

**DEPARTMENT OF EDUCATION****Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as Amended by the No Child Left Behind Act of 2001 (NCLB)**

**AGENCY:** Office of English Language Acquisition, U.S. Department of Education.

**ACTION:** Notice of proposed interpretations.

**SUMMARY:** The Secretary of Education (Secretary) proposes interpretations of several provisions of Title III of the ESEA regarding the annual administration of English language proficiency (ELP) assessments to limited English proficient (LEP) students served by Title III, the establishment and implementation of annual measurable achievement objectives (AMAOs) for States and subgrantees receiving Title III funds, and State and local implementation of Title III accountability provisions.

*Comments:* The Department is accepting comments on this notice of proposed interpretations in order that the Department may provide additional clarification, detail, or guidance regarding these interpretations before issuing a notice of final interpretations.

**DATES:** We must receive your comments on or before June 2, 2008.

**ADDRESSES:** Address all comments about this notice of proposed interpretations to Richard L. Smith, Office of English Language Acquisition, U.S. Department of Education, 400 Maryland Avenue, SW., Room 10087, Potomac Center Plaza, Washington, DC 20202, Attention: Comments on Title III Notice of Proposed Interpretations.

If you prefer to send your comments through the Internet, use the following address: [LEP.Partnership@ed.gov](mailto:LEP.Partnership@ed.gov).

You must use the term "Comments on the Title III Notice of Proposed Interpretations" in the subject line of your electronic message.

**FOR FURTHER INFORMATION CONTACT:** Richard L. Smith. Telephone: (202) 245-7100.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotope, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

During and after the comment period, individuals may inspect all public comments by appointment with the

contact person listed under **FOR FURTHER INFORMATION CONTACT**. The comments will be available for distribution electronically, to the extent feasible, and will be available at the Department's Office of English Language Acquisition, U.S. Department of Education, 550 12th Street, SW., Room 10081, Potomac Center Plaza, Washington, DC between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays. On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

*Background:* The intent of this notice is to ensure that all States understand and implement the requirements of Title III in accordance with the Secretary's "bright-line" principles of NCLB—including annual assessments of and accountability for all students—as they apply to the implementation of Title III.

One of the key goals of Title III of the ESEA is to ensure that LEP students attain English language proficiency, attain high levels of academic achievement in English, and meet the same challenging State academic content and student academic achievement standards that all children are expected to meet. To achieve this goal, Title III grants provide States and their subgrantees<sup>1</sup> with funds to implement language instruction educational programs to help LEP students acquire English and achieve at high levels in the core academic subjects. Title III subgrantees are required to use Title III funds to support (1) high-quality professional development designed to improve services to LEP students, and (2) high-quality language instruction educational programs that are designed to increase the English proficiency and academic achievement of LEP students. Title III does not require subgrantees to use any particular curriculum or approach to language instruction, except that the language instruction must be, as required in section 3113(b)(6) of the ESEA, tied to scientifically based

research on teaching LEP students and demonstrated to be effective.

The enactment of NCLB marked the first time States were required to establish ELP standards for LEP students. Under the statute, States must assess, on an annual basis, the progress of LEP students enrolled in language instruction educational programs funded under Title III.<sup>2</sup> States must also define annual measurable achievement objectives (AMAOs) and measure improvements in the development of and attainment of English proficiency by LEP students served by Title III.

The Department recognizes that the specific definition of the term "LEP students served by Title III" and similar terms used throughout this notice may vary across States and subgrantees based on the design of particular language instruction educational programs and professional development programs implemented using Title III funds. For example, States and subgrantees may, for Title III accountability purposes, define "Title III-served LEP students" or "LEP students served by language education instructional programs under Title III" as all LEP students in an LEA or subgrantee jurisdiction. States and subgrantees may also define "Title III-served LEP students" as only those LEP students within an LEA or subgrantee jurisdiction who specifically receive Title III-funded services.<sup>3</sup> The Department intends that the interpretations proposed in this notice apply to all such definitions.

As States have implemented Title III assessment and accountability requirements, they have faced numerous challenges and posed a number of questions to the Department about the law's requirements. This notice of proposed interpretations is intended to help States address those challenges by answering their questions and providing them with guidance on the implementation of Title III consistent with the basic tenets and goals of NCLB.

The following is a brief summary of the basic requirements of Title III to which the proposed interpretations apply. First, each State's Title III ELP standards must be based on four

<sup>2</sup> In addition to the ELP assessment provisions in Title III, Title I of the ESEA requires an annual assessment of all LEP students that measures LEP students' speaking, listening, reading, and writing skills in English.

<sup>3</sup> For accountability purposes, the Department expects States to have a clear policy for how subgrantees define which students are considered to be served by Title III. States should articulate clear guidance to subgrantees about how they are expected to identify who is served by Title III programs so that Title III-served LEP students are identified consistently across subgrantees with similar program designs.

<sup>1</sup> The majority of "subgrantees" under Title III are local educational agencies (LEAs). However, "subgrantees" may also include groups of LEAs in which one or more of the LEAs is too small to be individually eligible to apply for a Title III grant; these LEAs may join together to form consortia in order to qualify to receive the minimum amount of a Title III subgrant, \$10,000.

language domains—speaking, listening, reading, and writing—and be aligned with the achievement of challenging academic content and student achievement standards (section 3113(b)(2)). In addition, each State's ELP assessment must be administered annually to students served by Title III (section 3113(b)(3)(D)), be valid and reliable (section 3122(a)(3)(A)(ii)), and provide for the evaluation of LEP students' levels of speaking, reading, writing, listening, and comprehension in English (section 3121(d)(1)).<sup>4</sup> Title III requires that States ensure that all subgrantees comply with the requirement to annually assess the English proficiency of all LEP students, consistent with section 1111(b)(7) of the ESEA.

Under Title III, States and their subgrantees are accountable for meeting AMAOs that relate to LEP students' development and attainment of English proficiency and academic achievement. Each State must set AMAO targets, make determinations on whether subgrantees are meeting those targets, and report annually on subgrantees' performance in meeting those targets.

Title III accountability provisions apply to the States and to subgrantees. Title III accountability requirements do not, in general, apply to individual schools and do not apply to individual LEP students.

The first required AMAO (AMAO 1) focuses on the extent to which LEP students served by Title III in a State and a particular LEA are making progress in learning English. The second AMAO (AMAO 2) focuses on the extent to which LEP students served by Title III in a State and in their LEA are attaining proficiency in English. Both of these AMAOs use measures derived, in large part, from the results of the required annual State ELP assessment. The third AMAO (AMAO 3) is based on whether the LEP subgroup in the State and in its LEA makes adequate yearly progress (AYP) in reading/language arts and mathematics, as defined by the State under section 1111(b)(2)(B) in Title I of the ESEA.<sup>5</sup>

Title III requires subgrantees to notify parents of LEP students participating in language instruction educational

programs funded under Title III if the subgrantee does not meet all three of the AMAO targets. If a subgrantee does not meet the State's AMAO targets for two consecutive years, the subgrantee is required to develop and submit an improvement plan to the State and the State is required to provide technical assistance to the subgrantee in developing the improvement plan. If a subgrantee does not meet AMAO targets for four consecutive years, the subgrantee is required to undertake corrective actions.

In developing this notice, the Department examined current State policies and practices regarding implementation of Title III assessment and accountability requirements, and the extent to which these may have been implemented inconsistently or improperly.<sup>6</sup> The Department also considered issues and concerns identified during consultations with State representatives and experts.

## Proposed Interpretations

### 1. Annual ELP Assessments of LEP Students

*Background:* Section 3113(b)(3)(D) of the ESEA requires SEAs receiving grants under Title III, part A to ensure that eligible entities receiving a subgrant annually assess the English proficiency of all LEP students participating in a Title III-funded program, consistent with section 1111(b)(7) of Title I of the ESEA. Section 1111(b)(7) requires States, in their plans under Title I, to demonstrate that LEAs in the State provide an annual assessment of English proficiency that measures the oral language (speaking and listening), reading, and writing skills of all LEP students in the schools served by the SEA.

*Interpretation:* The Secretary proposes to interpret section 3113(b)(3)(D) to require that all LEP students be assessed annually with an assessment or assessments that measure each and every one of the language domains of speaking, listening, reading, and writing.

*Explanation:* Some States have asked the Department to allow them to exempt a LEP student from an annual ELP assessment in any domain in which the student has achieved proficiency. For example, States have requested that a LEP student who scores proficient in the domains of speaking and listening, but

not in reading or writing, continue to be annually assessed only in reading and writing, but not in speaking and listening, until such time as the student becomes proficient in all domains.

Based on the Secretary's proposed interpretation, States would not be able to forgo assessing a LEP student in any domain of the required annual ELP assessment. LEP students who score at or above proficient in a domain would have to continue to be assessed in all four domains of language as long as the student is identified as LEP. States would not be able to, in effect, "bank" the proficient scores of LEP students on ELP assessments in a particular domain until such time as the student is proficient in all domains and exits the LEP subgroup. This proposed interpretation is consistent with the clear language of the ESEA, which requires, without exception, that LEP students be assessed in all domains on an annual basis.

### 2. Use of Annual ELP Assessment Scores for AMAOs 1 and 2

*Background:* Section 3121(d)(1) of Title III requires States to evaluate the progress of LEP students toward attaining English proficiency, including LEP students' levels of comprehension, speaking, listening, reading, and writing in English. Section 3122(a)(3)(A)(i) and (ii) of Title III requires that States develop AMAOs that include annual increases in the number or percentage of children making progress in learning English and annual increases in the number or percentage of students attaining English proficiency by the end of each school year. States have asked the Department to provide guidance on the extent to which they may take into account student performance in each of the English language domains when setting the accountability targets for making progress in learning English (AMAO 1) and demonstrating proficiency in English (AMAO 2) under Title III.

*Interpretation for AMAO 1:* With regard to AMAO 1, the Secretary proposes to interpret Title III to allow States to base their student performance expectations and accountability (i.e., AMAO 1) targets for progress on assessment results derived from either (1) separate student performance levels or scores in each of the language domains or (2) a single composite score or performance level derived by combining performance scores across domains, so long as such a composite score can be demonstrated to be a valid and effective measure of a student's progress in each of the English language proficiency domains. The Secretary also

<sup>4</sup> The Department permits States to derive a score to reflect LEP student performance in the domain of comprehension based on the four assessment domains required by both Title I (section 1111(b)(7)) and Title III (section 3113(b)(3)(D))—speaking, listening, reading, and writing—rather than testing the performance of LEP students separately in the domain of comprehension.

<sup>5</sup> For Title III accountability purposes, AMAO 3—or AYP—is calculated at the subgrantee/LEA and State levels. For Title I accountability purposes, AYP is also calculated at the school level.

<sup>6</sup> Under 34 CFR 80.40(a), States are responsible for oversight and monitoring of their subgrantees' performance under the subgrant as a way of ensuring legislative and regulatory compliance with Title III. For more information, see <http://www.ed.gov/policy/fund/reg/edgarReg/edgar.html>.

proposes to interpret Title III to allow States to determine their AMAO 1 targets based on progress in one or more of the language domains, rather than requiring student progress separately in each and every one of the language domains, so long as the targets provide for meaningful progress toward attaining English language proficiency.

*Explanation for AMAO 1:* Some States previously may have been advised that, in setting AMAO targets for the State and for subgrantees regarding progress in learning English (AMAO 1), their accountability targets had to reflect LEP student progress in each and every one of the separate five domains for each and every annual ELP assessment administration. Under this proposed interpretation, however, States would have more discretion to set student performance expectations and accountability targets for AMAO 1, so long as the targets provide for meaningful progress toward attaining English language proficiency and overall student performance on the State's ELP assessment is improving. In the case of States measuring progress of LEP students using separate ELP domain scores, progress measures could include improvements in some but not all domains for AMAO 1. In the case of States using composite ELP assessment scores, progress measures could include improvements in some but not all domains, so long as a student's overall performance on the ELP assessment is improving. The Department recognizes that, given the nature of language acquisition, LEP students may make meaningful progress in learning English without necessarily making progress in each and every domain in a given school year. For the purposes of Title III accountability, this proposed interpretation would allow AMAO 1 targets to recognize such progress.

*Interpretation for AMAO 2:* With regard to AMAO 2, attaining English language proficiency, the Secretary proposes to interpret Title III to allow States to base their student performance expectations and accountability targets for attainment on assessment results derived from either (1) separate student performance levels or scores in each of the language domains or (2) a single composite score or performance level derived by combining performance scores across domains, provided that such a composite score can be demonstrated to be a valid and effective measure of a student's proficiency in each of the English language proficiency domains.

In setting student performance expectations and accountability targets for attaining proficiency in English

(AMAO 2), it is the Secretary's proposed interpretation of Title III that a LEP student must score proficient or above in each and every language domain required under Title III in order to be considered to have "attained proficiency" on a State's ELP assessment. If a State's ELP assessment generates a composite score, the State would have to demonstrate that an overall proficient ELP score represents proficiency in all domains for students served by Title III.

*Explanation for AMAO 2:* The Department has received questions from States about whether students must attain proficiency in each language domain required under Title III to be considered to have scored as proficient overall on the State ELP assessment required under Title III. This proposed interpretation is intended to clarify for States the distinction between the use of assessment scores for AMAO 1 and AMAO 2.

With respect to measuring progress, the Department recognizes that, due to the nature of language acquisition, it is possible for LEP students to make meaningful progress in learning English without evenly and consistently demonstrating progress in each of the language domains Title III requires for evaluating LEP student performance. Therefore, under this proposed interpretation, States would have discretion in how they factor LEP student progress in each domain and across domains into overall AMAO 1 targets. However, with respect to AMAO 2, this measure is intended to mark a completion point at which LEP students have acquired adequate skills in each of the language domains to be considered to have attained "proficiency" in English. Proficiency in English in each domain is critical to succeeding academically when the language of instruction is English. This is consistent with the definition of LEP, in section 9101(25) of the ESEA, which provides that a student can be LEP if the student's difficulty in reading, speaking, writing, or understanding English causes the student difficulty in achieving academically when the language of instruction is English.

Therefore, it is the Secretary's proposed interpretation that students must reach, and AMAO 2 targets must reflect, a proficient level of performance in each and every domain of English required to be evaluated under Title III.

### 3. Students Included in Title III Accountability

*Background:* Section 3122(a)(1) of the ESEA requires States to develop AMAOs for LEP students served under

Title III. The AMAOs relate to students' development and attainment of English proficiency while meeting challenging State academic content and student academic achievement standards required by section 1111(b)(1) of Title I of the ESEA. The AMAOs must include— (1) At a minimum, annual increases in the number or percentage of LEP children making progress in learning English; (2) at a minimum, annual increases in the number or percentage of LEP children attaining English proficiency by the end of each school year, as determined through a valid and reliable assessment of English proficiency, consistent with section 1111(b)(7); and (3) making AYP for the LEP subgroup, as described in section 1111(b)(2)(B) of Title I of the ESEA. States must set annual targets for each AMAO and measure the progress of each subgrantee in meeting the targets.

The Department is aware that some States treat AMAO 1 and AMAO 2 as mutually exclusive, such that LEP students served under Title III are included in either AMAO 1 or AMAO 2, but not both. The Department is also aware that some States identify a subgroup of Title III-served students as "eligible" to be included in AMAOs, which excludes some Title III-served LEP students from AMAO targets, calculations, and determinations.

*Interpretation:* The Secretary proposes to interpret Title III to require that *all* LEP students served by programs under Title III be included in *all* AMAO targets, calculations, and determinations. In addition, the Secretary proposes to interpret Title III, consistent with Title I, as requiring all LEP students attending a public school within a State or subgrantee's jurisdiction—not only those LEP students served by Title III programs—to be included in targets, calculations, and determinations for purposes of determining whether a State or Title III subgrantee meets AMAO 3.

*Explanation:* This proposed interpretation is consistent with the plain language of Title III, which makes no provision for excluding any LEP students from AMAO targets, calculations, and determinations. For AMAO 1 and AMAO 2, while the Department recognizes that States and subgrantees have discretion, for Title III purposes, to define "Title III-served LEP students" or "LEP students served by language education instructional programs under Title III" as all LEP students in an LEA or as only LEP students specifically receiving Title III-funded services, this proposed interpretation would mean that the performance of *all* LEP students who a

State and subgrantee define as served under Title III must be included in accountability determinations for both AMAO 1 and AMAO 2.

In the case of AMAO 3, this proposed interpretation would mean that all LEP students—not only those LEP students specifically served by Title III programs—would be required to be included in targets, calculations, and determinations for purposes of determining whether a State or Title III subgrantee met the AMAO.<sup>7</sup> For Title III subgrantees, this means that all LEP students in the subgrantee's jurisdiction would be required to be included in AMAO 3. For States, this would mean that all LEP students in the LEP subgroup Statewide would be required to be included in AMAO 3. This proposed interpretation is consistent with the provisions of Title I, which require that all LEP students be included in accountability determinations, including AYP determinations.<sup>8</sup>

#### 4. Exclusion of LEP Students "Without Two Data Points" From AMAO 1

*Background:* Section 3122(a)(3)(A)(i) of the ESEA requires States to develop AMAOs for LEP student progress in learning English. Thus, AMAO 1 requires that States and subgrantees, at a minimum, show annual increases in the number or percentage of LEP children making progress in learning English.

In paragraph 3 of this notice, the Department has set forth its proposed interpretation that all LEP students served by Title III must be included in Title III accountability determinations. In this paragraph, the Department addresses the more specific question of

whether States would be permitted to exclude from AMAO 1 calculations and determinations LEP students who do not have "two data points," that is, students who have not participated in two consecutive and consistent administrations of the annual ELP assessment required under Title III.

*Interpretation:* The Secretary proposes to interpret the requirement in section 3122(a)(3)(A)(i) of the ESEA to include all LEP students served by Title III in measurements of student progress in English (AMAO 1). This would mean that all such students would have to be included regardless of whether they have participated in at least two consecutive and consistent annual administrations of an ELP assessment required under section 3113 of the ESEA. Under this proposed interpretation, all LEP students served by programs under Title III would have to be included in AMAO 1 determinations.

If a State does not have the requisite two years of data for some LEP students served by Title III in the State, the State would be permitted to propose to the Department an alternative method of calculating AMAO 1. The Department would require that the alternative method for measuring progress under AMAO 1 be based on research on how LEP children acquire proficiency in English and include reliable measures of growth in English language proficiency.

Under this proposed interpretation, the Secretary also would allow States to include criteria—in addition to progress on an annual ELP assessment—to be factored into progress determinations for AMAO 1, even for students who have participated in two consecutive administrations of the required annual ELP assessments.

*Explanation:* To be consistent with NCLB's purpose to include *all* students in State assessment and accountability systems, the Department no longer would permit States and LEAs to exclude LEP students without two consecutive annual ELP assessment scores from AMAO 1 calculations and determinations. The Department recognizes, however, that there will be students who may not have attended a school long enough to have participated in two administrations of the required annual ELP assessment (e.g., highly mobile students or migrant students new to the country or to a State or school system). Accordingly, for these students, in the absence of data for two years from the State's ELP assessment, the Department would require States to propose to the Department an alternative method of calculating AMAO 1. To ensure accuracy and

validity, this alternative method for measuring progress under AMAO 1 would need to be based on research on how LEP children acquire proficiency in English and include reliable measures of growth in English language proficiency. A State could, for example, propose to allow its subgrantees to use the results of ELP placement assessments or other local ELP assessments to measure progress for LEP students served by Title III who do not have two consecutive ELP assessment scores.

The Secretary also would allow States to include criteria—in addition to progress on an annual ELP assessment—to be factored into progress determinations for AMAO 1, even for students who have participated in two consecutive administrations of the required annual ELP assessments. While the Department does not believe many States follow this practice, we believe it is important to permit this option for States that wish to factor additional relevant language acquisition data into progress measures. However, even if a State uses additional criteria, at a minimum Title III-served LEP students who have participated in two consecutive administrations of the required ELP assessments would be required to make progress on the ELP assessment to be counted towards a subgrantee meeting AMAO 1.

#### 5. Attainment of English Language Proficiency and "Exiting" the LEP Subgroup

*Background:* Section 3122(a)(3)(A)(ii) of the ESEA requires States to develop AMAOs for Title III-served LEP student attainment of proficiency in English, as determined through a valid and reliable assessment of English proficiency. AMAO 2 requires that States and subgrantees, at a minimum, show annual increases in the number or percentage of LEP children attaining English proficiency.

The Department understands that some States are using criteria, in addition to the results of a valid and reliable ELP assessment, to determine whether subgrantees meet AMAO 2. The Department also understands that in many States, LEP students are now considered proficient in English for the purposes of Title III accountability determinations but are not considered proficient for the purposes of determining whether such students are prepared to "exit" the LEP subgroup under Title I or are no longer eligible for services under Title III. For example, the Department has learned that some States require LEP students to demonstrate proficiency on content assessments before exiting the LEP subgroup. Some

<sup>7</sup> In addition, States may choose to use the flexibility granted to States by the Secretary to include former LEP students in AYP calculations for the LEP subgroup for up to two years after such students have exited the LEP subgroup. See 34 CFR 200.20(f)(2)(i)(A); <http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html> and <http://www.ed.gov/policy/elsec/guid/lepguidance.doc>.

<sup>8</sup> We note that under our regulations in 34 CFR 200.20(f), some LEP students may not be included in AYP determinations because of their recently arrived status. Furthermore, if a student has not been enrolled in the same school or LEA for a full academic year as defined by the State, such a student may be excluded from AYP calculations. However, other than these exceptions permitted in calculating AYP under Title I, this proposed interpretation provides that all LEP students must be included in Title I accountability determinations and, therefore, in AMAO 3 determinations. For more information on recently arrived LEP students see 34 CFR 200.20(f)(2)(i)(A); <http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html>. For more information on other exceptions permitted in AYP calculations, such as full academic year enrollment, see Title I guidance at <http://www.ed.gov/policy/landing.jhtml>.

States also consider LEP students' achievement in content classes when determining whether the students will exit the LEP subgroup.

*Interpretation:* It is the Secretary's proposed interpretation of section 3122(a)(3)(A)(ii) of the ESEA that State definitions of English language proficiency for the purposes of setting targets for AMAO 2—increasing the number or percentage of LEP students attaining English language proficiency—be consistent with and reflect the same criteria States use to determine that students from the LEP subgroup no longer need services under Title III and are prepared to exit the LEP subgroup for Title I accountability purposes.<sup>9</sup>

*Explanation:* This proposed interpretation would not require States to change their exit criteria for LEP students. Under this proposed interpretation, the Secretary would continue to permit States and subgrantees to use criteria in addition to ELP assessment results to determine a student's LEP status, as long as those criteria are applied consistently across all subgrantees in a State. However, this proposed interpretation requires that States make their AMAO 2 targets, calculations, and determinations consistent with their determination of LEP status, such that a student considered "proficient" in English for the purposes of AMAO 2 and Title III accountability would also necessarily be prepared to exit the LEP subgroup based on the State's definition of LEP under Title I and its criteria for determining when a LEP student is no longer in need of a language instruction educational program.

Likewise, any additional criteria a State uses under Title I for determining when a LEP student exits the LEP subgroup would have to be incorporated into that State's criteria for AMAO 2.

The Secretary believes that if a State determines students to be eligible for Title III services because such students have limited proficiency in English, then the criteria for attaining proficiency for AMAO 2 should be consistent with the criteria the State establishes for determining that LEP students no longer need Title III services. Thus, under the proposed interpretation, students would not be considered proficient for the purposes

of AMAO 2 until they are also considered proficient by the State for the purposes of exiting the LEP subgroup, i.e., students would have to be proficient on a State's ELP assessment and meet any other criteria used by a State to determine that a student can exit the LEP subgroup.

#### 6. Use of Minimum Subgroup Sizes in Title III Accountability

*Background:* Section 3122(a)(3)(A)(ii) of Title III requires that States' AMAOs for LEP student proficiency in English be determined by a valid and reliable assessment of English proficiency consistent with section 1111(b)(7) of Title I of the ESEA.

States have asked the Department to provide guidance on whether States may apply minimum subgroup sizes to the AMAO calculations and determinations. It is also the Department's understanding that numerous States are already implementing minimum subgroup size policies as part of their AMAO determinations.

*Interpretation:* The Secretary proposes to interpret section 3122(a)(3)(A) of the ESEA to permit States to apply minimum subgroup sizes to AMAO calculations and determinations under Title III, consistent with the minimum subgroup size policies that the State applies to AYP determinations for the LEP subgroup and that have been approved by the Department in the State's Accountability Workbook for Title I.

*Explanation:* This proposed interpretation is based on the statutory requirement that AMAO determinations be made based on valid and reliable measures of student performance on ELP assessments. In this context, a minimum subgroup size reflects the number of Title III-served LEP students who need to be enrolled in a district for the ELP assessment scores of those students, taken together, to be a reliable basis for making judgments about how that subgrantee is performing.

The Department is not encouraging States to adopt minimum subgroup size policies for purposes of complying with Title III's accountability provisions and does not believe it will be necessary for most States to adopt such policies. Title III accountability requirements apply only at the LEA/subgrantee and State levels, not to individual schools, where there are often smaller numbers of LEP students or frequent fluctuations in student populations that might make use of small subgroup sizes necessary. Furthermore, LEAs with very small numbers of LEP students are not typically eligible for Title III grant

funds, so this proposed interpretation would not affect them.

However, under this proposed interpretation, a State would be permitted to apply the same minimum subgroup size policies for Title III accountability purposes as the State applies to AYP determinations for the LEP subgroup and that have been approved by the Department in the State's Accountability Workbook for Title I. Policies designed to ensure that assessment results are used to make valid and reliable accountability determinations would have to be applied consistently across the State for Title III subgrantees. Under no circumstances could a State allow different subgrantees to use different minimum subgroup sizes for Title III accountability purposes.

#### 7. All LEP Students, Adequate Yearly Progress, and AMAO 3

*Background:* Section 3122(a)(3)(A)(iii) of the ESEA requires States to develop an AMAO for making adequate yearly progress for limited English proficient children as described in section 1111(b)(2)(B) of Title I of the ESEA.

In paragraph 3 of this notice, the Department has set forth its proposed interpretation that all LEP students served by Title III must be included in Title III accountability determinations. In this paragraph, the Department addresses the more specific question of whether States must include all LEP students—whether or not served by Title III—in determining whether the State or the subgrantee has met AMAO 3.

*Interpretation:* The Secretary proposes to interpret section 3122(a)(3)(A)(iii) of the ESEA to require that the LEP students included in AMAO 3 be the same LEP students referred to in section 1111(b)(2)(B) of Title I of the ESEA—that is, all students counted in the LEP subgroup for AYP purposes.<sup>10</sup> The setting of targets, calculations, and determinations of AMAO 3 would not be limited to, or based on, only the expectations for LEP students served by Title III. It is the Secretary's proposed interpretation that for a subgrantee or State to meet AMAO 3, the subgrantee or State would have to meet the overall AYP achievement targets for the LEP subgroup in both reading and mathematics.

*Explanation:* Early interpretations of AMAO 3 by Department staff may have led some States to believe that they

<sup>9</sup> States must define AMAO 2 criteria consistently with the criteria the State uses to determine that students from the LEP subgroup are prepared to exit LEP status for Title I accountability purposes. However, AMAO 2 calculations do not include former LEP students who, while they have exited the LEP subgroup, may still be included in the subgroup for two years for the purposes of Title I AYP calculations.

<sup>10</sup> This includes former LEP students if a State chooses to use the flexibility granted to States by the Secretary to include former LEP students for up to two years in AYP calculations.

needed to include only those LEP students receiving Title III services when calculating AYP for purposes of meeting AMAO 3. This may have led some States to make one AYP determination for Title III purposes and a separate AYP determination for Title I purposes.

However, one of the key purposes of AMAO 3 is to tie accountability under Title III to accountability under Title I to ensure that LEP students achieve to the same high standards as all students are expected to meet in the core content areas. The Department believes that it is a more accurate interpretation of the statute that LEAs and subgrantees be required to use the same criteria for determining AYP under AMAO 3 as they use to determine AYP for the LEP subgroup at the LEA level under Title I.

For Title III subgrantees, this proposed interpretation means that all LEP students in the subgrantee's jurisdiction would have to be included in AMAO 3 targets and calculations. For States, this proposed interpretation means that the Statewide LEP subgroup, representing all LEP students in the State, whether or not they are specifically served by Title III programs, would have to be included in AMAO 3 targets and calculations.

The Department would consider other methods for calculating AMAO 3 but only in special circumstances regarding Title III consortia, in which several otherwise separate LEAs have formed a group for funding purposes. (See the considerations outlined in paragraph 9 of this notice regarding accountability requirements for Title III consortia).

#### 8. AMAOs and the Use of Cohorts

*Background:* Section 3122(a)(2)(A) of the ESEA requires that AMAOs be developed in a manner that reflects the amount of time an individual student has been enrolled in a language instruction educational program.

States have some discretion in how to consider the amount of time a student has had access to a language instruction educational program when developing AMAO targets. Some States have appropriately considered empirical data, student demographics, and instructional practices in setting overall AMAO targets for English language acquisition by LEP students served under Title III. To date, the Department also has allowed States to establish different AMAO targets for different "cohorts" of LEP students based on characteristics of LEP students other than their access to English language instruction. For example, some States have established cohorts based on student proficiency level, the number of

years a student has been in the United States, or the likelihood a student will reach proficiency in English in a given year.

*Interpretation:* With this notice of interpretation, the Secretary proposes to interpret Title III to mean that (a) States may, but are not required to, establish "cohorts" for AMAO targets, calculations, and determinations; and (b) States may set separate AMAO targets for separate groups or "cohorts" of LEP students served by Title III based only on the amount of time (for example, number of years) such students have had access to language instruction educational programs.

*Explanation:* The plain language of Section 3122(a)(2)(A) specifically provides that, in developing AMAOs, States must take into account the time a student has spent in a language instruction educational program. It would, therefore, be inconsistent with this statutory language to set different expectations for different LEP students served by Title III based on their current language proficiency, time in the United States, or any other criteria other than time in a language instruction educational program.

Moreover, the purpose of the accountability requirements in Title III is to ensure that the language instruction educational programs in which LEP students are enrolled are accountable for helping all LEP students acquire English. Consistent with the basic principles of NCLB, under this proposed interpretation, subgrantee accountability would not be defined by the characteristics of LEP students themselves, but by the quality of, and student access to, language instruction educational programs that help LEP students learn English.

To the extent that States choose to define "cohorts" of LEP students based on their time in language instruction educational programs to set, calculate, and determine AMAO 1 or AMAO 2, the State, LEA, or subgrantee would have to meet all of the AMAO targets applied to each cohort of LEP students.

For example, if a State chooses to set two separate AMAO targets for progress (AMAO 1)—one for students with less than three years of access to a language instruction educational program and one for students with three or more years of access to a language instruction educational program—the State, LEAs, and subgrantees would have to meet both targets (i.e., both the target for students with less than three years of language instruction and the target for students with more than three years of language instruction) for that entity to meet the AMAO. For a subgrantee to

meet an AMAO overall, all cohorts for which the State has set separate targets would have to meet the AMAO targets.

#### 9. Determining AMAOs for Consortia

*Background:* Section 3113(b)(5)(A) of Title III requires States to submit a plan to the Secretary describing how the agency will hold eligible entities accountable for meeting all AMAOs described in section 3122.

Under Title III, an SEA can make subgrants to eligible entities, which include LEAs applying individually or as part of a group or consortium. Because section 3114(b) of the ESEA does not permit States to award Title III grants in amounts smaller than \$10,000, a consortium arrangement can be used by a group of LEAs that are not individually eligible for Title III funds due to the small number of LEP students in their LEAs.

To date, some Department officials have communicated to States that AMAOs must be calculated for consortia by compiling ELP assessment data and other applicable data from each of the LEAs in the consortium and determining, based on those data, whether the consortium has met the State's AMAOs. In the case of AMAO 3 (i.e., AYP for the LEP subgroup), Department staff, in some cases, have required States to aggregate and compile results across LEAs and compute a new "consortium AYP." The Department is also aware that some States use different approaches to calculating AMAOs for various consortia within their States.

*Interpretation:* The Secretary requires States to hold consortia, like any other eligible subgrantee, accountable for meeting AMAOs. However, the Secretary proposes to interpret Title III to allow States discretion on whether to treat subgrantees that consist of more than one LEA as a single entity or as separate entities for the purpose of calculating each of the three AMAOs required under Title III. States would, for example, be permitted to combine data across LEAs in a consortium or treat LEAs within a consortium separately for the purposes of accountability determinations. Except as described in the following paragraphs, a State would have to apply a uniform approach to all the consortia in the State.

*Explanation:* The Department is proposing this interpretation to ensure that consortia are held accountable for meeting AMAOs. The Department believes this will best be accomplished if States adopt an approach that is generally consistent in implementing AMAOs for consortia within each State. To the degree a State does not adopt a

uniform approach, however, the Department would require a State to demonstrate that its method for calculating AMAOs for consortia would hold all consortia accountable for ensuring that LEP students acquire English language skills and make AYP.

If a State intends to, among other things, combine assessment or other data, apply a minimum group size (“n”-size) or confidence intervals, create a “consortium AYP” calculation, or treat individual LEAs separately for the purposes of calculating AMAOs, the State would have to describe its methods and rationale in its State Title III plan.

If a State intends to change the way it computes AMAOs for consortia, or wishes to propose criteria for using different approaches based on the characteristics of consortia, the Secretary would require the State to submit, for approval, an amendment to its Title III Consolidated State application, required under section 3113 of the ESEA.

#### 10. Implementation of Corrective Actions Under Title III

*Background:* Section 3122(b) of the ESEA describes the actions that a State and subgrantee must take if the subgrantee fails to meet Title III AMAOs for two or four consecutive years. If a State determines that a subgrantee has failed to make progress toward meeting the AMAOs for two consecutive years, the State must require the subgrantee to develop an improvement plan. The improvement plan must specifically address the factors that prevented the subgrantee from meeting the AMAOs. If a State determines that an eligible subgrantee has not met the AMAOs for four consecutive years, the State must—(1) Require the subgrantee to modify its curriculum, program, and method of instruction; or (2) determine whether the subgrantee should continue to receive Title III funds and require the subgrantee to replace educational personnel relevant to the subgrantee’s failure to meet the objectives. Furthermore, section 3302 of Title III requires that parents of LEP students served by a subgrantee receive notice each year that a subgrantee does not meet AMAOs.

*Interpretation:* Through this notice, the Secretary intends to reinforce the proper implementation of the requirements of section 3122(b). First, the Department proposes to interpret this provision to require that *all* States comply with Title III requirements and make determinations for each of the three AMAO targets—making progress in English proficiency (AMAO 1),

attaining English proficiency (AMAO 2), and AYP for the LEP subgroup (AMAO 3)—for *every* Title III subgrantee in the State for *every* school year. Not meeting any one of the three AMAO targets in a given school year constitutes not meeting AMAOs.

The Department also proposes to interpret Title III to require that States annually inform their subgrantees when the subgrantees do not meet the State’s AMAO targets—for each and every AMAO target the subgrantee does not meet. In addition, States and subgrantees must communicate AMAO determinations to the parents of LEP students served by subgrantees’ Title III programs when subgrantees do not meet AMAOs.

*Explanation:* In monitoring State compliance with Title III, the Department has become aware that some States have made AMAO determinations and reported those determinations to the Department, but have neither informed subgrantees of the AMAO determinations nor implemented any measures to address subgrantees’ failures to meet the AMAOs. The purpose of including these interpretations in this notice is to be clear that States must communicate with Title III subgrantees and the parents of students served by or identified for services by the subgrantees about student progress and achievement, as well as provide parents with information about their child’s education; these requirements are central to the purposes and goals of NCLB.

Thus, the Department expects States, on an annual basis, to maintain evidence that (a) the State has informed a subgrantee if the subgrantee did not meet one or more AMAO, (b) the subgrantee has notified parents that it did not meet one or more AMAO, (c) the State has provided required technical assistance to the subgrantee, and (d) the State has implemented required measures to address the subgrantee’s failure to meet the AMAOs. The Department may review this evidence as part of its annual desk audits and on-site monitoring in order to ensure that Title III corrective action requirements are being appropriately and effectively implemented.

#### Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553) (APA), this notice is an interpretative rule and therefore is exempt from the notice-and-comment rulemaking requirements under the APA. Notwithstanding this exemption, the Department is soliciting public comment on these proposed

interpretations so that we can provide additional details and clarifications in a notice of final interpretations.

#### Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

#### Electronic Access to This Document

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Dated: April 29, 2008.

**Margaret Spellings,**

*Secretary of Education.*

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## DEPARTMENT OF ENERGY

### Biomass Research and Development Technical Advisory Committee

**AGENCY:** Department of Energy, Office of Energy Efficiency and Renewable Energy.

**ACTION:** Notice of Open Meeting.

**SUMMARY:** This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee under the Biomass Research and Development Act of 2000. The Federal Advisory Committee Act (Pub. L. No. 92-463, as amended) requires that agencies publish these notices in the **Federal Register** to allow for public participation. This notice announces the meeting of the Biomass Research and