

CRS Report for Congress

Received through the CRS Web

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

Updated January 6, 2004

Richard N. Apling
Specialist in Social Legislation
Domestic and Social Policy Division

Nancy Lee Jones
Legislative Attorney
American Law Division

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

Summary

The Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLBA) are two of the most significant federal statutes relating to education. Although they both have the goal of improving education, IDEA for children with disabilities and NCLBA for all children, the two statutes take different approaches. IDEA looks at the individual child with an emphasis on developing an individualized education program (IEP) and specific services for children with disabilities, while NCLBA takes a more global view with an emphasis on closing gaps in achievement test scores. The 108th Congress is currently considering the reauthorization of IDEA. The House has passed H.R. 1350; the Senate Committee on Health, Education, Labor, and Pensions has reported S. 1248. S. 1248 was placed on the Senate legislative calendar under general orders on November 3, 2003.

The relationship of IDEA and NCLBA has become of increasing significance with the current legislative activity. This report will provide a brief overview of IDEA and NCLBA, a comparison of selected provisions of IDEA and NCLBA, a discussion of Department of Education regulations and guidance regarding IDEA and NCLBA, and a discussion of provisions in the House and Senate bills regarding the intersection of IDEA and NCLBA.

This report will be updated to reflect major congressional action.

Contents

Introduction	1
Overview of Selected IDEA and NCLBA Provisions	1
Overview of IDEA and NCLBA Assessment and Accountability Requirements	2
IDEA Assessment Requirements in the IEP	2
IDEA State and Local Requirements on Student Achievement	3
NCLBA Assessment and Accountability Requirements	4
IDEA and NCLBA Teacher Requirements	6
IDEA Teacher and Paraprofessional Qualifications Requirements	6
NCLBA Teacher and Paraprofessional Qualifications Requirements ..	7
Department of Education Regulations, Rulings and Comments Regarding	
IDEA and NCLBA	8
Secretary's Principles for Reauthorizing IDEA	8
Final Rules on Accountability	9
Draft Non-Regulatory Guidance	10
Public School Choice	10
Standards and Assessments	10
Supplemental Educational Services	11
Selected Provisions of H.R. 1350 and S. 1248 Related to NCLBA	11
Personnel Requirements	11
Assessment and Accountability	12
Selected Issues	13

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

Introduction

The Individuals with Disabilities Education Act (IDEA)¹ and the No Child Left Behind Act (NCLBA)² are two of the most significant federal statutes relating to education. Although they both have the goal of improving education, IDEA for children with disabilities and NCLBA for all children, the two statutes take different approaches. IDEA looks at the individual child with an emphasis on developing an individualized education program (IEP) and specific services for children with disabilities, while NCLBA takes a more global view with an emphasis on closing gaps in achievement test scores. The 108th Congress is currently considering the reauthorization of IDEA. The House has passed H.R. 1350; the Senate Committee on Health, Education, Labor, and Pensions has reported S. 1248. S. 1248 was placed on the Senate legislative calendar under general orders on November 3, 2003.

The relationship of IDEA and NCLBA has become of increasing significance with the current legislative activity. This report will provide a brief overview of IDEA and NCLBA, a comparison of selected provisions of IDEA and NCLBA, a discussion of Department of Education regulations and guidance regarding IDEA and NCLBA, and a discussion of provisions in the House and Senate bills regarding the intersection of IDEA and NCLBA.

Overview of Selected IDEA and NCLBA Provisions

IDEA is the major federal law dealing with the education of children with disabilities. In addition to authorizing funds to help states and local educational agencies (LEAs) provide special education and related services, IDEA requires the provision of a free appropriate public education (FAPE) for children with disabilities

¹ 20 U.S.C. §1400 *et seq.*

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

and specifies in some detail the provision of services for these children,³ and guarantees certain procedural rights for these children and their parents.

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

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

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

Overview of IDEA and NCLBA Assessment and Accountability Requirements

IDEA Assessment Requirements in the IEP. A key component of the provision of special education is the IEP, which is based on “a written statement for each child with a disability” developed, reviewed, and revised by the IEP team. In addition to specifying the special education and related services the child will receive, the IEP must peg the child's educational goals to the LEA's general

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

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

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

educational goals for nondisabled students. The IEP must assess the child's current level of educational performance, including how the child's disability impacts his or her "involvement and progress in the general curriculum." The IEP must specify the child's needs (and how those needs will be met) so that the child can be involved in and progress in the general school curriculum. Progression must be gauged in terms of annual measurable goals. In addition, parents must be regularly informed on the child's progress (for example, by report cards) at least as frequently as other parents are informed of their children's progress.

As discussed below, IDEA requires states and LEAs to ensure the involvement of children with disabilities in statewide and districtwide assessments. It is the IEP team that determines the extent to which the child requires accommodations to participate in these assessments or, alternatively, determines and justifies why the child will not participate (even with accommodations) in these assessments. In the latter case, the IEP team specifies how the child will be assessed.

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

It continues to be necessary to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency and the teacher that a child will progress at a specified rate. Despite this, public agencies and teachers have continuing obligations to make good faith efforts to assist the child in achieving the goals and objectives or benchmarks listed in the IEP, including those related to transition services.⁶

IDEA State and Local Requirements on Student Achievement. As noted above, IDEA requires states and LEAs to involve children with disabilities in statewide and districtwide assessment programs, with accommodations as appropriate.⁷ In addition, states are required to develop guidelines for alternative assessments for those unable to participate in such assessments and to have begun administering these alternative assessments by July 1, 2000. States are required to report the numbers of children with disabilities participating in regular and in alternative assessments together with these children's performance on such tests (if so doing would be "statistically sound" and would not violate confidentiality requirements). These reports to the public are to be made "with the same frequency and in the same detail as [a state] reports on the assessment of nondisabled children." IDEA requires LEAs to provide states with all information necessary for the state to comply with these requirements.

IDEA requires states to establish performance goals and indicators for children with disabilities. The aim of these goals is to promote the overall purposes of the Act. In addition, the goals are to be consistent with overall state educational goals, "to the maximum extent appropriate." At a minimum a state's indicators should

⁶ 64 Fed. Reg. 12598, Mar. 12, 1999.

⁷ To accommodate a child's disability, he or she might be allowed to take the assessment without time restriction or might be read test questions and provide verbal responses, rather than marking an answer sheet.

address academic performance, drop-out rates, and graduation rates. States must report periodically to the Secretary of Education and to the general public on progress towards meeting these goals and must revise state plans to the extent that performance needs to be improved.

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

NCLBA requires that states have in place a single state accountability system based on standards of adequate yearly progress (AYP) aimed at reducing achievement gaps between high-achieving and low-achieving students. These standards must be applied to specified groups, including children with disabilities,⁹ as well as to all students in each public school, LEA, and state as a whole. The ultimate goal of these state systems is that all students reach proficient or advanced levels of achievement by school year 2013-2014.

AYP standards must be applied to all public schools¹⁰ and LEAs in states receiving ESEA Title I-A funds; however, certain actions will apply only to schools and LEAs receiving Title I-A funds.¹¹ Applicable schools that fail to meet AYP standards over 2 consecutive years must be identified as requiring improvement. Technical assistance is provided to those schools, and public school choice must be offered to pupils of such schools for the next school year. Choice of schools must only include those not identified for improvement.¹² Following 3 consecutive years

⁸ For further information on NCLBA testing requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*, by Wayne C. Riddle; CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*, by Wayne C. Riddle; final rule regarding Title I and children with disabilities (68 Fed. Reg. 68698, Dec. 9, 2003); and ED non-regulatory draft guidance on NCLBA standards and assessments (Mar. 10, 2003), available at [<http://www.ed.gov/policy/speced/guid/nclb/standassguidance03.pdf>].

⁹ Other specified groups are economically disadvantaged pupils, limited English proficient (LEP) pupils, and pupils in major racial and ethnic groups.

¹⁰ A school must assess at least 95% of relevant pupils — both all pupils and those in each identified subgroups — in order to meet AYP standards.

¹¹ A large majority of LEAs receive funding under Title I-A. Only those LEAs with very few poor children (fewer than 10) or very low poverty rates (under 2%) do not qualify. However, even if an LEA receives Title I-A funding, typically not all schools within the LEA qualify for Title I-A funding.

¹² ED comments with respect to final NCLBA regulations specify the following regarding public school choice for children with disabilities:

of failure to meet AYP, pupils from low-income families must be offered the opportunity to obtain supplementary services from approved providers, which could include public or private schools, as well as non-profit and for-profit providers.¹³ Following 5 consecutive years of failure, the school must be subject to “restructuring.” For example, staff could be replaced, or the school could be converted to a charter school. Similar procedures apply to LEAs that fail to meet AYP standards. In addition to these corrective actions, states may reward schools that significantly close achievement gaps among various groups or exceed AYP for 2 or more consecutive years.

¹² (...continued)

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

LEAs are not required to offer students with disabilities the same choices of schools as are offered to nondisabled students, but may match the abilities and needs of a student with a disability, as indicated on the student’s IEP, to those schools that have the ability to provide FAPE to the student. However, school districts must offer students with disabilities and those eligible under Section 504 and Title II of the ADA the opportunity to be educated in an eligible school, namely, a school that has not been identified for school improvement, corrective action, or restructuring and that has not been identified by the State as persistently dangerous. Like other students, students with disabilities and those covered by Section 504 and Title II of the ADA must have the opportunity to express a preference among at least two eligible schools and that preference must be considered by the school district in making their assignment. 67 Fed. Reg. 71756 (Dec. 2, 2002). See also the draft non-regulatory guidance issued by ED regarding public school choice discussed in *infra* at page 10.

¹³ ED notes that

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

In addition, ED notes that

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

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

IDEA and NCLBA Teacher Requirements

IDEA Teacher and Paraprofessional Qualifications Requirements.

IDEA recognizes the importance of well qualified personnel for providing quality education and related services to children with disabilities and contains many provisions related to professional development of special education and general education teachers and other individuals who serve these children. In some cases, IDEA explicitly authorizes funds to be spent on personnel development. In other cases, personnel development is one among several authorized purposes for certain funding amounts. In still other instances, IDEA prescribes certain state and local personnel development requirements as conditions of accepting IDEA funding. While these requirements are not always linked to specific funding sources, it is possible or even likely that some IDEA funding is used to meet them.

One way IDEA supports personnel preparation is to authorize competitive grants for this purpose. For example Section 673 authorizes grants "to help address State-identified needs for qualified personnel ..." and "to ensure those personnel have the skills and knowledge ... to be successful."¹⁴ A portion of these grants is targeted for preparation of personnel who serve children with low-incidence disabilities (e.g., visually impaired children). Another portion targets high-incidence disabilities (e.g., those with specific learning disabilities). Grants are also made to train individuals for leadership positions in special education and for projects of national significance (e.g., development of models for teacher preparation).

In addition to authorizing competitive grants for improving personnel development, the IDEA Part B grants-to-states program contains a series of inter-related state and local requirements aimed at improving the supply and quality of those providing education and related services for children with disabilities. In order to qualify for IDEA grants, a state must have in effect "a comprehensive system of personnel development to ensure an adequate supply of qualified special education, regular education, and related services personnel."¹⁵ By cross-reference, the Act requires that a state's comprehensive personnel system must meet the same requirements that a state would meet in applying for a program improvement grant under Section 653(b)(2)(B) (regarding analyzing state and local professional

¹⁴ Section 673(a)(1) and (2), 20 U.S.C. §1473.

¹⁵ Section 612(a)(14), 20 U.S.C. §1412(a)(14).

development needs)¹⁶ and under Section 635(c)(3)(D) (regarding improvement strategies).¹⁷ In addition, states receiving IDEA state grants are required to establish and maintain personnel standards “to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained.”¹⁸ The Act also places personnel development requirements on LEAs as a condition of receiving funds. LEAs must “ensure that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with the requirements” (Section 613((a)(3)) discussed above related to the SPIGs (i.e., Section 635 (c)(3)(D)).

NCLBA Teacher and Paraprofessional Qualifications Requirements.¹⁹ NCLBA contains a series of requirements aimed at improving the qualifications of teachers and paraprofessionals. The ultimate aim is that all teachers of “core” subjects be highly qualified by school year 2005-2006 in states and LEAs receiving Title I-A funding. Core academic subjects include: English, reading or language arts, mathematics, science, foreign language, civics, government, arts, history, and geography. Teachers who teach other subjects are not required to be highly qualified.²⁰

¹⁶ 20 U.S.C. §1453(b)(2)(B).

¹⁷ 20 U.S.C. §1435(c)(3)(D).

¹⁸ Section 612(a)(15), 20 U.S.C. §1412(a)(15). In implementing these standards, “a State may adopt a policy that includes a requirement that local educational agencies in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards.” Section 612(a)(15)(C), 20 U.S.C. §1412(a)(15)(C).

¹⁹ For further information on NCLBA teacher requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*, by James B. Stedman.

²⁰ ED notes that

The ESEA specifies that all teachers of core academic subjects are to meet the requirements set forth in the statute. Students with limited English proficiency or with disabilities are expected to meet the same standards as all other students, and their teachers should be expected to have met the same standards for content knowledge. On the other hand, special educators who do not directly instruct students on any core academic subject or who provide only consultation to highly qualified teachers of core academic subjects in adapting curricula, using behavioral supports and interventions, and selecting appropriate accommodations do not need to meet the same “highly qualified” subject matter competency requirements that apply under the NCLBA Act to teachers of core academic subjects. SEAs and LEAs must ensure that all special education personnel, including related services providers, meet the personnel standards requirements of Section 612(a)(15) of the IDEA and 34 CFR § 300.136. Special education teachers who are providing instruction in core academic subjects also must meet the “highly qualified” requirements of the ESEA. 67 Fed. Reg. 71763-4 (Dec. 2, 2002).

NCLBA specifies a variety of requirements to be met for a teacher to be classified as highly qualified. To meet the definition, all teachers must have at least a BA degree and full state certification. In addition, teachers must demonstrate subject area knowledge, for example, by passing rigorous state tests in the subject area taught by the teacher. Despite other qualifications, a teacher with an emergency, temporary, or provisional certification or license is not deemed to be highly qualified.

NCLBA also aims to upgrade the qualifications of certain paraprofessionals. These requirements are limited to paraprofessionals who provide instructional services. Other paraprofessionals (for example, those providing computer support or personal care services) are excluded. In addition, in “targeted assistance” Title I schools, only those paraprofessionals paid by Title I-A funds are covered. However, all instructional paraprofessionals in schoolwide project schools are covered. In general, all covered paraprofessionals must have earned a high school diploma or a recognized equivalent. Those hired after January 8, 2002, must have completed at least 2 years of higher education and obtained an associate’s degree or met “rigorous” state or local standards. Those hired before January 8, 2002, must meet equivalent requirements by January 8, 2006.

Department of Education Regulations, Rulings and Comments Regarding IDEA and NCLBA

Secretary’s Principles for Reauthorizing IDEA

On February 25, 2003, the Secretary of Education released a statement of principles for reauthorizing IDEA. In describing these principles the Secretary stated: “Every child in America deserves the highest-quality education, including our children with disabilities Our goal is to align IDEA with the principles of No Child Left Behind by ensuring accountability, more flexibility, more options for parents and an emphasis on doing what works to improve student achievement.”²¹

With regard to accountability, the statement of principles noted that states, under NCLBA, are responsible for implementing a single accountability system for all students, including students with disabilities. The Secretary’s principles went on to state that “IDEA must incorporate the NCLBA principles of assessment for children receiving special education and align with NCLBA accordingly to enhance state efforts to improve student achievement. Consistent with those principles, IDEA should ensure that students with disabilities have access to and make progress in the general curriculum, and are appropriately included in state accountability systems. IDEA must move from a culture of compliance with process to a culture of accountability for results. Consequently, IDEA eligibility and compliance paperwork

²¹ *Paige Releases Principles for Reauthorizing Individuals with Disabilities Education Act (IDEA)*, at [<http://www.ed.gov/PressReleases/02-2003/02252003.html>].

requirements at the federal level must be streamlined and focused on improving results for students with disabilities.”²²

The other principles referred to by the Secretary involve simplifying paperwork, “doing what works,” and increasing “choices and meaningful involvement for parents.” This last principle, increasing choices, is described as expanding “opportunities to help parents, schools, and teachers choose appropriate services and programs for children with disabilities, including the charter and private schools of their choice.”²³

Final Rules on Accountability

On December 9, 2003, ED issued a final rule amending the regulations governing Title I of the Elementary and Secondary Education Act (ESEA) to clarify school accountability for the academic achievement of students with the most significant cognitive disabilities.²⁴ The rule emphasizes that all students — including all children with disabilities — are to be assessed in relationship to the state’s established academic content standards. At the same time, students may be assessed by different means. In general, the rule divides the assessment of children with disabilities into four groups:

- students assessed with regular assessments based on the grade-level achievement standards,
- students assessed with regular assessments (with accommodations, such as testing in a quiet location) based on the grade-level achievement standards,
- students assessed with alternative assessments based on the grade-level achievement standards, and
- students assessed with alternative assessments based on achievement assessment standards.

Thus the rule clarifies that the achievement of most children with disabilities will be measured against a state’s grade-level achievement standards for accountability purposes, while only those with the most significant cognitive disabilities would be measured against alternative achievement standards aligned with the state’s academic content standards and reflecting the professional judgment of the highest learning standards possible for the students.

The rule would allow states to use alternative achievement standards for students with the most significant cognitive disabilities to calculate adequate yearly

²² Ibid. For a discussion of paperwork issues in special education see CRS Report RS21226, *The Individuals with Disabilities Education Act: Paperwork in Special Education*, Richard Apling.

²³ For a discussion of IDEA and school choice see CRS Report RL31489, *Individuals with Disabilities Education Act (IDEA): Possible Voucher Issues*, by Richard N. Apling, Nancy L. Jones and David P. Smole.

²⁴ 68 Fed. Reg. 68698 (Dec. 9, 2003).

progress (AYP) as long as the percentage of these students at the school district or state level who are counted as “proficient” or “advanced” does not exceed 1% of all students assessed.²⁵ However, if a school district or state can document that the number of students with the most significant cognitive impairments exceeds 1%, the district could be permitted to request an exception from the state or the state could request an exception from ED. The final rule provides some flexibility to states in defining children eligible for alternative assessments. The rule requires states to “establish and ensure implementation of clear and appropriate guidelines for individualized education program (IEP) teams to apply in determining when a child’s significant cognitive disability justifies assessment based on alternative academic achievement standards.”²⁶

Draft Non-Regulatory Guidance

Public School Choice. Draft non-regulatory guidance was issued by ED relating to public school choice on December 4, 2002. This guidance provides that school districts must offer students with disabilities the same opportunity as children without disabilities to be educated in a school that has not been identified as in need of school improvement and has not been identified as persistently dangerous. “However, students with disabilities do not have to be offered their choice of the same schools as are offered to nondisabled students. A school district must ensure that students with disabilities receive a free appropriate public education (FAPE) when they enroll in their school of choice. In offering choice to students with disabilities, school districts may match the abilities and needs of a student with disabilities to the possible schools that have the ability to provide the student FAPE.”²⁷ The draft guidance also noted that the movement of a child with a disability to a school of choice does not “in and of itself” trigger IDEA’s change in placement procedures. The new school can adopt the existing IEP and the change of placement procedures do not apply. “However, the school district must comply with the ‘change of placement’ requirements of the IDEA if the new IEP will change the services on the IEP or the extent to which the student will participate with nondisabled students in academic and non-academic activities.”²⁸

Standards and Assessments. On March 10, 2003, ED issued draft non-regulatory guidance on standards and assessments.²⁹ This included a discussion of issues related to special populations, including children with disabilities. In this document, ED defined accommodations, alternate assessments and noted that if a child is a child with a disability as defined by IDEA, the student’s IEP team determines the accommodations needs to measure academic achievement. The IEP, however, cannot exempt a child from participating in the State’s assessment.

²⁵ ED estimates that this is about 9 percent of children with disabilities.

²⁶ 68 Fed. Reg. 68702 (Dec. 9, 2003).

²⁷ [<http://www.ed.gov/offices/OESE/SASA/schoolchoiceguid.doc>].

²⁸ See also ED’s comments to the final NCLBA regulations, no. 12.

²⁹ [<http://www.ed.gov/policy/speced/guid/nclb/standassguidance03.pdf>].

Supplemental Educational Services. ED has also issued draft non-regulatory guidance regarding supplemental educational services. Supplemental educational services are defined as additional academic instruction designed to increase the academic achievement of students in low-performing schools. ED’s draft guidance provides that “an SEA and each LEA that arranges for supplemental educational services must ensure that eligible students with disabilities and students covered under Section 504 may participate.”³⁰ Once parents select a provider for their child, the LEA must enter into an agreement with the provider that has certain provisions including a timetable for improving the student’s achievement. In the case of a student with a disability, this timetable is to be consistent with the student’s IEP.³¹

Selected Provisions of H.R. 1350 and S. 1248 Related to NCLBA

Both H.R. 1350 and S. 1248 contain provisions aimed at aligning the requirements of IDEA with NCLBA. Arguably the most notable provisions in the two bills related to NCLBA deal with personnel and assessment and accountability requirements.

Personnel Requirements

H.R. 1350 includes language to align IDEA with NCLBA personnel requirements. For example, a new definition of “highly qualified” would be added by H.R. 1350 with the same meaning as the term in Section 9101 of ESEA.³² In addition, H.R. 1350 would amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would have to “ensure that special education teachers who teach core academic subjects [e.g., mathematics and reading and language arts] are highly qualified in those subjects.”³³

S. 1248 also includes language to align IDEA with NCLBA personnel requirements. The bill adds a definition of a “core academic subject” by reference to the definition of that term in Section 9101 of ESEA.³⁴ In addition, S. 1248 adds an extensive definition of “highly qualified”³⁵ and “consultative services,”³⁶ which

³⁰ [<http://www.ed.gov/offices/OESE/SASA/suppsvcsguid.doc>].

³¹ Ibid.

³² Section 602(9).

³³ Section 612(a)(14)(B)(i).

³⁴ Section 602(4). The ESEA definition lists “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography” as core academic subjects.

³⁵ Section 602(10).

³⁶ Section 602(10)(E)(ii). These services would include, for example, adjustments to the
(continued...)

would align IDEA with NCLBA requirements with respect to the qualification of educational personnel, while taking into account differences between special education and general education teachers. For example, under this definition, if a special education teacher provides only “consultative services” to a secondary school teacher teaching core academic subjects to children with disabilities, the special education teacher, to meet the definition of highly qualified, must meet the standards of the definition for all special education teachers (that is, be fully certified in the state as a special education teacher and demonstrate the knowledge and skills necessary to teach children with disabilities) but need not meet standards with respect to the academic subjects being taught (as the regular teacher must do to be highly qualified under NCLBA).

Like H.R. 1350, S. 1248 would amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would be required to “ensure that each special education teacher in the State who teaches in an elementary, middle, or secondary school is highly qualified not later than the 2006-2007 school year.”³⁷

Assessment and Accountability

H.R. 1350 would require that state performance goals for children with disabilities would have to be “the same as the State’s definition of adequate yearly progress ... under section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965.”³⁸ The bill would continue the requirement (with some modification, including reference to ESEA assessments) in Section 612 (regarding state eligibility) that all children with disabilities are to be included state and district-wide assessments. States would continue to be required to develop and implement guidelines for providing accommodations to permit children with disabilities to participate in assessments, to develop and provide guidelines for participating in alternative assessments, and to conduct those alternative assessments.

S. 1248 would also align IDEA performance goals and indicators with requirements for AYP, standards, and assessments under NCLBA. In general, children with disabilities would be required to participate in state and districtwide testing programs as under NCLBA. As determined by the IEP team, depending on each child’s needs, he or she could take assessments with or without accommodations (e.g., different testing environments, such as a quieter location than the regular classroom). For some, presumably more severely disabled children, alternative assessments can be used. These alternative assessments are to be aligned with the state’s “challenging academic content and academic achievement standards”³⁹ or with a state’s content standards but with alternative achievement standards.

³⁶ (...continued)

learning environment, modifications to instructional methods, and adaptations of the curriculum.

³⁷ Section 612(a)(14)(C)(i).

³⁸ Section 612(a)(15)(A)(ii).

³⁹ Section 612(a)(16)(C)(ii)(I).

Both H.R. 1350 and S. 1248 would continue requirements in Section 614 with respect to statements in the IEP related to need for accommodations and with respect to justification for participating in alternative assessments.

Selected Issues

The provisions of NCLBA emphasizing that all children (including children with disabilities) should be held to the same high standards to the maximum extent possible have given rise to numerous questions by commentators about its relationship with IDEA, with many of these questions arising from the different philosophical approaches taken to education in IDEA and NCLBA.⁴⁰ The House and Senate IDEA bills and the most recent ED regulations appear to address many of these concerns.

One area of concern is that the inclusion of children with disabilities in the assessment and accountability requirements of NCLBA will lead to the exclusion of these children from the mainstream curriculum — a trend that federal special education legislation has aimed to thwart. As one commentator has noted, NCLBA requires annual tests and states that if a child with a disability is given an out-of-level test and the state reports these children as “below proficient,” it would be counted against the school’s performance. “Such ties to testing could exacerbate a problem that parents often talk about — principals who try to push special education students out of their schools because they bring down their test scores.”⁴¹ The December 9, 2003 regulations address this concern. For one thing, the performance of the most severely cognitively disabled children would be judged on alternative achievement standards, with those performing at the proficient and advanced levels of these alternative standards counted toward achieving AYP. In addition, out-of-level assessments will meet the alternative achievement standards “if they are aligned with the State’s academic content standards, promote access to the general curriculum and reflect professional judgement of the highest achievement standards possible.”⁴² Finally, the 1% cap for including performance on alternative assessment standards for calculating AYP does not apply at the school level. Thus there would be less incentive to segregate children with disabilities in separate schools or separate classrooms to ensure that school-level AYP is met.

Another area of concern is the application of NCLBA personnel standards to special education teachers and other special education service providers. The

⁴⁰ Two organizations have published detailed charts that take sections of NCLBA and then look at the implications for special education. See National Association of State Directors of Special Education, *Implementing the No Child Left Behind Act: What it Means for IDEA*, June 2002, [<http://www.nasdse.org/downloadnclb.htm>]; Council for Exceptional Children, *No Child Left Behind Act of 2001: Implications for Special Education Policy and Practice*, Jan. 2003, [http://www.cec.sped.org/pp/side-by-side09_04_02.pdf].

⁴¹ Allison L. Bruce, “No Child Act Stirs Special ED Fears,” *The Post and Courier* (Charleston, S.C.), Feb. 17, 2003, p. 1B.

⁴² 68 Fed. Reg. 68700 (Dec. 9, 2003).

Council for Exceptional Children (CEC) has interpreted the NCLBA standards as applying to special education teachers, related services providers and early intervention teachers. However, CEC asked several questions concerning the application of these standards to special education teachers and paraprofessionals.⁴³ For example, what would holding full state certification mean for special education teachers? In addition, another commentator raised the issue: would a single special education teacher be expected to hold degrees in every subject he or she teaches to a class of students with disabilities?⁴⁴ As discussed above, S. 1248 appears to address some of these concerns by modifying the definition of “highly qualified” to take into account differences between special education and general education personnel.

The potential for litigation has also been a concern for some commentators. IDEA includes a private right of action for parents but the NCLBA does not. One commentator interpreted NCLBA and posed the following issue: “under the NCLB, states are to employ early intervention methods, especially in teaching reading, before seeking special ed. Yet the IDEA continues to include the parents’ right to ‘child find’ obligations. If a district follows the NCLBA and provides early intervention for a student who, unfortunately, continues to lag behind, will the parents still be able to seek a hearing, alleging the failure of child find under the IDEA? How will NCLB protect districts that follow its mandates?”⁴⁵ Both H.R. 1350 and S. 1248 appear to address this issue. Both bills permit LEAs to use some IDEA Part B funds for “prereferral” services for children who require additional support but have not been identified as requiring special education. Both bills note that these services may be coordinated with similar services authorized under ESEA. In addition, both bills provide that “nothing in this subsection shall be construed to either limit or create a right to a free appropriate public education under this part [i.e., Part B of IDEA].”

Despite these attempts to address various issues with respect to the interact of IDEA and NCLBA, other issues and concerns are likely to arise over time. For example, although the CEC has responded favorably to the December 9, 2003, regulations, it warns in a December 19, 2003 press release “that implementing the regulations will take a huge investment in training and technical assistance” and recommends that ED “develop a strategic plan to assist states and districts to develop alternative achievement standards and their corresponding assessments quickly.”⁴⁶

⁴³ CEC, *No Child Left Behind Has Major Implications for Special Education*, vol. 9, no. 4, Advocacy in Action, Nov./Dec. 2002, p. 4.

⁴⁴ Allison L. Bruce, “No Child Act Stirs Special ED Fears,” *The Post and Courier* (Charleston, S.C.) Feb. 17, 2003, p. 1B.

⁴⁵ Miriam Kurtzig Freedman, “Different Approaches of NCLB, IDEA May Lead to Troubling Inconsistencies,” *The Special Educator*, vol. 18, no. 8, Nov. 5, 2002.

⁴⁶ [http://www.cec.sped.org/pp/press_release_122203.htm].