being college and career ready. As discussed in the previous section, it appears that “college ready” means that a student would not require remedial coursework at the postsecondary level; however, there does not appear to be a comparable definition of “career ready.” It may be difficult for an SEA to demonstrate that its assessment measures whether a student is “career ready” when neither ED nor the common core standards initiative has developed a definition of this term.

Second, “high quality assessments” are required to assess all students, including English Learners and students with disabilities. The “students with disabilities” group includes students identified with the most significant cognitive disabilities that are eligible to participate in alternate assessments based on alternate achievement standards under current law.<sup>100</sup> Currently, the common core standards initiative has not developed alternate achievement standards for students with the most significant cognitive disabilities, and it is unclear whether common alternate achievement standards will be developed under this initiative. SEAs may still be able to use the alternate achievement standards that have been developed under current law; however, these standards would not be common across states. Another issue is that the common assessments funded by RTTT are not developing alternate assessments. ED has supported the development of alternate assessments for students with the most significant cognitive disabilities through a

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<sup>97</sup> To see the complete list of requirements for a “high-quality assessment,” see *ESEA Flexibility*, pg. 10; <http://www.ed.gov/esea/flexibility>.

<sup>98</sup> For more information, see <http://www2.ed.gov/programs/racetothetop-assessment/index.html>.

<sup>99</sup> See *ESEA Waiver Request*, pg. 10; <http://www.ed.gov/esea/flexibility>.

<sup>100</sup> For more information on alternate assessments, see CRS Report R40701, *Alternate Assessments for Students with Disabilities*, by Erin D. Lomax.

separate competitive grant program.<sup>101</sup> As part of this grant program, applicants were required to develop alternate achievement standards for students with the most significant cognitive disabilities; however, it remains unclear whether these standards are required to be common across states.

Third, the results of “high-quality assessments” are required to be used in multiple ways, several of which are relatively new uses of standardized assessment scores at the federal level. For example, SEAs are required to use student achievement data to make determinations of principal and teacher effectiveness for the purposes of evaluation. There may be a number of logistical and measurement issues that make this use of student achievement data difficult, including the timing of assessments and the potential for score inflation.<sup>102</sup> In addition, there are questions about how to create a comprehensive system that measures teacher effectiveness when the waiver request does not require SEAs to assess all subjects and all grade levels.

Finally, the requirements listed in the definition of “high-quality assessments” may not be met by all of the three options listed in the ESEA flexibility request. For example, SEAs participating in a state consortium funded by RTTT do not necessarily participate in a state consortium to develop and administer alternate assessments for students with the most significant cognitive disabilities. In addition, it is unclear whether SEAs selecting any of the three options in the ESEA flexibility request have developed a definition of “career ready” and can measure whether a student is “career ready” with any high-quality assessment.

## **Student Growth: Discussion and Possible Issues**

SEAs are required to implement high-quality assessments that measure student growth. For the purposes of the ESEA flexibility package, “student growth” is defined as the change in student achievement for an individual student between two or more points in time.<sup>103</sup> “Student achievement” is defined in two different ways, depending on whether achievement is being measured in grades and subjects for which assessments are required by law or not.<sup>104</sup> With respect to the grades and subjects for which assessments are required, student achievement is determined based on a student’s score on such assessments and may also include other measures of student learning (e.g., end-of-course tests, objective performance-based assessments, student learning objectives) provided they are “rigorous and comparable across schools within an LEA.” For grades and subjects for which assessments are not required under current law, student achievement may be measured using alternative measures of student learning and performance (e.g., pre-tests, end-of-course tests, objective performance-based assessments). Student achievement may also be measured using “student learning objectives; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across school with an LEA.”

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<sup>101</sup> See U.S. Department of Education, “Office of Special Education and Rehabilitative Services; Overview Information; Technical Assistance on Data Collection – General Supervision Enhancement Grants: Alternate Academic Achievement Standards; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010,” *75 Federal Register* 32435-32440, June 8, 2010.

<sup>102</sup> For more information on the implications of using student achievement data in the measurement of teacher effectiveness, see CRS Report R41051, *Value-Added Modeling for Teacher Effectiveness*, by Erin D. Lomax and Jeffrey J. Kuenzi.

<sup>103</sup> ED, *ESEA Flexibility*, p. 9.

<sup>104</sup> *Ibid.*

Currently, 15 states have received waivers to use growth models to meet the current accountability requirements include in Title I-A.<sup>105</sup> However, these models were designed based on the requirement that all students achieve proficiency in reading/language arts and mathematics by the end of the 2013-2014 school year. In addition, they were generally not designed to measure student growth based on high-quality assessments aligned with college- and career-ready standards. Thus, states that are currently using growth models as part of their accountability system under Title I-A may have to redesign their models.

ED has stated that it will only approve growth models “that incorporate aggressive growth targets that would result in all students, including students with disabilities and English Learners, meeting the State’s college- and career-ready standards within a specified number of years.”<sup>106</sup> More specifically ED has indicated that it will only approve models that require students to meet college- and career-ready standards within four years or less or by high school graduation, whichever comes first. In addition, ED has stated that it does not anticipate that it will approve growth models that take into account student background characteristics (e.g., socioeconomic status). ED intends to provide more guidance to states on how growth models will be reviewed sometime closer to the 2014-2015 school year, the school year in which SEAs are required to adopt assessments that measure student growth. It is unclear what guidance may be available to SEAs that choose to implement growth models sooner than the 2014-2015 school year.

As previously mentioned, growth models must be used to measure student achievement. Unlike the growth models currently in use, growth models implemented in compliance with the four principles are not limited to only measuring test scores. While test scores must be taken into account for assessments required under current law, alternative measures of student achievement may also be taken into account. Without information about each state’s plans for how growth models will be implemented, it is not possible to know whether the use of additional measures will make it easier or harder for states to demonstrate student growth. It will depend on how rigorous each state decides to make its accountability system.

## **College-Going and College-Credit Accumulation: Discussion and Possible Issues**

Each SEA is required to report annually to the public on college-going and college-credit accumulation rates by the year following the implementation of its college- and career-ready standards but no later than the 2014-2015 school year. States were initially required to begin work on collecting these data under the State Fiscal Stabilization Fund (SFSF) program authorized by ARRA in FY2009.<sup>107</sup> With respect to college-going rates, ED has indicated that the SEA should use its statewide longitudinal data system or other third-party verified data system to collect these

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<sup>105</sup> ED, *Justifications of Appropriations*, p. B-20. The 15 states are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Michigan, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas. The list of the states is available from the Council for Exceptional Children at <http://cecblog.typepad.com/policy/2010/01/report-on-growth-models-highlights-the-difficulties-states-have-including-alternative-assessment-sco.html>.

<sup>106</sup> ED, *Flexibility FAQs*, Item C-13.

<sup>107</sup> Under ARRA Title XIV, Section 14005(d)(3), states were required to establish a longitudinal data system that would include the elements described in Section 6401(e)(2)(D) of the America COMPETES Act (20 U.S.C. 9871). The RTTT grant application process provided points to applicants based on fully implementing a statewide longitudinal data system that included these elements. For more information on these 12 data elements, see <http://edocket.access.gpo.gov/2009/pdf/E9-27426.pdf>, p. 59806. For more information on the RTTT scoring rubric, see <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>.

data. With respect to college credit-accumulation rates at in-state public IHEs, ED notes that the state may work with its statewide longitudinal data system or with a state network of IHEs. As all states accepted funds under the SFSF, it is expected that they have put in place systems by which the SEA is able to track its students from secondary education into postsecondary education.<sup>108</sup>

## **2. State-Developed Differentiated Recognition, Accountability, and Support**

In order to receive the ESEA flexibility package, SEAs are required to develop and implement a system of “differentiated recognition, accountability, and support” for every LEA in the state and all Title I-A schools. The systems must continue to examine student achievement in reading/language arts and mathematics for all students and all subgroups, graduation rates for all students and all subgroups, and school performance and progress over time, including for all subgroups. The SEA has the discretion to include other subject areas in its new accountability system, as it could have under current law. The SEA is required to adopt high-quality assessments that are aligned with its standards, and upon adoption of these assessments, must begin to measure student growth. The new system must create incentives and provide differentiated interventions and supports to address student achievement, graduation rates, and achievement gaps for all subgroups.

More specifically, the SEA’s system must meet the following six requirements:

1. The SEA’s system must set “new ambitious but achievable” AMOs for at least reading/language arts and mathematics for the state, and all LEAs, schools, and subgroups. The AMOs must reflect “meaningful goals” and must be used to “guide support and improvement efforts.”
2. The SEA’s system must provide incentives and recognition for achieving student success on an annual basis by publicly recognizing Title I schools that have made the most progress or reward schools. If possible, SEAs should reward these schools, as well.
3. In order to “[e]ffect dramatic, systemic change in the lowest-performing schools,” the SEA’s system must publicly identify priority schools.<sup>109</sup> LEAs with one or more priority schools must implement “meaningful” interventions that are aligned with turnaround principles<sup>110</sup> in each of these schools for three years. Each SEA must develop criteria to determine when a school has made “significant progress” in improving student achievement and can exit priority status.

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<sup>108</sup> For information about states’ progress in implementing the SFSF requirements as of March 2011, see each state’s amended application for SFSF, at <http://www2.ed.gov/programs/statestabilization/resources.html>.

<sup>109</sup> Priority schools were defined previously in the section discussing flexibility in the implementation of school improvement requirements.

<sup>110</sup> The turnaround principles are defined in ED, *ESEA Flexibility*, p. 9. The turnaround principles address seven areas: (1) school leadership; (2) staff quality; (3) redesigning the school day, week, or year; (4) school’s instructional program; (5) data use to inform instruction and continuous improvement; (6) school environment; and (7) mechanisms for family and community engagement.



4. Similar to the previous requirement, the SEA's system must also publicly identify Title I schools with the greatest achievement gaps or those in which subgroups are the furthest behind as focus schools.<sup>111</sup> LEAs with one or more of these schools must implement interventions, which may include public school choice or tutoring, in each school based on a needs assessment of the school and its students. Each SEA must also develop criteria for determining when a school exits focus status.
5. The SEA's system must provide incentives and supports to "ensure continuous improvement" in Title I schools not identified as priority or focus schools, but which are not making progress in improving student achievement or closing achievement gaps.
6. The SEA's system must build capacity at all levels to improve student learning in all schools, particularly in low-performing schools and schools with the largest achievement gaps. The SEA is required to provide "timely and comprehensive monitoring" of, and technical assistance for, LEA implementing interventions in priority and focus schools. It must hold LEAs accountable for improving school and student performance, including turning around priority schools. The SEA and its LEAs "must ensure sufficient support" for the implementation of interventions in priority schools, focus schools, and other Title I schools identified under the system. ED notes that this may include leveraging funds that LEAs were previously required to reserve under ESEA Section 1116(b)(10) for public school choice and tutoring, SIG funds, other federal funds (as permitted), as well as state and local resources.

SEAs would be required to provide a description of their differentiated recognition, accountability, and support system and how this system would be implemented no later than the 2012-2013 school year. Each SEA must specify whether only achievement in reading/language arts and mathematics will be taken into account in its new system and for the purposes of identifying reward, priority, and focus schools, or whether student performance on other assessments will be included as well. If the latter, the SEA must provide data on the performance of the percentage of students in the all students group that scored at the proficient level on the additional assessments during their most recent administration. The SEA must also explain how the assessments will be weighted to ensure that all schools are held accountable for students meeting college- and career-ready standards.

As previously discussed, the ESEA flexibility package application would give states three options for establishing the new AMOs.<sup>112</sup> The state could set AMOs in annual equal increments to meet the goal of reducing by half the percentage of students in the all students group and in each of the subgroups who are not proficient within six years. The second option would be for states to establish AMOs that increase in equal increments and result in 100% of students achieving proficiency no later than the end of the 2019-2020 school year. The third option would allow the state to set its AMOs based on an "educationally sound rationale." The baseline for establishing the AMOs under the first two options would be the proficiency rates based on the 2010-2011 school year assessments. No baseline is prescribed for the third option; however, the SEA would

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<sup>111</sup> Focus schools were defined previously in the section discussing flexibility in the implementation of school improvement requirements.

<sup>112</sup> This was previously discussed in the section on flexibility regarding the 2013-2014 timeline for determining AYP.

have to provide information regarding average statewide proficiency based on reading/language arts and mathematics assessments administered during the 2010-2011 school year.<sup>113</sup>

With respect to reward, priority, and focus schools, each SEA in its application must describe its methodology for identifying these schools and submit a list of the schools in each of the categories.<sup>114</sup> In identifying these schools, the SEA is not required to take grade spans into account. ED, however, is encouraging SEAs to include a mix of schools in each grade span for each type of identified schools.<sup>115</sup>

The SEA must also provide additional information related to the three types of schools. For reward schools, the SEA must specify how it will publicly recognize these schools and, if possible, reward the highest-performing and high-progress schools. For priority schools, the SEA must describe the interventions that LEAs with priority schools will implement and the timeline for implementing these interventions. (Interventions must be implemented no later than the 2014-2015 school year.) For focus schools, the SEA must describe the process and timeline the SEA will use to ensure that LEAs with focus schools will identify the specific needs of these schools, as well as examples of interventions that LEAs will implement in these schools.<sup>116</sup> The SEA must also provide the criteria that will be used to determine whether a school has made “significant” progress to justify its exit from priority or focus status.<sup>117</sup>

Finally, the application requires each SEA to describe how its new system will ensure continuous improvement in other Title I schools not identified as focus or priority schools, but which are not making progress in improving student achievement or closing achievement gaps. The SEA must also discuss its process for building SEA, LEA, and school capacity to improve student learning.

As previously discussed, many of these requirements are similar to proposals included in the Administration’s Blueprint for ESEA reauthorization. For example, states would have been able to replace their current system of AMOs with a new set of goals based on having all students on track to be college- and career-ready by high school graduation by 2020. States would have had to set up a new accountability system that identified the lowest-performing schools and schools with the largest achievement gaps. Outcome accountability requirements would have been prescribed only for the lowest-performing schools, and public school choice and SES would be optional. States would also have had to identify the highest performing schools and provide rewards. There would also have been an emphasis placed on building capacity to improve low-performing schools and those with the largest achievement gaps.

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<sup>113</sup> Based on its analysis of the accountability provisions included in SEA applications for the waivers submitted by the November 2011 deadline, none of the states opted to have 100% of students be proficient by the 2019-2020 school year.

<sup>114</sup> The number of priority schools identified must equal 5% of all Title I schools in the state based on the number of schools that participated in Title I during the 2010-2011 school year. (ED, *Flexibility FAQs*, Item C-26.)

<sup>115</sup> ED, *Flexibility FAQs Addendum*, Item C-23a.

<sup>116</sup> There are no prescribed interventions that focus schools must implement. However, the interventions implemented in these schools must be appropriate for the school’s and the students’ needs. (ED, *Flexibility FAQs*, Item C-45.)

<sup>117</sup> If a priority school has already started to implement interventions but exits priority status, it must continue implementing the interventions for three years to “ensure full and effective implementation.” (ED, *Flexibility FAQs*, Item C-44.)

## **Discussion and Possible Issues**

Under current law, LEAs and schools simply do or do not meet AYP standards. There is generally no distinction between those that fail to meet only one or two required performance or participation thresholds to a marginal degree versus those that fail to meet numerous thresholds to a substantial extent. The ESEA flexibility package eliminates the use of AYP as the sole determinant of whether a school or LEA is determined to be in need of improvement, corrective action, or restructuring. Under the ESEA flexibility package, LEAs no longer have to be identified based on the performance of their schools. SEAs are required to develop a system whereby schools are identified for rewards and only the lowest performing schools are identified as either priority or focus schools. Thus, only 15% of schools have to be identified for interventions and publicly labeled as needing intervention.<sup>118</sup> This is a substantial change from the current system of outcome accountability whereby any school that fails to make AYP for at least two consecutive years is publicly identified for and subject to specific outcome accountability measures.

State and local report cards will no longer be required to identify which schools have been identified for improvement, corrective action, or restructuring. They will now identify schools as reward, priority, and focus schools. This will provide the public with information about which schools are making the greatest gains in improving achievement and which schools are among the lowest-performing schools. It is unclear whether the report cards will indicate for how many years a particular school has been identified as a priority or focus school or whether a school has just exited one of these statuses. Under the current system, depending on a school's designation, it is possible to have some sense of how long they have failed to make AYP.

An SEA may use the results of any assessments that it includes in its differentiated recognition, accountability, and support system to identify reward, priority, and focus schools. As previously mentioned, these assessments can include the state assessments in reading/language arts and mathematics, but may also include assessments in other subject areas. These additional assessments may only be included in the state's system if they are administered statewide; include all students and provide appropriate accommodations for students with disabilities and English learners, as well as required alternative assessments for students with disabilities,<sup>119</sup> and are valid and reliable for use in the SEA's system. ED has indicated, however, that it expects that the results of the reading/language arts and mathematics assessments will receive "significant weight" in the system used to identify reward, focus, and priority schools.<sup>120</sup> It is unclear what constitutes "significant weight." Thus, different SEAs may give varying weight to the results of these assessments when making decisions about which schools should be identified as reward, priority, and focus schools. This too constitutes a potential shift from the current law academic accountability requirements.

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<sup>118</sup> An SEA could choose to identify more than the required number of schools as priority or focus schools.

<sup>119</sup> See 34 C.F.R. 200.6 or CRS Report R40701, *Alternate Assessments for Students with Disabilities*, by Erin D. Lomax, for more information.

<sup>120</sup> ED, *Flexibility FAQs*, Item C-24.

### **3. Supporting Effective Instruction and Leadership<sup>121</sup>**

To receive the ESEA flexibility package, state and local educational agencies must commit to develop, adopt, pilot, and implement teacher and principal evaluation and support systems that

1. will be used for continual improvement of instruction;
2. meaningfully differentiate performance using at least three performance levels;
3. use multiple valid measures in determining performance levels, including data on student growth, and other measures of professional practice;
4. evaluate teachers and principals on a regular basis;
5. provide clear, timely, and useful feedback, including feedback that guides professional development; and
6. will be used to inform personnel decisions.

An SEA must develop and adopt guidelines for these systems, and LEAs must develop and implement teacher and principal evaluation and support systems that are consistent with SEA guidelines. An SEA must also provide student growth data on current and former students to teachers of reading/language arts and mathematics in grades in which the state administers assessments in those subjects.

Each SEA in its application for the ESEA flexibility package is required to select one of three options regarding the development and adoption of guidelines for local teacher and principal evaluation and support systems.

1. If the LEA had not developed any guidelines consistent with the aforementioned requirements, it must provide the SEA's plan to develop and adopt guidelines by the end of 2011-2012 school year.
2. If the SEA has adopted at least one, but not all, of the aforementioned requirements, the SEA must submit a copy of the guidelines that have been developed, evidence of their adoption, and the SEA's plan to develop and adopt the remaining guidelines by the end of the 2011-2012 school year.
3. If an SEA has developed and adopted guidelines that are consistent with the aforementioned requirements, the SEA must provide a copy of the guidelines that have been developed and evidence of their adoption.

Under both the first and second options, the SEA must provide an assurance that it will submit a copy of the guidelines that it will adopt by the end of the 2011-2012 school year. Under all three options, the SEA must provide a description of the process it used to involve teachers and principals in the development of the guidelines.

In addition, each SEA must describe its process for ensuring that each LEA develops, adopts, pilots, and implements teacher and principal evaluation and support systems that are consistent with the SEA's guidelines. The LEAs must involve teachers and principals in the process. The systems developed by the LEAs must also include mechanisms to review, revise, and improve the systems.

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<sup>121</sup> This section was prepared by Jeff Kuenzi. Please contact him at 7-8645 for more information.

These requirements represent a substantial departure from current law. Under current law, there are no requirements related to teacher and principal evaluations. The focus of current law is having teachers in core academic subjects who are highly qualified teachers (HQT). To be deemed highly qualified, a new teacher must possess a baccalaureate degree, be fully certified to teach, and demonstrate subject-matter knowledge in each of the areas that she or he teaches. Veteran teachers may achieve HQT status in the same manner or, instead, they may do so by demonstrating competency in all subjects taught using a “high objective uniform state standard of evaluation” described in ESEA Section 9101(23)(B). Each SEA was required to ensure, by the end of the 2005-2006 school year, that all teachers of core academic subjects met the HQT definition.

In an October 2005 letter to chief state school officers, ED announced additional flexibility in meeting the HQT deadline. The Secretary stated that the letter’s purpose was “to assure you that States that do not quite reach the 100% goal by the end of the 2005-2006 school year will not lose federal funds if they are implementing the law and making a good-faith effort to reach the HQT goal in NCLB as soon as possible.”<sup>122</sup> Instead, states that “meet the law’s requirements and the Department’s expectations in these areas but fall short of having highly qualified teachers in every classroom” would be given an additional year to reach the 100% goal. To have received this flexibility, an SEA was required to submit a revised plan to meet the new 2006-2007 deadline.

Prior to the present offer of flexibility under the ESEA flexibility package, ED’s latest statement on HQT policy (a letter to chief state school officers dated July 23, 2007) announced that all but one state had its revised plan approved and reiterated that no penalties would be imposed on states making a good-faith effort to reach the 100% HQT goal.<sup>123</sup>

While the requirements related to supporting effective instruction and leadership differ substantially from current law, they bear similarities to both the Administration’s Blueprint for ESEA reauthorization and RTTT. Under the Blueprint, states and LEAs would be required to implement the following policies and systems, none of which are required under current law:

1. Statewide definitions of “effective teacher,” “effective principal,” “highly effective teacher,” and “highly effective principal” developed in collaboration with stakeholders that are “based in significant part on student growth and also include other measures, such as classroom observations;”<sup>124</sup>
2. State-level data systems that link information on teacher and principal preparation programs to the job placement, student growth, and retention outcomes of their graduates; and
3. District-level evaluation systems that (1) meaningfully differentiate teacher and principal effectiveness in at least three performance levels, (2) are consistent with state definitions of effectiveness, (3) provide meaningful feedback that informs professional development, and (4) are developed in collaboration with stakeholders.

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<sup>122</sup> The Secretary’s letter is available at <http://www2.ed.gov/policy/elsec/guid/secletter/051021.html>.

<sup>123</sup> The Secretary’s letter is available at <http://www2.ed.gov/policy/elsec/guid/secletter/070723.html>.

<sup>124</sup> The Blueprint notes that during the transition to using these new definitions, the department will maintain current HQT provisions with additional flexibility. (*Blueprint*, p. 14).

These reforms would be supported by an amended ESEA Title II-A formula grant program in which each LEA would develop and implement fair and meaningful teacher and principal evaluation systems; foster and provide collaboration and development opportunities; build instructional teams; and improve instructional practice through effective, ongoing, job-embedded professional development. The Blueprint further requires that these activities “must be aligned with evidence of improvements in student learning ... [and] aimed at improving the equitable distribution of effective teachers and principals.”<sup>125</sup>

Under RTTT, subsection (D)(2) of the first round application<sup>126</sup> asked states to describe the extent to which it has developed a plan and set annual targets to ensure that participating LEAs

- establish clear approaches to measuring individual student growth;
- design and implement “rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth (as defined in this notice) as a significant factor, and (b) are designed and developed with teacher and principal involvement”;
- conduct annual evaluations of teachers and principals that include the provision of timely and constructive feedback; and
- use the results of these evaluations for “developing teachers and principals;” making decisions regarding compensation, promotion, and retention of teachers and principals; determining whether to grant tenure or full certification to teachers and principals; or removing ineffective tenured and untenured teachers and principals after providing opportunities for improvement.

## **Discussion and Possible Issues**

The ESEA flexibility package requires that LEAs must implement the new teacher evaluation systems no later than the start of the 2013-2014 school year (or the start of the 2014-2015 school year if they choose to pilot them in 2013-2014). Although many states may be able to produce the teacher evaluation guidelines required by the ESEA flexibility package, it is not clear whether school districts would be able to meet the deadlines required for piloting and full implementation of new teacher evaluation systems. Recent reviews of state policy in this area suggest that several states have already established some of the required guidelines such as multiple performance levels, use of student growth data, multiple observations, and annual evaluations.<sup>127</sup> Many states, however, have made some or all of these guidelines optional and it is not clear how many and to what extent school districts have adopted them. It may be difficult for some LEAs, particularly those with limited staff, to implement certain elements of the proposed evaluation system either by the pilot deadline or the full implementation deadline.

The ESEA flexibility package requires that the new evaluation systems inform personnel decisions. However, perhaps the most important of these decisions, the granting of tenure, may

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<sup>125</sup> *Blueprint*, p. 15.

<sup>126</sup> For more information, see <http://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>, p. 11.

<sup>127</sup> The National Council on Teacher Quality conducts an annual review of these policies (see <http://www.nctq.org/stpy09/>) and the Education Commission for the States tracks recent policy developments (see <http://ecs.org/html/issue.asp?issueid=129&subissueID=62>).

occur too soon for evaluation information to have an impact. Tenure policies are governed at the state level. Most states (43) award tenure after three or fewer years of teaching<sup>128</sup> and only four states require that “evidence of student learning be the preponderant or decisive criterion in such decisions.”<sup>129</sup> If evaluation information were to be part of the tenure decision, some districts may only have one or two years of results to use in the tenure decision-making process. Thus, without tenure reform, it may not be practical to expect evaluation systems to inform tenure decisions.

States applying for the ESEA flexibility package are expected to ensure that districts implement evaluation systems in a high-quality manner by, among other steps, monitoring inter-rater reliability. This may be difficult in very small districts with few staff members (roughly one-third of all LEAs nationwide had fewer than 20 FTE teachers in 2009-2010).<sup>130</sup> Such LEAs may have difficulty staffing enough evaluators to gauge inter-rater reliability.

The ESEA flexibility package retains the requirement, in ESEA Section 1111(b)(8)(C), that states ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, while it removes the mechanisms in current law to enforce the HQT requirement. Although ED’s latest HQT report reveals that nearly all (97%) core academic classes nationwide are staffed by HQTs, classes in high-poverty schools were less likely to be staffed by an HQT than were classes in low-poverty schools.<sup>131</sup> At the elementary level, 98% of core academic classes in low-poverty schools were taught by HQTs compared to 97% of classes in high-poverty schools. The gap was greater at the secondary level, with 97% of classes in low-poverty schools taught by HQTs compared to 94% of classes in high-poverty schools.

#### **4. Reducing Duplication and Unnecessary Burden**

Each SEA is required to provide an assurance that it will evaluate its reporting requirements and based on the findings from this evaluation, “revise its own administrative requirements to reduce duplication and unnecessary burden on LEAs and schools.” ED notes that in order to support schools and LEAs in focusing on achieving the best outcomes for students, SEAs should eliminate duplicative and burdensome reporting requirements that do not affect student outcomes. Under Title I-A, states are already required to provide the “least restrictive and burdensome regulations” for LEAs and schools receiving Title I-A funds.<sup>132</sup> The Blueprint did not address this issue.

In the ESEA Eligibility FAQs, ED provides several example of actions SEAs might take to reduce burden. For example, an SEA might review its record keeping and reporting requirements to identify any duplicity. It might also identify ways to streamline data collection timelines, share similar information among programs and agencies, or identify barriers to the flexible use of funds. Once burdens or barriers are identified, a state could take regulatory or legislative action to

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<sup>128</sup> Robin Chait, *Removing Chronically Ineffective Teachers*, Center for American Progress, Washington, DC, p. 14, [http://www.americanprogress.org/issues/2010/03/pdf/teacher\\_dismissal.pdf](http://www.americanprogress.org/issues/2010/03/pdf/teacher_dismissal.pdf).

<sup>129</sup> National Council on Teacher Quality, *2010 Update of the 2009 State Teacher Policy Yearbook*, <http://www.nctq.org/stpy09/updates/primaryFindings.jsp>.

<sup>130</sup> CRS analysis of U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “Local Education Agency (School District) Universe Survey,” 2009-10 v.1a.

<sup>131</sup> The department’s HQT report is available at <http://www2.ed.gov/programs/teacherqual/resources.html>.

<sup>132</sup> ESEA, Section 1111(c)(7).

address them. In making changes, however, ED cautions states to evaluate changes by “considering their impact on student outcomes and in particular the outcomes of its neediest students.”

## **Implementation Timeline**

As previously discussed, the ESEA flexibility package would apply to school years 2011-2012, 2012-2013, and 2013-2014.<sup>133</sup> States would have the option to apply for a one-year waiver extension for the 2014-2015 school year.<sup>134</sup> ED has established a detailed timeline for the implementation of the waivers by states, indicating what states must provide when they submit their applications and what must be accomplished during each year of the waiver. One interesting aspect of the timeline is that if states do not apply for the optional one-year extension, they may not have to actually implement various requirements associated with the conditions for receiving waivers. For example, during the 2013-2014 school year, states are required to pilot the implementation of teacher and principal evaluation and support systems. Full implementation is not required until the 2014-2015 school year. If Congress has not acted to reauthorize the ESEA by the end of the 2013-2014 school year, it appears that states that do not apply for the one-year waiver extension may then have to revert to compliance with current law requirements. Also, the Secretary retains the authority under ESEA Section 9401 to terminate the waivers if SEAs or LEAs fail to comply with the requirements associated with the waivers.

ED has noted that the implementation timeline specifies both a timeline for implementing the principle associated with the waivers as well as the waivers themselves. The deadlines for meeting a particular principle are the latest dates by which an SEA or LEA may meet a principle and still be in compliance with the requirements established for receiving the ESEA flexibility package. The dates specified for implementing a particular waiver are the earliest time that an SEA or LEA may take advantage of a particular waiver. An SEA can choose not to implement a particular waiver, provided it continues to carry out current law in that area.<sup>135</sup> Regardless of whether an SEA chooses to implement some or all of the available waivers, it must adhere to the four principles established by ED to receive the waivers.

## **State Applications Submitted for the ESEA Flexibility Package**

While it is beyond the scope of this report to analyze the contents of the state applications submitted in the first and second rounds of applications or approved by ED, the Center on Education Policy (CEP) has examined the accountability proposals included in the hundreds of

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<sup>133</sup> If an SEA needs additional time to implement the flexibility available through the waivers, it may request approval to use its annual measurable objectives from the 2010-2011 school year to make AYP determinations for the 2011-2012 school year. In exchange for this temporary flexibility, the SEA must “adopt college- and career-ready standards; link teacher, principal, and student data and provide that information to educators to improve their practices; and identify persistent achievement gaps within the State.” (ED, *Flexibility FAQs*, Item A-14.)

<sup>134</sup> SEAs may request the waiver extension provided the flexibility provisions included in the waiver package are not “superseded” by reauthorization of the ESEA. (ED, *Flexibility FAQs*, Item A-6.)

<sup>135</sup> ED, *Flexibility FAQs Addendum*, Item A-8.



pages of materials submitted by applicants in both the first and second rounds of applications. CEP has also examined the accountability plans approved by ED for the 11 states from the first round of applications.

In general, with respect to the approved applications from the first round CEP characterized the accountability provisions proposed in the state applications as more complex than those required under current law. They report that these changes would result in a “more diverse and complicated array of accountability systems across states.” In addition, they report that the new accountability provisions “would lead to greater complexity within many states.” Other key findings include the following:

- all 11 states will more closely integrate federal accountability requirements with state accountability systems than they do now;
- 10 of the 11 states have already adopted and are implementing the Common Core State Standards and most of the states are part of one of the two consortia developing assessments aligned with these standards;
- most states will continue to establish AMOs but their use in making major accountability determinations (e.g., identifying schools for interventions) will vary;
- most of the states will use new, multifaceted measures to identify schools for various levels of interventions or rewards;
- most of the states will have multiple performance levels with respect to the identification of schools for interventions or rewards;
- most of the states will make some of their major accountability decisions based on two student groups—all students and a single, broad “disadvantaged” students group; and
- only 2 of the 11 states will require public school choice or SES.<sup>136</sup>

In its examination of the second round of applications, CEP noted once again that “Not only will these changes result in a more diverse and complicated array of accountability systems across states, but they also will lead to greater complexity within states.” They found many similarities between the approved accountability plans of the first round applicants and the proposed accountability plans of the second round applicants. Key findings include the following:

- all 27 applicants will more closely integrate federal and state accountability requirements;
- 26 of the 27 applicants have adopted and are implementing the Common Core State Standards, and most of the states are participating in one of the two consortia developing assessments aligned with these standards;<sup>137</sup>
- all 27 states will continue to have AMOs but will vary in their use of them in making major accountability decisions;

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<sup>136</sup> Wayne Riddle, *Major Accountability Themes of Approved State Applications for NCLB Waivers*, Center on Education Policy, March 8, 2012, <http://www.cep-dc.org/displayDocument.cfm?DocumentID=387>.

<sup>137</sup> Virginia is the only second round applicant that has not adopted the Common Core State Standards and is not involved with one of the two consortia developing assessments aligned with the standards.

- 26 of the 27 applicants will replace the goal of 100% proficiency by the 2013-2014 school year;
- at least 24 of the 27 applicants will supplement or replace AYP with a “new, state-specific primary accountability indicator;”
- most of the applicants will use multiple performance levels to identify schools for consequences or rewards;
- at least 19 of the applicants would change their use of subgroups for some or all of their major accountability determinations;
- none of the applicants indicated that they will continue to require school choice; and
- none of the applicants indicated that they would reserve the full 20% required under current law for school choice transportation or SES.<sup>138</sup>

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<sup>138</sup> Wayne Riddle, *Major Accountability Themes of Second-Round State Applications for NCLB Waivers*, Center on Education Policy, May 8, 2012, <http://www.cep-dc.org/displayDocument.cfm?DocumentID=404>.