Congressional Research Service

MEMORANDUM June 28, 2011

To: House Committee on Education and the Workforce
Attention: Majority Committee Staff

From: Emily Barbour, Legislative Attorney
Jody Feder, Legislative Attorney
Rebecca Skinner, Specialist in Education Policy

Subject: **Secretary of Education's Waiver Authority with Respect to Title I-A Provisions Included in the Elementary and Secondary Education Act**

This memorandum responds to your request for an analysis of the Secretary of Education's waiver authority with respect to Title I-A provisions included in the Elementary and Secondary Education Act (ESEA). This memorandum is substantially identical to a November 29, 2010 memorandum that was prepared for committee staff by Jody Feder, Legislative Attorney, and Rebecca Skinner, Specialist in Education Policy. At the Committee's request, the November 2010 memorandum was reviewed, and its analysis was determined to be both accurate and timely under current circumstances. That memorandum, the body of which begins in the next paragraph, examines: (1) the Secretary's use of waivers in the circumstances the Committee specified; (2) the extent to which the Secretary can condition waivers on an applicant's performance of other actions; and (3) the scope of the Secretary's waiver authority in the instances the Committee identified.

The first section of the memorandum begins with a general overview of the authority provided to the Secretary under Section 9401 of the ESEA to grant case-by-case waivers under the ESEA. This discussion examines the requirements that waiver requests must meet and limitations on the Secretary's authority in this area. This is followed by an examination of any potential waiver authority or prohibitions on waivers included in Title I-A. The next section of the memorandum discusses current uses of waiver authority by the Secretary. The following section provides a legal analysis of the scope of the Secretary's authority to waive ESEA requirements. This discussion is followed by an analysis of whether the Secretary has the authority to require states and local educational agencies (LEAs) to take an action not required by law in order to receive a waiver. The last part of the memorandum discusses the potential use of the Secretary's waiver authority in the five specific examples you specified. Given the general interest in this topic, CRS may provide some or all of the information contained in this memorandum to other congressional requesters.

Secretarial Case-by-Case Waiver Authority Under the ESEA

Section 9401 grants the Secretary of Education (hereafter referred to as the Secretary) the authority to issue waivers of any statutory or regulatory requirement of the ESEA for a state educational agency

(SEA), LEA, Indian tribe, or school (through an LEA) that receives funds under an ESEA program and requests a waiver.[1] 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),[2] 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);
- maintenance of effort (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 (Section 9501);
- 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 (Section 9522);
- prohibitions against use of funds for religious worship or instruction (Section 9505);
- certain prohibitions against use of funds for sex education (Section 9526); and
- certain ESEA Title I-A school selection requirements.

Waivers granted under the authority of Section 9401 may not exceed four years, except that they may be extended if the Secretary determines that the waiver has contributed to improved student achievement and

[1] 20 U.S.C. § 7861. See also, U.S. Department of Education, *Non-Regulatory Guidance on Title I, Part A Waivers*, January 2009.

[2] See the subsequent section of the memorandum for a discussion of the provisions included in Section 1111(b).

is in the public interest. In contrast, waivers are 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 of Education is required to publish a notice of the decision to grant a waiver in the *Federal Register*.[3] 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.[4]

Title I-A Waiver Authority

Given that the focus of this memorandum is on the accountability provisions included in Title I-A, Title I-A was also examined to determine whether there are any provisions in statutory language that address the Secretary's waiver authority, or limits on that authority, with respect to accountability provisions. None were identified.[5]

Current Use of Waiver Authority Under Section 9401

As previously mentioned, ED publishes an annual accounting of all waivers granted under Section 9401. The most recent announcement covers waivers granted during calendar year 2009.[6] During calendar year 2009, the Secretary of Education issued 351 waivers. Over half of the waivers granted (196 waivers) were provided to LEAs and schools with respect to the treatment of their Title I-A funds granted under the American Recovery and Reinvestment Act (ARRA; P.L. 111-5) when calculating the amount of Title I-A funds that were required to be used to provide public school choice and supplemental educational services (SES) and when calculating their per-pupil amount for SES, as well as to waive a carryover limitation for Title I-A funds more than once every three years. The majority of the remaining waivers addressed ESEA-specific issues (as opposed to issues resulting from ARRA enactment) such as the "growth model" pilot and the "differentiated accountability" pilot. Examples of the types of waivers granted under Section 9401 during calendar year 2009 appear below.

- Four waivers were granted to allow states to implement growth models.
- Three waivers were granted to states to permit the implementation of a differentiated accountability model.
- The Secretary granted waivers of the regulatory requirement that an LEA provide notice of public school choice options at least 14 days before the start of the school year to 23 states. Waivers were only granted with respect to students in schools that were newly identified for improvement under Section 1116 for the 2009-2010 school year, or that could have possibly exited improvement status for the 2009-2010 school year but did not.

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[3] 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.

[4] 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.

[5] The Secretary does have waiver authority related to MOE requirements under Title I-A, but this authority does not address Title I-A accountability requirements.

[6] U.S. Department of Education, "Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended," 75 *Federal Register* 56834-56856, September 16, 2010.

- The Secretary granted waivers to 28 states to allow state educational agencies to approve schools or LEAs in need of improvement to be SES providers.

While waivers allowing states to implement growth models continue to be granted based on the Secretary's authority under Section 9401, specific requirements regarding growth models are now included in regulations.[7] In the October 2008 regulations[8] issued by Secretary Spellings, the specific requirements that states must meet to have a growth model approved were included. The regulations also specifically state that the Secretary will continue to use the authority provided under Section 9401 to allow states to implement growth models.

A Legal Analysis of the Scope of the Secretary's Waiver Authority

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 significant, 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.[9] According to the court, "the language of the provision governing waivers grants the Secretary broad discretion to deny states' waiver requests."[10]

Less judicial guidance is available regarding the full reach of the Secretary's authority to grant statutory waivers.[11] 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.[12] Based on the plain language of the statute, the scope of ED's waiver authority appears to be quite broad, suggesting that ED does indeed have the authority to waive the various requirements of the ESEA that you specified in your request. 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 at the same time as it enacted the provisions you identified, 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.

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.

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[7] 34 CFR 200.20.

[8] The regulations are available online at http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/102908a.html.

[9] State of Connecticut v. Spellings, 453 F. Supp. 2d 459, 496 (D. Conn. 2006), *aff'd on other grounds*, Connecticut v. Duncan, 612 F.3d 107 (2d Cir. 2010), *cert. denied* 131 S. Ct. 1471 (2011).

[10] Id. at 495.

[11] Given that your request questioned ED's authority to waive certain statutory requirements, this memorandum 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.

[12] *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002); Caminetti v. United States, 242 U.S. 470 (1917).

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.[13] Specifically, the plaintiffs argued that the waiver authority violates separation of powers principles because it was an unconstitutional delegation of 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."[14] Waiver authorities under other federal statutes have withstood similar "nondelegation doctrine" challenges.[15] 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 he may find necessary and proper in the public interest."[16] 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.[17] 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.[18] 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.'"[19] 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.[20] In

[13] P.L. 109-13, codified at 8 U.S.C. § 1103 note.

[14] Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 126 (D.D.C. 2007) (citations omitted).

[15] See, e.g., 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).

[16] 29 U.S.C. § 628.

[17] AARP v. EEOC, 383 F. Supp. 2d 705 (E.D. Pa. 2005).

[18] AARP v. EEOC, 390 F. Supp. 2d 437 (E.D. Pa. 2005).

[19] 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.

[20] 42 U.S.C. § 1315.

general, the courts have been unwilling to circumscribe the Secretary's authority to approve experimental projects under Section 1115 and have rejected challenges to such waivers on numerous occasions.[21] 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."[22] 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."[23] 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.[24]

Taken together, these 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, as a general matter, ED does have the authority to waive the statutory requirements that you have specified.

Secretary's Authority to Grant a Waiver in Exchange for Another Action

You also questioned whether the Secretary, as a condition of granting a waiver, could require a waiver applicant to take another action that is not currently required by law, including an action that appears to be unrelated to the subject of the waiver. Given the novelty of the question, it is unclear how a reviewing court would rule on such an issue.

On the one hand, as noted above, ED is authorized to grant waivers only in response to a waiver request submitted by a grantee. Thus, while the Secretary cannot unilaterally impose new requirements on grantees, ED could theoretically invite applications for waivers and implicitly or explicitly condition their approval on a grantee's willingness to submit to new conditions. Such conditions would not necessarily be considered to be requirements, given that a grantee's compliance would be purely voluntary, and any grantee who did not want to submit to such conditions would simply forgo seeking a waiver on that basis. Indeed, a grantee could decide instead to initiate a separate request for an unconditional waiver of the same requirements.

On the other hand, if the Secretary did, as a condition of granting a waiver, *require* a grantee to take another action not currently required under the ESEA, the likelihood of a successful legal challenge might increase, particularly if ED failed to sufficiently justify its rationale for imposing such conditions. Under

[21] See, e.g., 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).

[22] 5 U.S.C. § 706(2)(A).

[23] Beno v. Shalala, 30 F.3d 1057, 1073 (9th Cir. 1994) (quoting Motor Vehicle Mfr. Ass'n v. State Farm Ins., 463 U.S. 29, 44 (1983)).

[24] Id.

such circumstances, a reviewing court could deem the conditional waiver to be arbitrary and capricious or in excess of the agency's statutory authority. Ultimately, the resolution of such a question would probably depend on the facts of a given case.

Examination of the Secretary's Waiver Authority in Specific Instances

This section of the memorandum addresses areas in which you specifically questioned the Secretary's ability to grant waivers on a case-by-case basis under the authority granted by Section 9401. As you requested, background information related to each of these areas has been kept to a minimum.[25]

Academic Standards and Assessments

Sections 1111(b)(1) and (3) include requirements related to academic standards and assessments, respectively. Under Section 1111(b)(1), states participating in ESEA Title I-A[26] are required to develop and implement academic content and achievement standards in reading/language arts, mathematics, and science. The academic achievement standards must include at least three levels of performance: basic, proficient, and advanced. The same academic content and achievement standards must apply to all students.[27] Section 1111(b)(3) requires states to administer annual reading/language arts and mathematics assessments in grades 3-8 and once in high school (grades 10-12) and in science at least once in each of three grade levels (i.e., grades 3-5, grades 6-9, and grades 10-12). The assessments must be aligned with the state's academic content and achievement standards. Section 1111(b)(3) also includes provisions related to the participation of all students in assessments, accommodations for students with disabilities and limited English proficient (LEP) students, exceptions to assessment requirements for certain LEP students and students who have not attended a single school for a full academic year, and assessment data reporting requirements.

Waiver Authority

As noted above, ED appears to have the authority to waive ESEA requirements related to standards and assessments, as long as ED 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 Section 9401.

Accountability Requirements, Including Proficiency Timeline

Section 1111(b)(2) includes accountability requirements that states must agree to incorporate into their state plans for Title I-A and their state accountability systems. It requires that state accountability systems be based on the academic standards and assessments required under Sections 1111(b)(1) and (3), be the same accountability system for all public schools (except that public schools and LEAs that do not receive Title I-A funds are not subject to outcome accountability requirements included in Section 1116), and

[25] For a more detailed discussion of 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.

[26] Currently, all states participate in Title I-A.

[27] One exception to this provision involves students with disabilities. For more information, see CRS Report R40701, *Alternate Assessments for Students with Disabilities*, by Erin D. Lomax.

incorporate rewards and sanctions based on student performance. Section 1111(b)(2) defines adequate yearly progress (AYP) and includes requirements for the disaggregation of data by specified subgroups provided a minimum group size is met for each subgroup.[28] AYP is determined based on three components: student academic achievement on the required state reading/language arts and mathematics assessments,[29] 95% student participation rates in assessments by all students and for any subgroup for which data are disaggregated, and performance on another academic indicator, which must be graduation rates for high schools.[30] Section 1111(b)(2) also requires states to develop annual measurable objectives (AMOs) that are established separately for reading/language arts and mathematics assessments, are the same for all schools and LEAs, 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 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 established by the state must require the percentage of students reaching proficiency on the assessments to increase in equal increments at least once every three years based on the goal that all students meet or exceed the state's proficient level of achievement by the end of the 2013-2014 school year. Section 1111(b)(2) also contains a "safe harbor" provision that can be used to determine whether a group of students is considered to have satisfied the academic proficiency portion of the AYP determination. It provides for a uniform averaging procedure that may be used to determine whether schools are making AYP and includes a requirement that the accountability provisions under the ESEA will be overseen in accordance with state charter school law.

Waiver Authority

As noted above, ED appears to have the authority to waive ESEA requirements related to accountability, including the timeline and AMOs, as long as ED 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 Section 9401.

Corrective Action and Restructuring Requirements

Section 1116(b) prescribes requirements with which schools receiving Title I-A funds must comply if they fail to make adequate yearly progress for at least two consecutive years. When Title I-A schools do not make AYP for two or more consecutive years, they become subject to a range of increasingly severe performance-based accountability requirements, which are coupled with technical assistance provided by the LEA.

After not making AYP for two consecutive years, a Title I-A school is identified for school improvement. Being designated for school improvement carries with it the requirement to develop or revise a school plan designed to result in the improvement of the school. LEAs are required to provide schools within their jurisdictions with technical assistance in the design and implementation of school improvement plans. Schools identified for improvement must use at least 10% of their Title I-A funding for professional development. All students attending Title I-A schools identified for school improvement also must be offered public school choice—the opportunity to transfer to another public school within the same LEA.[31]

[28] States determine what the minimum subgroup size is.

[29] Results from the science assessments do not have to be included in the AYP calculation.

[30] States select the other academic indicator for elementary and middle schools.

[31] For further information on public school choice, see CRS Report RL33506, *School Choice Under the ESEA: Programs and* (continued...)

Under public school choice, students must be afforded the opportunity to choose from among two or more schools, located within the same LEA, that have not been identified for school improvement, corrective action, or restructuring, and that also have not been identified as persistently dangerous schools.[32] LEAs are required to provide students who transfer to different schools with transportation and must give priority in choosing schools to the lowest-achieving children from low-income families. LEAs may not use lack of capacity as a reason for denying students the opportunity to transfer to a school of choice.[33] In instances where there are no eligible schools in the student's LEA, LEAs are encouraged to enter into cooperative agreements with surrounding LEAs to enable students to transfer to an eligible public school.

If, after being identified for school improvement, a school does not make AYP for another year, it must be identified for a second year of school improvement by the end of that school year. All students attending a school identified for a second year of school improvement must continue to be offered the option of attending another eligible public school within the same LEA. In addition, students from low-income families who continue to attend the school must be offered the opportunity to receive supplemental educational services.[34] SES are educational activities, such as tutoring, that are provided outside of normal school hours and which are designed to augment or enhance the educational services provided during regular periods of instruction. Supplemental educational services may be provided by a non-profit entity, a for-profit entity, or the LEA, unless such services are determined by the SEA to be unavailable in the local area.[35] The SEA is required to maintain a list of approved SES providers (including those offering services through distance learning) from which parents can select. LEAs may be required to expend up to an amount equal to 20% of their Title I-A grants on transportation for public school choice and supplemental educational services combined.[36]

If a school fails to make AYP for a total of two years after being identified for school improvement, it must be identified for corrective action. For schools identified for corrective action, LEAs must continue to provide technical assistance, offer public school choice and supplemental educational services, and must implement one of the following corrective actions: replacing school staff relevant to the school not making AYP; implementing a new curriculum; limiting management authority at the school level; appointing an expert advisor to assist in implementing the school improvement plan; extending the school year or the school day; or restructuring the school's internal organization. If a school does not make AYP for a third year after being identified for school improvement, the LEA must begin to plan for restructuring, while continuing to implement the requirements of corrective action. Restructuring of the school must involve implementation of some form of alternative governance structure, such as reopening the school as a charter school, replacing all or most of the school staff, contracting with an education management organization to operate the school, or turning the school over to the SEA. If an additional year passes without the school making AYP, the LEA must implement restructuring of the school.

(...continued)

Requirements, by David P. Smole.

[32] For more information on persistently dangerous schools, see CRS Report RL33371, *K-12 Education: Implementation Status of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Gail McCallion.

[33] 34 CFR 200.44(d).

[34] For further information on supplemental educational services, see CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*, by David P. Smole.

[35] Schools identified for improvement, corrective action, or restructuring, and LEAs identified for improvement or corrective action, lose their eligibility to supplemental educational services providers.

[36] More specifically, LEAs are to use an amount equal to 5% of their Title I-A grant for public school choice and transportation costs, 5% for SES, and up to an additional 10% for either, to the extent needed. These funds may be taken from the LEA's Title I-A grant or from other sources.

Any of the sanctions described above may be delayed for up to one year if the school makes AYP for a single year, or if the school's failure to make AYP is due to unforseen circumstances, such as a natural disaster or a significant decline in financial resources of the LEA or school. Schools that make AYP for two consecutive years may no longer be identified for school improvement, nor subject to the sanctions associated with school improvement, corrective action, or restructuring.

Waiver Authority

As noted above, ED appears to have the authority to waive ESEA requirements related to corrective action and restructuring, as long as ED 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 Section 9401.

Public School Choice Requirements

As discussed above, schools failing to make AYP for at least two consecutive years are required to offer students an opportunity to transfer to another public school in the LEA that is making AYP (Section 1116(b)(1)(E)). During the 2008-2009 school year, the latest data available, only 2.7% of students eligible for public school choice actually took advantage of the option.[37] This relatively low take-up rate on public school choice may be due to numerous factors including attending a school in an LEA where there are no schools making AYP, parents failing to be informed about the option to transfer their child to another school, or parents choosing to keep their child at their current school.[38] The Administration's blueprint for ESEA reauthorization[39] would make the provision of public school choice optional.

Waiver Authority

As noted above, ED appears to have the authority to waive ESEA requirements related to public school choice, as long as ED 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 Section 9401.

Secretary's Ability to Restrict Interventions to the Lowest Performing 5% of Schools

As discussed above, currently the outcome accountability requirements related to failing to make AYP for two consecutive years or more are applied to all Title I-A schools that meet this criteria. Based on test data from the 2008-2009 school year, over 14,500 Title I-A schools (27.7% of Title I-A schools) had been identified for improvement, corrective action, or restructuring for the 2009-2010 school year. Of these schools, nearly 8,000 schools had been identified for corrective action or restructuring. In its blueprint for reauthorization of the ESEA, the Administration proposes replacing the current system of outcome accountability with one that would focus on the lowest performing schools. In addition, in 2010, ED released new regulations for the School Improvement Grant program (Section 1003(g)) that requires states and LEAs to use these funds to focus primarily on the lowest performing 5% of schools.

[37] Data provided by the U.S. Department of Education, November 19, 2010, through the ED Data Express system.

[38] For more information, see http://www2.ed.gov/rschstat/eval/choice/nclb-choice-ses/nclb-choice-ses.pdf.

[39] The Administration's blueprint for ESEA reauthorization is available online at http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf.

Waiver Authority

As noted above, ED appears to have the authority to waive ESEA requirements related to corrective action and restructuring, as long as ED 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 Section 9401. You questioned whether ED could use this waiver authority to require states to focus their interventions on the lowest performing 5% of schools. Under Section 9401, ED is authorized to grant waivers only in response to a waiver request submitted by a grantee. Thus, ED does not appear to have the authority to spontaneously issue a waiver requiring states to focus on the lowest performing schools. However, if ED invited states to voluntarily apply for a waiver of the corrective action and restructuring requirements and requested that such states focus on the lowest performing schools as a condition for receiving such a waiver, then ED would presumably be acting within the scope of its waiver authority when approving waiver requests so long as ED otherwise complied with the statutory requirements regarding the granting of such waivers.[40]

[40] It is important to note that this analysis may change if, instead of approving waiver requests on a case-by-case basis, ED summarily approved waivers for all 50 states. Under the latter scenario, a court might inquire more closely whether ED carefully considered each waiver application and whether such waivers were consistent with the underlying statutory purposes.