

CRS Report for Congress

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

Updated February 13, 2008

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

Nancy Lee Jones
Legislative Attorney
American Law Division



**Prepared for Members and
Committees of Congress**

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

Summary

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

On December 4, 2004, President Bush signed P.L. 108-446, which reauthorized and amended IDEA. Among other things, P.L. 108-446 was aimed at better coordinating special education with the requirements of NCLB. Changes to IDEA have been in effect since the 2005-2006 school year.

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

This report will be updated to reflect major congressional action or major regulatory actions by ED. Additional legislative action could result in connection with consideration of the Elementary and Secondary Education Act (ESEA), which is authorized through FY2008. It is generally assumed that the 110th Congress will actively consider legislation to amend and extend the ESEA. Such legislation could impact IDEA — for example, regarding how adequate yearly progress (AYP) is assessed for children with disabilities and how special education teachers are determined to be highly qualified.

Contents

Introduction	1
Overview of Selected IDEA and NCLB Provisions	2
Overview of NCLB and IDEA Assessment and Accountability Requirements	3
Overview	3
NCLB Assessment and Accountability Requirements	3
ED NCLB Regulatory Requirements Regarding Children with Disabilities	5
IDEA Assessment and Accountability Requirements	12
IDEA Assessment Requirements in the IEP	12
IDEA State and Local Requirements on Student Achievement	13
NCLB and IDEA Teacher Requirements	13
Overview	13
NCLB Requirements	14
IDEA Requirements	16
IDEA State and Local Personnel Requirements	19
Department of Education Non-Regulatory Guidance	
Regarding IDEA and NCLB	22
Public School Choice	22
Supplemental Educational Services	22
Selected Issues and Judicial Decisions	23
Exclusion of Children with Disabilities	24
Highly Qualified Teachers	24
Judicial Decisions	25

List of Tables

Table 1. Comparison of Definitions of “Highly Qualified” Teachers Under the Elementary and Secondary Education Act (ESEA) and Under the Individuals with Disabilities Education Act (IDEA)	20
--	----

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

Introduction

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

On December 4, 2004, President Bush signed P.L. 108-446, which reauthorized and amended IDEA. Among other things, P.L. 108-446 was aimed at better coordinating special education with the requirements of NCLB. Changes to IDEA made by P.L. 108-446 have been in effect since school year 2005-2006. Additional legislative action could result in connection with consideration of the Elementary and Secondary Education Act (ESEA), which is authorized through FY2008. It is generally assumed that the 110th Congress will actively consider legislation to amend and extend the ESEA. Such legislation could impact IDEA — for example, regarding how adequate yearly progress (AYP) is assessed for children with disabilities and how special education teachers are determined to be highly qualified.

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

¹ 20 U.S.C. §1400 *et seq.*

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

Overview of Selected IDEA and NCLB Provisions

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

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

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

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

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

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

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

Overview of NCLB and IDEA Assessment and Accountability Requirements

Overview. NCLB requires that all states have in place a single state accountability system aimed at reducing achievement gaps between higher-achieving students and lower-achieving students, including those children with disabilities who are lower-achieving. NCLB permits use of alternate standards-based assessments for children with disabilities for whom the statewide assessment is inappropriate. Final regulations, issued in December 2004, clarified that relatively small groups of the most significantly cognitively disabled students (1% of all children tested) can meet the requirements of the statewide system based on alternate achievement standards. That is, their scores of “proficient” or “advanced,” based on alternate assessments and alternate achievement standards, may be counted as such in adequate yearly progress determination as discussed below. In April 2005, the Secretary of Education announced a new policy that would permit other children with disabilities who experience “persistent academic difficulties” (an additional 2% of those tested) to meet achievement requirements based on “modified achievement standards.” All other children with disabilities must be assessed based the same achievement standards that non-disabled children are assessed on (although some of these children with disabilities may be assessed with alternate assessments). Final regulations to implement this policy were published in the *Federal Register* on April 9, 2007.

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

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

⁶ For further information on NCLB testing and accountability requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*; CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*; and CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, all by Wayne C. Riddle.

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

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

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

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

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

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

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

See, also, the non-regulatory guidance issued by ED regarding public school choice, discussed below.

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

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

ED NCLB Regulatory Requirements Regarding Children with Disabilities. Since the enactment of NCLB, ED has issued two sets of regulations regarding the assessment of certain children with disabilities served under IDEA. One group is those with the most significant cognitive disabilities, for whom alternate assessments based on alternate achievement standards may be used to assess whether they meet AYP. The other group includes students who may be making progress toward grade-level achievement but are not likely to do so as quickly as other students. The AYP of these students may be assessed by alternate assessments based on modified academic achievement standards.

Regulations Regarding Children with the Most Significant Cognitive Disabilities. On December 9, 2003, ED issued a final rule amending the regulations governing Title I, Part A of the Elementary and Secondary Education Act (ESEA) to clarify school accountability for the academic achievement of students with the most

¹¹ ED notes that

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

In addition, ED notes that

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

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

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

significant cognitive disabilities.¹⁴ The rule emphasizes that all students — including all children with disabilities — are to be assessed in relationship to the state’s established academic content standards. At the same time, students may be assessed by different means. Thus the rule clarifies that the achievement of most children with disabilities will be measured against a state’s grade-level achievement standards for accountability purposes, while only those with the most significant cognitive disabilities can be measured against alternate 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 allows states to use test scores based on alternate achievement standards for students with the most significant cognitive disabilities to calculate adequate yearly progress (AYP), as long as the percentage of these students at the school district or state level who are counted as “proficient” or “advanced” does not exceed 1% of all students assessed (or about 9% of all children with disabilities according to ED).¹⁵ However, if a school district can document that the number of students with the most significant cognitive impairments exceeds 1%, the district can request an exception from the state.¹⁶ The final rule provides some flexibility to states in defining children eligible for alternate 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 alternate academic achievement standards.”¹⁷

Children Assessed Against Modified Achievement Standards. On April 7, 2005, the Secretary of Education announced additional flexibility in ED’s AYP policy.¹⁸ In addition to permitting up to 1% of tested students achieving proficiency on **alternate** achievement standards to be counted in AYP calculation, an additional 2% of tested students¹⁹ achieving proficiency on **modified** academic achievement standards (MAAS) can be counted in these calculations. ED released further specifics on May 10, 2005,²⁰ which focused mainly on short-term options.

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

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

¹⁶ Prior to the final regulations discussed below, the Secretary of Education could grant state exceptions to the 1% rule. Such exceptions are no longer permitted

¹⁷ 68 *Federal Register* 68702, December 9, 2003.

¹⁸ Summaries of the Secretary’s announcement may be found at [<http://www.ed.gov/news/pressreleases/2005/04/04072005.html>] for the press release, and [<http://www.ed.gov/policy/elsec/guid/raising/alt-assess-long.html>] for the “full version” of the policy.

¹⁹ As with the 1% cap, the 2% cap does not apply to individual schools.

²⁰ See [<http://www.ed.gov/news/pressreleases/2005/05/05102005.html>]. This announcement provided short-term or transition options that states could have used for the 2005-2006

ED issued proposed regulations on these provisions on December 15, 2005,²¹ and issued final regulations on April 9, 2007.²² The final regulations regarding flexibility under the “2% rule” amend the regulations related to ESEA as amended by NCLB and regulations related to IDEA as amended by P.L. 108-446.²³

Additions to Title I Regulations. In general, this policy is aimed at “a small group of students whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level achievement standards in the same time frame as other students.”²⁴ The preamble to the final regulations clarifies that these students are not limited to students with disabilities achieving close to grade level, that they may be in any of the disability categories listed in the IDEA, and may represent a wide spectrum of abilities.²⁵ For this group of children with disabilities, states may elect to develop or modify assessments based on modified academic achievement standards for appropriate grade-level content. In all cases, the IEP teams (discussed below) continue to make the decisions about which children with disabilities will take which assessment.

The rationale for identifying this second group of children with disabilities is that

[a] grade-level assessment is too difficult and, therefore, does not provide data about a student’s abilities or information that would be helpful to guide instruction. An alternate assessment based on alternate academic achievement standards [which is appropriate for students with the most significant cognitive disabilities] is too easy and is not intended to assess a student’s achievement across the full range of grade-level content.²⁶

The final regulations allow states to develop modified academic achievement standards for such students that would be based on the state’s grade-level standards, “although the assessment may be less difficult than the State’s regular assessment.”²⁷ The preamble to the final regulations provides some general examples of how states might design alternate assessments based on modified achievement standards. The state could remove more difficult items from the assessments and replace them with simpler items. Another strategy would be to reduce the number of alternative answers on multiple-choice items. Other strategies include developing alternate assessments

²⁰ (...continued)
school year.

²¹ 70 *Federal Register*, December 15, 2005.

²² 72 *Federal Register*, April 9, 2007.

²³ For a discussion of final IDEA regulations, see CRS Report RL33649 *The Individuals with Disabilities Education Act (IDEA): Final Regulations for P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

²⁴ 72 *Federal Register*, 17748, April 9, 2007.

²⁵ 72 *Federal Register*, 17749, April 9, 2007.

²⁶ 72 *Federal Register*, 17748, April 9, 2007.

²⁷ 72 *Federal Register* 17750, April 9, 2007.

that incorporate technology to provide for more flexibility in the presentation of material and permit more flexibility in how students respond to test items (e.g., by dictating answers rather than responding on a paper and pencil test).²⁸

The final regulations make clear that any alternate assessment based on modified achievement standards must meet several criteria. Although an alternate assessment may be easier than the assessment for the majority of students, it must still be based on the same grade-level academic content standards. In addition, these assessments must meet technical standards, “including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.”²⁹

As with the 1% rule discussed above, states will be allowed to count proficient and advanced scores based on MAAS in determining AYP; however, proficiency or higher scores on these tests would be capped at 2% of all students tested or about 20% of students with disabilities.³⁰ Proficient or advanced scores in excess of the 2% limit would not count toward AYP. Instead, those scores would only be counted in the denominator of the AYP fraction as non-proficient scores.³¹ In addition, the final regulations introduce a 3% cap, which is the combined cap for AYP determination for students assessed on alternate assessments.³²

The final regulations provide for certain exceptions to the 1% and 2% caps in combination with the overall 3% cap. The exceptions for states are that:

- States may only exceed the 2% cap if they are below the 1% cap.
- States may never exceed the 3% combined cap.

The exceptions for LEAs are the following:

- States may continue to grant local exceptions to the 1% cap.³³
- LEAs may exceed the 2% cap only if they are below 1% cap.

²⁸ Unlike alternate achievement standards, MAAS cannot be based on out-of-level testing (for example, assessing a student in 5th grade based on an assessment suitable for 3rd grade students). As the preamble to the final regulations notes, out-of-level tests “cannot be used as an alternate assessment based on modified academic achievement standards because, by definition, an out-of-level assessment does not cover the same content as an assessment based on grade-level academic content standards.” *72 Federal Register* 17750, April 9, 2007.

²⁹ *72 Federal Register* 17750, April 9, 2007.

³⁰ This estimate is provided at *72 Federal Register* 17749, April 9, 2007.

³¹ See *72 Federal Register* 17780, April 9, 2007 (34 CFR 200.13(c)(7)).

³² See *72 Federal Register* 17779, April 9, 2007 (34 CFR 200.13(c)(3)).

³³ An LEA seeking a state exemption must demonstrate that and explain why the percentage of children with the most significant cognitive disabilities exceeds 1%. In addition, states must regularly monitor the justifications for such exemptions. Note: there is no state exception for the 1% cap. See *72 Federal Register* 17779, April 9, 2007 (34 CFR 200.13(c)(4)).

- LEAs may exceed the 3% combined cap if granted an exception to the 1% cap but only by the amount of the exception.

No caps apply to schools, but if some schools in an LEA exceed either cap, other schools will have to be lower to achieve the LEA's overall caps.³⁴

The final regulations require that states use a documented and valid process for setting MAAS so that the standards

- are aligned with the state's academic content standards for the grade in question;
- are challenging for these students, but may be easier than the grade-level standards for most students; and
- must describe at least three levels of achievement: basic, proficient, and advanced.³⁵

The final regulations provide state requirements with respect both to students assessed based on alternate standards and to students assessed based on modified standards. States must

- establish and monitor guidelines for IEP teams regarding the determination of students with the most significant cognitive disabilities and students to be assessed based on modified academic achievement standards;
- provide IEP teams with clear explanations of how grade-level academic achievement standards differ from alternate and modified standards; and
- ensure that parents are informed if their children will be assessed based on alternate or modified standards.³⁶

The final regulations provide additional state requirements with respect to students assessed based on modified academic achievement standards. These include that states must ensure

- that these students have access to grade-level instruction;
- that these students are not prevented from pursuing a regular high school diploma; and
- that the IEP team annually reviews the appropriateness for the student of assessment based on modified standards.³⁷

³⁴ For a summary of these cap provisions, see the table at *72 Federal Register* 17780, April 9, 2007.

³⁵ 34 CFR §200.1(e), *72 Federal Register* 17778, April 9, 2007.

³⁶ 34 CFR §200.1(f)(1), *72 Federal Register* 17778, April 9, 2007.

³⁷ 34 CFR §200.1(f)(2), *72 Federal Register* 17778-17779, April 9, 2007.

The final regulations make certain technical changes to the ESEA/NCLB assessment requirements with respect to children with disabilities. The changes include the following:

- States are prohibited from setting higher minimum subgroup numbers (for determining when it is permissible not to consider a particular subgroup for separate AYP calculations) for some subgroups, such as children with disabilities and limited English proficient students.³⁸
- States are no longer required to use a student's first attempt at a state assessment. Instead, a state could use a student's best score from multiple testing to determine AYP.³⁹
- States are permitted to include scores of students who exit from special education in the AYP calculation for children with disabilities for up to two years to avoid penalizing states for this positive outcome.⁴⁰

The final regulations provide the Secretary of Education with the ability to grant states flexibility for implementing modified academic achievement standards through the 2008-2009 school year if states can demonstrate that they are "moving expeditiously to adopt and administer" these standards. To qualify for this flexibility, a state must meet criteria that the Secretary established.⁴¹

Additional Resources. To assist states to implement these new requirements, ED will be providing funds through competitive grants to help in the development of new assessments.⁴² ED proposes to provide \$7.6 million under the Title I Enhanced Assessment Grants program and \$13.5 million under the IDEA General Supervision Enhancement Grants program. In addition, ED notes that "States also may use funds from Title I, Title VI State Assessment Grants, and the IDEA to develop these new assessments."⁴³

Additions to IDEA Regulations. The *Federal Register* of April 9, 2007, also amends the IDEA regulations.⁴⁴ A new paragraph reiterates several requirements added to the Title I regulations and adds several requirements, including

- that states must ensure the participation of all children with disabilities in state and district-wide assessments, including those required under ESEA as amended by NCLB;

³⁸ 34 CFR §200.7(a)(2)(ii), *72 Federal Register* 17779, April 9, 2007.

³⁹ 34 CFR §200.20(c)(3), *72 Federal Register* 17780, April 9, 2007.

⁴⁰ 34 CFR §200.20(f)(2)(i)(B), *72 Federal Register* 17780, April 9, 2007.

⁴¹ 34 CFR §200.20(g), *72 Federal Register* 17780-17781, April 9, 2007.

⁴² See *72 Federal Register* 15126-15129 March 30, 2007.

⁴³ The U.S. Department of Education. *Measuring the Achievement of Students with Disabilities*, April 2007, p. 2.

⁴⁴ A new paragraph is added to the IDEA regulations (34 CFR §300.160) at *72 Federal Register* 17781, April 9, 2007.

- that states must provide guidelines on testing accommodations so that accommodations do not invalidate assessment results;⁴⁵
- that states and LEAs (with respect to district-wide assessments) must report the number of children with disabilities assessed under the various alternatives listed in the box below; and
- that states and LEAs (with respect to district-wide assessments) must use principles of “universal design,” to the extent possible, in the development and administration of assessments.⁴⁶

Summary of NCLB Assessment Requirements

In general, the final rule together with the final rule of December 2005 divides the assessment of children with disabilities into five 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 alternate assessments based on the grade-level achievement standards;
- students assessed with assessments based on modified achievement standards (“proficient” or “advanced” scores on such tests limited to 2% of all children tested); and
- students assessed with alternate assessments based on alternate achievement standards (“proficient” or “advanced” scores on such tests limited to 1% of all children tested).

⁴⁵ According to draft non-regulatory guidance,

If a student uses an accommodation that results in an invalid score, the student is considered to be a nonparticipant under both Title I and the IDEA. If a student takes an assessment with an accommodation that invalidates the score, the assessment is no longer measuring the concepts it was intended to measure. Therefore, the score does not accurately reflect the student’s academic achievement. U.S. Department of Education. *Modified Academic Achievement Standards Non-regulatory Guidance*, Draft, April 2007, p. 32.

⁴⁶ The general principle of universal design is that products and services (in this case, assessments of academic achievement) be devised so that they may be used by as many people (regardless of circumstance) as possible.

IDEA Assessment and Accountability Requirements

IDEA Assessment Requirements in the IEP. A key component of the provision of special education is the IEP, which is based on “a written statement for each child with a disability” developed, reviewed, and revised by the IEP team. In addition to specifying the special education and related services the child will receive, the IEP must peg the child’s educational goals to the LEA’s general educational goals for nondisabled students, presumably including AYP standards.⁴⁷ The IEP must assess the child’s current level of educational and functional performance, including how the child’s disability impacts his or her “involvement and progress in the general educational curriculum.” The IEP must specify the child’s needs (and how those needs will be met) so that the child can be involved in and progress in the general school curriculum. Progression must be gauged in terms of annual measurable goals, presumably including progress in reaching proficiency on state standards. In addition to annual goals, short-term objectives and benchmarks are required *only* for those children with disabilities “who take alternate assessments aligned to alternate achievement standards.”⁴⁸ Finally, parents must be regularly informed on the child’s progress (for example, by report cards) at least as frequently as other parents are informed of their children’s progress.

As discussed below, IDEA requires states and LEAs to ensure the involvement of children with disabilities in statewide and districtwide assessments. It is the IEP team that determines the extent to which the child requires accommodations⁴⁹ to participate in these assessments or, alternatively, determines and justifies why the child is to take an alternate assessment.⁵⁰

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

It continues to be necessary to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency and the teacher that a child will progress at a specified rate. Despite this, public agencies and teachers have continuing obligations to make good faith efforts to assist the child

⁴⁷ Final IDEA regulations clarifies that performance goals must be “the same as the State’s objectives for progress by children in its definition of adequate yearly progress, including the State’s objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the ESEA, 20 U.S.C. 6311” 34 C.F.R. §300.157(a)(2).

⁴⁸ Presumably this refers to the significantly cognitively disabled, as discussed above with respect to NCLB regulations.

⁴⁹ To accommodate a child’s disability, he or she might be allowed to take the assessment in an alternate, quiet location, or might be read test questions and provide verbal responses, rather than marking an answer sheet.

⁵⁰ While each IEP team determines whether an individual child with a disability is to be assessed on modified or alternate achievement standards, such determinations do not influence how many children may demonstrate AYP based on modified or alternate standards. As discussed above, ED policy sets percentage caps on these AYP determinations. IDEA permits states to use funds reserved for “state-level activities” under §611(e)(2) for “the development and provision of alternate assessments” (§611(e)(2)(C)(x)).

in achieving the goals and objectives or benchmarks listed in the IEP, including those related to transition services.⁵¹

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

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

IDEA requires states to establish performance goals and indicators for children with disabilities. These goals and indicators are aimed at promoting the overall purposes of the act. In addition, they must be the same as the state’s definition of AYP under ESEA as amended by NCLB, as discussed above and address dropout and graduation rates of children with disabilities, as well as other factors that the state might identify. States must report annually to the Secretary of Education and to the general public on progress towards meeting these goals. Such reporting requirements may be tied in with ESEA reporting requirements.⁵²

NCLB and IDEA Teacher Requirements

Overview. The ESEA, as amended by NCLB, requires that each state educational agency (SEA) receiving ESEA Title I, Part A funding (compensatory education of disadvantaged students)⁵³ must have a plan to ensure that all public-school teachers teaching in *core academic subjects*⁵⁴ within the state will meet the definition of a “highly qualified” teacher, by no later than the end of the 2005-2006 school year.⁵⁵ (Note: as discussed below, this deadline has been extended for one school year under certain circumstances.)

⁵¹ 64 *Federal Register* 12598, March 12, 1999.

⁵² ESEA §1111(b)(2)(C)(v)(II)(cc).

⁵³ Recall that all states currently receive ESEA Title I-A grants.

⁵⁴ Core subjects are defined as “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.” ESEA §9101(11).

⁵⁵ The relevant sections of ESEA are §1119 regarding qualifications for teachers and paraprofessionals, and §9101(23), the definition of “highly qualified.”

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

NCLB Requirements.⁵⁶ The NCLB “highly qualified” definition applies to public school teachers who teach core subjects and differentiates between new and veteran teachers and between elementary and middle/secondary school teachers. To be highly qualified, a *public elementary or secondary school teacher* must meet the following requirements:

- **Every public elementary or secondary school teacher**, regardless of whether he or she is new or experienced, (1) must have full state certification (a charter school teacher must meet the requirements in the state charter school law), (2) must not have had any certification requirements waived on an emergency, temporary, or provisional basis, and (3) must have at least a baccalaureate degree.
- Each **new public elementary school teacher** must pass a rigorous state test demonstrating subject knowledge and teaching skills in reading, writing, math, and other basic elementary school curricular areas (such tests may include state certification exams in these areas).
- Each **new public middle or secondary school teacher** must demonstrate a high level of competency in all subjects taught by (1) passing rigorous state academic tests in those subjects (may include state certification exams in those subjects), *or* (2) completing an academic major (or equivalent course work), graduate degree, or advanced certification in each subject taught.
- Each **experienced public elementary, middle, or secondary school teacher** must meet (1) the requirements just described for a new teacher (depending upon his or her level of instruction), *or* (2) demonstrate competency in all subjects taught using a “high objective uniform state standard of evaluation” (HOUSSE).⁵⁷

As part of this plan, each Title I-funded state must establish annual measurable objectives for each local educational agency (LEA) and school that, at a minimum, include annual increases in the percentage of highly qualified teachers at each LEA

⁵⁶ This section was adopted from CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*, by James B. Stedman.

⁵⁷ Among requirements, the state-set HOUSSE must provide objective information about teachers’ content knowledge in all subjects taught; be aligned with challenging state academic and student achievement standards; be applied uniformly statewide to all teachers in the same subjects and grade levels; and consider, but not be based primarily on, time teaching those subjects. It may use multiple measures of teacher competency.

and school to ensure that the 2005-2006 deadline is met, and an annual increase in the percentage of teachers receiving high quality professional development.

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

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

In March 2004, ED announced that additional flexibility could be applied in the implementation of these requirements with regard to teachers in small rural school districts, science teachers, and to teachers teaching multiple subjects.⁵⁸

- For small rural districts, ED now provides that teachers teaching core academic subjects who meet the highly qualified requirements in at least one of the subject areas they teach may have an additional three years to meet these requirements in the other subjects they might teach. States decide whether to offer this flexibility to eligible rural districts.
- For science teachers, states determine whether science teachers need to be highly qualified in each science field they teach (e.g., biology and chemistry) or highly qualified in science in general, based on how the state currently certifies teachers in these subject areas.
- For teachers of more than one core subject, ED allows states to design their HOUSSE procedures to allow a teacher to go through the process a single time to demonstrate competency in multiple subjects.

On October 21, 2005, the Secretary announced further flexibility by assuring that “States that do not quite reach the 100 percent goal by the end of the 2005-2006 school year will not lose federal funds if they are implementing the law and making

⁵⁸ A two-page fact sheet on these new policies is available at [<http://www.ed.gov/nclb/methods/teachers/hqtflexibility.html>]. A more detailed letter to each of the chief state school officers, dated March 31, 2004, is available at [<http://www.ed.gov/policy/elsec/guid/secletter/040331.html>].

a good-faith effort to reach the HQT goal in NCLB as soon as possible.”⁵⁹ To determine whether a state is making a good-faith effort, ED will examine the implementation of the HQT requirements with respect to

- The state’s definition of highly qualified teacher,
- The state’s reporting procedures regarding teacher quality to parents and the public,
- The quality of the data on highly qualified teachers that the state reports to ED, and
- The equitable distribution of highly qualified teachers among schools serving poor and minority children.

For states that are not in compliance with HQT requirements and are judged not to be making a good-faith effort, “the Department reserves the right to take appropriate action such as the withholding of funds.”⁶⁰

IDEA Requirements. P.L. 108-446 links its definition of “highly qualified” [§602(10)] to the definition in §9101(23) of the ESEA but modifies that definition as it applies to special education teachers in public schools.⁶¹ Most notably, it addresses concerns that have been raised about certain groups of special education teachers, such as those who teach more than one core academic subject.⁶²

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

⁵⁹ Policy letter to Chief State School Officers from Secretary of Education Margaret Spellings, October 21, 2005, p. 1. Available at [<http://www.ed.gov/policy/elsec/guid/secletter/051021.html>].

⁶⁰ *Ibid.*, p. 2.

⁶¹ The regulations at 34 C.F.R. §300.18(h) clarify that requirements for highly qualified teachers do not apply to private school teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children with disabilities under §300.138. This exception is also contained in §300.138(a)(1). Advocates for children with disabilities, such as the Council for Exceptional Children (CEC), oppose this exception:

CEC is dismayed to report that the final regulations do not require private school teachers to be highly qualified. CEC believes all teachers should be highly qualified, and we will renew our efforts to ensure all students with disabilities, including those in private schools, receive instruction from teachers who meet highly qualified requirements. CEC, “CEC Pleased that IDEA Regulations Are Released, Urges Department of Education to Act on Missing Pieces,” press release, August 7, 2006. Downloaded from [<http://www.cec.org>].

⁶² P.L. 108-446 cross-references the ESEA definition of “core subjects” [§602(4)].

P.L. 108-446 provides additional requirements and options to the definition with respect to special education teachers.⁶³ (See **Table 1** below for a summary of these requirements.) First of all, to be highly qualified under IDEA, *all special education teachers* (whether they teach core subjects or not) must hold at least a bachelor's degree and must obtain full state special education certification or equivalent licensure [§602(10)(B)].⁶⁴ Special education teachers who have emergency, temporary, or provisional certification do not meet the IDEA definition. In addition, P.L. 108-446 modifies the ESEA requirements with respect to two groups of special education teachers: those *who teach only core subjects exclusively to the most significantly disabled children* and those *who teach more than one core subject*. (If the teachers in these two groups meet the IDEA criteria, they are considered to have met the ESEA requirements.)

Both new⁶⁵ and veteran special education teachers who teach core subjects exclusively to children with disabilities who are assessed against alternate achievement standards under ESEA (i.e., the most significantly cognitively disabled)⁶⁶ can, of course, meet the definition of highly qualified by meeting their applicable ESEA standards.⁶⁷ Alternatively, new, as well as veteran, teachers of these students at *the elementary level* may meet the highly qualified definition by demonstrating “competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation” (i.e., HOUSSE).⁶⁸ Teachers of these students at *levels above elementary school* can meet the definition by demonstrating “subject matter knowledge appropriate to the level of instruction

⁶³ P.L. 108-446 does not amend the ESEA definition of “highly qualified.”

⁶⁴ The final IDEA regulations clarify that a special education teacher participating in an alternative certification program meeting certain requirements will be considered to have met the certification requirement (§300.18(b)(2)).

⁶⁵ The final IDEA regulations clarify a situation in which a regular teacher subsequently becomes certified as a special education teacher. Even though such a teacher is not new to the profession, he or she is considered a new special education teacher for the purposes of the highly qualified teacher definition as it applies to special education teachers (34 C.F.R. §300.18(g)(2)).

⁶⁶ As discussed above, the ESEA requires that nearly all students must be held to the same high state achievement standards. One exception with respect to children with disabilities is that those who are the most significantly cognitively disabled can be held to alternate achievement standards.

⁶⁷ That is, special education teachers at the elementary level can pass a rigorous state subject matter and teaching skills test, and special education teachers at the middle school and high school level can pass such a test or earn a degree or take a minimum number of courses in the relevant core subject or subjects.

⁶⁸ Under ESEA, the HOUSSE option is available only for veteran teachers [ESEA §9101(23)(C)(ii)]. The final IDEA regulations permit states to develop separate HOUSSE procedures for special education teachers, including a single procedure assessing multiple core subject areas, “provided that any adaptations of the State’s HOUSSE would not establish a lower standard for the content knowledge requirements for special education teachers and meets all the requirements for a HOUSSE for regular education teachers ...” (34 C.F.R. §300.18(e)).

... as determined by the State, needed to effectively teach to those standards [i.e., alternate achievement standards]” (§602(10)(C)(ii)).⁶⁹

New and veteran special education teachers *who teach two or more core subjects* exclusively to children with disabilities may qualify as highly qualified by meeting the requirements in each core subject taught under applicable ESEA provisions. Alternatively *veteran special education teachers* teaching two or more core subjects may also qualify as highly qualified based on the ESEA HOUSSE option [§602(10)(D)(ii)], which may include a single evaluation covering multiple subjects.⁷⁰ Finally, *newly hired special education teachers* teaching two or more core subjects who are already highly qualified in mathematics, language arts, or science are given two years from the date of employment to meet the highly qualified definition with respect to the other core subjects taught. This could occur through the HOUSSE option [§602(10)(D)(iii)]. This two-year window is the only exception to the 2005-2006 deadline [ESEA, §1119(a)(2)],⁷¹ explicitly applied to special education teachers, for meeting the “highly qualified” definition under either IDEA or ESEA.

Other classifications of special education teachers who do not teach core subjects would meet the IDEA definition if they meet the IDEA criteria for all special education teachers (full certification and at least a bachelor’s degree).⁷² With respect to special education teachers who provide only consultative services to other teachers, the Conference Report observes that,

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

⁶⁹ For this second group of special education teachers, the regulations **do** reference the ESEA HOUSSE alternative as follows:

or, in the case of instruction above the elementary level, meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher **and** have subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards (34 C.F.R. §300.18(c)(2); emphasis added).

⁷⁰ The Conference Report notes that the use of options, such as a single evaluation of multiple subjects “must not ... establish a lesser standard for the content knowledge requirements of special education teachers compared to the standards for general education teachers.” H.Rept. 108-779, 108th Cong., 2nd sess., 171 (2004).

⁷¹ See §612(a)(14)(C).

⁷² The final IDEA regulations include specific language (following clarifying language in Note 21 of the conference report (H.Rept. 108-779, 108th Cong., 2nd sess., at 169 (2004))) that special education teachers who do not provide instruction in core academic subjects need only meet the requirements of a baccalaureate degree and a full special education certification to meet the highly qualified definition (34 C.F.R. §300.18(b)(3)). See also 71 *Federal Register* 46556, August 14, 2006.

supports and interventions, or the use of appropriate accommodations to meet the needs of individual children.⁷³

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

Other special education teachers who teach *only one* core subject would appear to have to meet the relevant criteria under the ESEA definition (in addition to the overarching IDEA certification and degree criteria) and would then also be considered highly qualified under IDEA.⁷⁴ Finally, §602(10)(E) provides that the definition does not create a right of action based on an employee's failure to meet the "highly qualified" requirements of the act.⁷⁵

IDEA State and Local Personnel Requirements. IDEA requires that states ensure that personnel serving children with disabilities are "appropriately and adequately prepared and trained." Regarding special education teachers, states must insure that all are "highly qualified" by the deadline specified in the ESEA.⁷⁶ Regarding providers of related services (for example, speech pathologists and physical therapists), states must ensure that their qualifications "are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline," and that they "have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis." Regarding paraprofessionals, IDEA requires that states "are appropriately trained and supervised, in accordance with State law, regulation, or written policy."⁷⁷

⁷³ H.Rept. 108-779, 108th Cong., 2nd sess., 171 (2004).

⁷⁴ See H.Rept. 108-779, 108th Cong., 2nd sess., 171 (2004) regarding new and "not new" special education teachers teaching one core subject.

⁷⁵ The regulations reiterate this provision. In addition, the regulation clarifies that parents still have the right to file a complaint related to staff qualifications under state complaint procedures under 34 C.F.R. §300.151 through §300.153 (34 C.F.R. §300.18(f)).

⁷⁶ See ESEA §1119(a)(2).

⁷⁷ NCLB also aims to upgrade the qualifications of certain paraprofessionals. In "targeted assistance" Title I schools, only those paraprofessionals who provide instructional services (as opposed to those who provide computer support or personal-care services) — and are paid by Title I-A funds — are covered. However, all instructional paraprofessionals in schoolwide project schools are covered. In general, all covered paraprofessionals must have earned a high school diploma or a recognized equivalent. Those hired after January 8, 2002, must have completed at least two years of higher education and obtained an associate's degree or met "rigorous" state or local standards. Those hired before January 8, 2002, must meet equivalent requirements by January 8, 2006.

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

Category of teachers	ESEA definition	IDEA definition
Covered teachers	All teachers of “core subjects” including special education teachers teaching “core subjects”	All special education teachers
All covered teachers	<p>Hold at least a baccalaureate degree</p> <p>Obtain full state certification or pass the state licensing exam or fulfill requirements in state’s charter school law for teachers in charter schools</p> <p>Cannot have an emergency or temporary certification</p>	<p>Hold at least a baccalaureate degree</p> <p>Obtain full state <i>special education</i> certification or pass the state licensing exam or fulfill requirements in state’s charter school law for teachers in charter schools</p> <p>Cannot have an emergency or temporary certification</p>
New elementary teachers	<p>In addition to general requirements for all covered teachers above:</p> <p>pass rigorous state tests on subject knowledge and teaching skills in reading, math, and other basic elementary curriculum</p>	<p>In addition to general requirements for all covered teachers above:</p> <p>for special education teachers teaching core subjects, same with two exceptions:</p> <p>1. elementary school special education teachers teaching one or more core academic subjects only to children with disabilities held to alternate academic standards (most significantly cognitively disabled):</p> <p>may demonstrate academic subject competence through “a high objective uniform State standard of evaluation” (the HOUSSE process)</p> <p>2. new special education teachers of two or more academic subjects who are highly qualified in either mathematics, language arts, or science:</p> <p>have two-year window in which to become highly qualified in the other core academic subjects and may do this through the HOUSSE process (including a single evaluation for all core academic subjects)</p> <p>baccalaureate degree</p>

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

Category of teachers	ESEA definition	IDEA definition
		2. veteran teachers at any level who teach two or more core academic subjects only to children with disabilities: may demonstrate academic subject competence through the HOUSSE process (including a single evaluation for all core academic subjects)
Teachers providing consultative services	If these teachers do not teach “core subjects,” they are not subject to ESEA requirement to be deemed “highly qualified”	Meet only the general requirements for all covered teachers above

Source: Congressional Research Service.

Department of Education Non-Regulatory Guidance Regarding IDEA and NCLB

Public School Choice. Non-regulatory guidance was issued by ED relating to public school choice on February 6, 2004. This guidance provides that school districts must offer students with disabilities the same opportunity as children without disabilities to be educated in a school that has not been identified as in need of school improvement and has not been identified as persistently dangerous. “However, an LEA is not required to offer students with disabilities the same choices of schools as it offers to nondisabled students. In determining the choices available to such students, the LEA should match the abilities and needs of a student with disabilities with those schools that have the ability to provide the student FAPE. Such students still must be offered the opportunity to choose from among two or more schools.”⁷⁸ The draft guidance also notes that the movement of a child with a disability to a school of choice does not “in and of itself” trigger IDEA’s change in placement procedures. The new school can adopt the existing IEP and the change of placement procedures do not apply. However, “[t]he IDEA statute and implementing regulations contain specific requirements regarding ‘change of placement’ provisions, and LEAs must comply with these requirements when they are triggered.”⁷⁹

Supplemental Educational Services. ED has also issued non-regulatory guidance regarding supplemental educational services. Supplemental educational services are defined as additional academic instruction designed to increase the academic achievement of students in low-performing schools. ED’s draft guidance provides that “an SEA and each LEA that arranges for supplemental educational

⁷⁸ U.S. Department of Education, Office of Innovation and Improvement, Public School Choice: Non-Regulatory Guidance, February 6, 2004, downloaded from [<http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.doc>] (visited on January 30, 2007).

⁷⁹ Ibid.

services must ensure that eligible students with disabilities and students covered under Section 504 may participate.”⁸⁰ Also, if no provider is able to offer services with the necessary accommodations, the LEA must provide such services with necessary accommodations, either by doing so itself or through a contract. 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.⁸¹

Selected Issues and Judicial Decisions

The provisions of NCLB 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 NCLB.⁸² The 2004 IDEA reauthorization, the ED regulations, and the recent enforcement flexibility announced by ED appear to address some of these concerns. However, there have been several lawsuits regarding NCLB.⁸³ In addition, the ED’s new enforcement policy has itself generated some issues.

⁸⁰ Each provider of supplemental educational services does not necessarily need to be able to serve children with disabilities or children covered under Section 504. However, LEAs must ensure that services with the necessary accommodations are available, and if no other provider makes them available, the LEA must do so itself or through contract. [<http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc>].

⁸¹ Ibid.

⁸² The Council for Exceptional Children has published a detailed chart that takes sections of NCLB and then looks at the implications for special education. Council for Exceptional Children, *No Child Left Behind Act of 2001: Implications for Special Education Policy and Practice*, January 2003, [http://www.cec.sped.org/pp/side-by-side09_04_02.pdf]. See also Michael Metz-Topodas, “Testing — The Tension Between the no Child Left Behind Act and the Individuals with Disabilities Education Act,” 79 TEMP. L. REV. 1387 (2006).

⁸³ The National Education Association (NEA) and school districts in Michigan, Texas, and Vermont filed suit in U.S. District Court for the Eastern District of Michigan, asking for a judicial order declaring that states and school districts are not required to spend non-NCLB funds to comply with NCLB mandates, and that a failure to comply with NCLB mandates for this reason does not provide a basis for withholding federal funds. The district court dismissed the suit, finding that the statutory language does not support these arguments. *School District of the City of Pontiac v. Spellings*, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. November 23, 2005). The sixth circuit on January 7, 2008, reversed and remanded the district court decision finding that statutes enacted under the Spending Clause of the U.S. Constitution must provide clear notice to states regarding liabilities so states can decide whether or not to accept the federal funds and that NCLB failed to provide clear notice. 2008 U.S. App. LEXIS 198 (6th Cir. January 7, 2008).

Exclusion of Children with Disabilities

One area of concern is that the inclusion of children with disabilities in the assessment and accountability requirements of NCLB 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, NCLB 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.”⁸⁴ The December 9, 2003, regulations and the April 9, 2007, regulations address this concern. First, the performance of certain children with disabilities would be judged on alternate achievement standards or modified achievement standards, with those performing at the proficient and advanced levels of these alternate standards counted toward achieving AYP. In addition, out-of-level assessments will meet the alternate achievement standards for the most significantly cognitively disabled children “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.”⁸⁵ Finally, the 1% and 2% caps do not apply at the school level. The new Education Department enforcement policy which gives the states more freedom in how they test children with disabilities may also address this issue. Thus, there might be less incentive to segregate children with disabilities in separate schools or separate classrooms to ensure that school-level AYP is met.

Highly Qualified Teachers

Another area of concern is the application of NCLB personnel standards to special education teachers. P.L. 108-446 specifically addresses this issue in its definition of “highly qualified” which was discussed previously. Although this helps to align IDEA with NCLB, the definition has been criticized by some as leading to anomalous results, such as long time, highly regarded special education teachers not being considered highly qualified.⁸⁶ In addition, the more stringent requirements may exacerbate the existing shortage of special education teachers.⁸⁷ On the other hand, it could be argued that all children, especially children with disabilities, should have highly qualified teachers.

⁸⁴ Allison L. Bruce, “No Child Act Stirs Special ED Fears,” *The Post and Courier* (Charleston, S.C.), February 17, 2003, p. 1B.

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

⁸⁶ See, e.g., Christine Samuels, “Subject Qualification Vexing for Teachers in Special Education,” *educationweek.org*, February 16, 2005, at [<http://www.edweek.org/agentk-12/articles/2005/02/16/23idea.h24.html>].

⁸⁷ See, e.g., Associated Press, “Special Education Teachers Needed, Officials Say,” *Indianapolis Star*, March 28, 2005, at [<http://www2.indystar.com>]; Mike Sherry, “Law Could Drive Some Out of Special Education,” *Kansas City Star*, March 22, 2005, at [<http://www.kansascity.com/>].

Judicial Decisions

Arguments have been made in several cases that NCLB should be read as adding to IDEA's requirements. In *Leighty v. Laurel School District*,⁸⁸ the plaintiffs argued that NCLB changed the way in which IDEA cases should be analyzed, contending that the determination of FAPE was dependant on a child's performance on standardized tests. The court observed that "[w]hile it is clear that both the IDEA and the NCLB require recipient States to include disabled children in the assessments, with the modifications necessitated by their disabilities, neither statute indicates that FAPE determinations under the IDEA are controlled by the performance of disabled children on assessments required under the NCLB." Similarly, in *Kirby v. Cabell County Board of Education*,⁸⁹ the court rejected an argument that the NCLB imposed additional obligations regarding IDEA requirements.

In *Board of Education of Ottawa Township High School Dist. 140 v. U.S. Department of Education*,⁹⁰ the plaintiffs, school boards, and special education students brought suit against the Department of Education, alleging a violation of IDEA since the students with disabilities had been tested at grade level standards rather than based on their IEP. The district court held that the plaintiffs had no standing to bring the suits since the harm alleged by the plaintiffs could not be attributed to the Department of Education. The district court noted that "not one provision of the NCLBA ultimately requires Plaintiff school districts to change the IEPs of its disabled students," and observed that alternate assessments were available. In addition, the court stated that "there has been no showing that holding disabled children to the same achievement standards as non-disabled children is in itself harmful or violative of IDEA's guarantee of a free appropriate education, especially when IDEA requires all disabled children included in statewide assessment programs, including NCLBA assessments, to take alternative assessments, if required by their respective IEPs...." The Seventh Circuit Court of Appeals affirmed and held that the plaintiffs had standing to bring the suit but found that the action was properly dismissed "because the plaintiffs' claim is too weak to justify continued litigation."⁹¹ The rationale given for this decision was that the IDEA provisions at issue were enacted prior to the enactment of NCLB and that the most recent law, that is, NCLB, controls. The court of appeals noted that IDEA had been reauthorized in 2004 after enactment of NCLB but that the provisions in question had not been changed by the reauthorization.

⁸⁸ 457 F. Supp.2d 546 (W.D. Pa. 2006).

⁸⁹ 2006 U.S. Dist. LEXIS 67254 (S.D. W.Va. (September 19, 2006). See, also, *School Board of Lee County, Florida v. MM*, 2007 U.S. Dist. LEXIS 21582 (March 27, 2007), where the court found in part that NCLB did not elevate the substantive component of the free appropriate public education requirement of IDEA.

⁹⁰ 2007 U.S. Dist. LEXIS 24057 (March 31, 2007), aff' d 2008 U.S. App. LEXIS 2937 (7th Cir. Feb. 11, 2008).

⁹¹ *Board of Education of Ottawa Township High School Dist. 140 v. Spellings*, 2008 U.S. App. LEXIS 2937 (7th Cir. Feb. 11, 2008).