quantity and quality, geologic resources, vegetation, fish and wildlife, threatened and endangered species, soils, prime farmland, noise, light, aesthetics, historic and pre-historic cultural resources, socioeconomics, land use, public roads, and air quality.

5. *Cooperating Agencies:* At this time, no other federal or state agencies have been established as cooperating agencies in preparation of the EIS. However, numerous federal and state agencies, including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, the Texas Historical Commission, and the U.S. Forest Service are expected to be involved in the preparation of, and provide comments on, the EIS.

6. *Additional Review and Consultation:* Compliance with other federal and state requirements that will be addressed in the EIS include, but will not be limited to, state water quality certification under Section 401 of the Clean Water Act, protection of water quality under the Texas Pollutant Discharge Elimination System, protection of air quality under the Texas Air Quality Act, protection of endangered and threatened species under Section 7 of the Endangered Species Act, and protection of cultural resources under Section 106 of the National Historic Preservation Act.

7. *Availability of the Draft EIS:* The Draft EIS is projected to be available by June 2009. A public hearing will be conducted following the release of the Draft EIS.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. E8–24818 Filed 10–16–08; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

### Inland Waterways Users Board

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of open meeting.

**SUMMARY:** In Accordance with 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the forthcoming meeting.

*Name of Committee:* Inland Waterways Users Board (Board).

*Date:* November 18, 2008.

*Location:* Chicago Marriott O'Hare, 8535 West Higgins Road, Chicago, Illinois 60631, (773–693–4444 or 800–228–9290).

*Time:* Registration will begin at 8:30 a.m. and the meeting is scheduled to adjourn at 1 p.m.

*Agenda:* The Board will hear briefings on the status of the funding for inland navigation projects and studies, an assessment of the Inland Waterways Trust Fund, and a preliminary plan for a future business model for inland waterways projects.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark R. Pointon, Headquarters, U.S. Army Corps of Engineers, CECW–IP, 441 G Street, NW., Washington, DC 20314–1000; Ph: 202–761–4258.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

[FR Doc. E8–24679 Filed 10–16–08; 8:45 am]

**BILLING CODE 3720–58–P**

## 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 final interpretations.

**SUMMARY:** In a notice of proposed interpretations published on May 2, 2008, the Secretary of Education (Secretary) proposed 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. This notice of final interpretations provides the Secretary's final interpretation for each of the ten proposed interpretations.

**DATES:** These final interpretations are effective November 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Richard L. Smith, Office of English Language Acquisition, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C–132, Washington, DC 20202. Telephone: (202) 401–1402.

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, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

#### Background

*General.* The intent of this notice of final interpretations (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 of the ESEA.

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 [1] 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 a specific or 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.

With the enactment of NCLB, States for the first time were required to

[1] This notice refers to ''subgrantees'' throughout, consistent with the language in Title III of the ESEA, to refer to entities receiving Title III, Part A subgrants. The vast majority of subgrantees under Title III are local educational agencies (LEAs). However, subgrantees may also include groups of LEAs in which one or more LEAs is too small to be individually eligible to apply for a Title III grant; such LEAs may join together to form consortia in order to qualify to receive the minimum amount of a Title III subgrant, $10,000.

establish ELP standards for LEP students. Under the ESEA, States also must assess, on an annual basis, the progress of LEP students served by language instruction educational programs funded under Title III.[2] States must also set targets for three separate annual measurable achievement objectives (AMAOs) and measure improvements in the development and attainment of English proficiency by LEP students served by Title III.

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. The final interpretations in this notice are 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. In developing this notice, the Department examined current State policies and practices regarding the implementation of Title III assessment and accountability requirements, and the extent to which these may have been implemented inconsistently or incorrectly.[3] The Department also considered issues and concerns submitted during the public comment period for this notice, as well as issues raised in our consultations with Congressional staff, State Title III and Title I representatives, and assessment and accountability experts since the implementation of NCLB.

*Defining Title III-Served LEP Students.* The Department recognizes that the specific meaning of the term ''LEP students served by programs funded under 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, as well as the design and capacity of State Title III data and accountability systems.

However, at a minimum, under the ESEA, States and subgrantees must define ''Title III-served LEP students'' as those LEP students within a State's and subgrantee's jurisdiction, respectively, who directly receive Title III-funded services. The Department recognizes that, for practical reasons, including data system capacity and the nature of language instruction educational programs and professional development funded under Title III, many States include, in their Title III accountability determinations, all LEP students attending public schools in their States or all LEP students attending public schools within subgrantees' jurisdictions to be Title III-served for the purposes of making AMAO determinations. The Department intends that the interpretations established in this notice apply to both narrow and broad definitions of ''Title III-served LEP students.''

The final interpretations are neither meant to expand beyond the statutory requirements in Title III nor in any way restrict a State's discretion in defining broadly which students it considers ''Title III-served LEP students'' for purposes of Title III accountability.

The Department requires, however, that each State have a consistent policy regarding the methods by which it will make AMAO determinations for the State and its subgrantees. The Department also requires each State to have consistent guidelines or ''decision rules'' for how subgrantees within each State define which students are considered ''Title III-served LEP students'' for Title III accountability purposes.[4]

*Overview of Title III Assessment and Accountability Requirements.* The following is a brief summary of the basic requirements of Title III to which the final interpretations apply. First, each State's Title III ELP standards must be based on four 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 Title III-served LEP students (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)).[5] Title III requires States to ensure that all subgrantees comply with the requirement to annually assess the English proficiency of all Title III-served LEP students, consistent with the ELP assessment requirements in section 1111(b)(7) of the ESEA.

Under Title III, States and their subgrantees are accountable for meeting AMAOs that relate to Title III-served 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 each State and its 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 Title III-served LEP students in a State and its subgrantee jurisdictions are making progress in learning English. The second AMAO (AMAO 2) focuses on the extent to which Title III-served LEP students in a State and its subgrantee jurisdictions are attaining proficiency in English. Both of these AMAOs are based on measures derived, in large part, from the results of the annual State ELP assessment required under section 3113(b)(3)(D) in Title III of the ESEA. The third AMAO (AMAO 3) is based on whether the State and its subgrantees meet the State's adequate yearly progress (AYP) targets for the LEP subgroup in reading/language arts and mathematics, as defined by the State under section 1111(b)(2)(B) in Title I of the ESEA.[6]

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 one or more of the State's three required AMAO targets. If a subgrantee does not meet all

[2] In addition to the ELP assessment provisions in Title III, Title I of the ESEA requires an annual assessment of all LEP-designated students that measures LEP students' oral language (speaking and listening), reading, and writing skills in English.

[3] Under 34 CFR 80.40(a), States are responsible for oversight and monitoring of their subgrantees' performance. For more information, *see http://www.ed.gov/policy/fund/reg/edgarReg/edgar.html.*

[4] The Department recognizes that the particular LEP students designated as Title III-served may differ among subgrantees based on the unique designs of the language education instructional programs implemented by subgrantees. State decision rules, therefore, do not have to yield a single definition of Title III-served LEP students that is uniform for every subgrantee. However, States must have consistent guidelines so that subgrantees that employ the same kinds of program models define their Title III-served LEP student population in the same manner. This will help ensure that subgrantees are accurately identifying their Title III-served LEP student population and that State data and AMAO determinations are accurate.

[5] The Department permits States to derive a score to reflect LEP student performance in the domain of comprehension based on the other 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. Throughout this notice, the Department refers to four domains when discussing assessment requirements under Title I and Title III.

[6] 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.

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

*Implementation Timeline.* State Title III assessment and accountability systems must be consistent with the final interpretations presented in this notice effective with the assessments administered in the 2009–2010 school year and AMAO determinations made based on those assessments.

The Department requires States to revise their Consolidated State Plans to reflect changes in their Title III assessment or accountability systems. To the extent that the final interpretations presented in this notice require States to make changes to their Title III assessment and accountability systems, the Department requires States to use the amendment process already in place to request such changes.

Prior to implementing any revisions, a State must submit its proposed amendments to the Secretary for review and approval. We strongly encourage States to submit amendments that are either (1) necessary to bring State Title III accountability systems into compliance with current law, or (2) required to accurately reflect current State practices in implementing Title III assessment and accountability requirements.

The Department intends to follow this notice with a letter to Chief State School Officers, State Title III directors, and State Title I directors providing more specific details on amendment requests and the deadline for making such requests. Amendment requests for the 2008–2009 school year were due to the Department no later than February 15, 2008. We expect a similar deadline to be in place for the 2009–2010 amendments and will establish that deadline in the forthcoming letter.

**Public Comments**

In response to the Secretary's invitation for public comment in the notice of proposed interpretations, 74 parties submitted comments. A summary of these comments is provided in the following section. There are several differences between the notice of proposed interpretations and this notice of final interpretations. We discuss these changes in greater detail in the following section. Generally, we do not address technical or minor changes, and suggested changes that we are not authorized to make under the law.

**Final 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.

This interpretation addresses inquiries that the Department received regarding whether States and subgrantees are permitted to exempt a LEP student from an annual ELP assessment in any domain in which the student has received a proficient score. For example, States have requested that, with respect to Title III-served LEP students who score proficient in the domains of speaking and listening, but not in reading or writing, the State be required to continue to annually assess those students only in reading and writing, but not in speaking and listening, until such time as the students become proficient in all domains.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III 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. We explained in the notice of proposed interpretations that States could not exempt a student from an annual ELP assessment in any domain or ''bank'' the proficient scores of a LEP student.

*Analysis of Comments and Changes*

*Comments:* A number of commenters expressed support for the proposed interpretation to disallow ''banking'' of proficient ELP scores in a particular domain until such time as a student is proficient in all domains. These commenters noted that because academic demands increase with each successive grade, language proficiency at one grade level in any domain may not be adequate for higher grade levels.

However, a number of commenters, including several States, supported ''banking'' proficient scores in a particular domain. The commenters stated that administering annual ELP assessments in all four domains is time consuming, detracts from instructional time, and adds administrative burden to schools, districts, and States. The commenters noted that no purpose is served by retesting students in areas that they have already mastered. Some commenters also asserted that student motivation decreases with repeated testing. Other commenters suggested that States should not have to reassess speaking and listening skills if a student demonstrates proficiency, but should annually reassess reading and writing skills.

Several commenters suggested clarifying in the notice of final interpretations whether banking scores within a grade span is also prohibited.

*Discussion:* The Secretary shares the commenters' concerns that LEP students could be considered proficient in English without having grade-level language proficiency in each domain if ''banking'' of proficient scores was permitted. We recognize, as some commenters noted, that language development does not necessarily progress evenly, and that students may indeed become proficient in some language domains (such as listening and speaking) before becoming proficient in other domains (such as reading and writing). However, the ELP annual assessment requirements in both Title I (section 1111(b)(7)) and Title III (section 3113(b)(3)(D)) of the ESEA are explicit in requiring an annual assessment of LEP students in each of the language domains. The research suggesting that some language skills (e.g., speaking and listening) may develop before others (e.g., reading and writing) does not necessarily mean that banking proficient scores in some domains is an appropriate practice. Even if the development of language is sequential across domains, language demands increase as development progresses. Therefore, it would not be appropriate to ''bank'' a student's listening and speaking scores, for example, in an early grade when the student may require language instruction services for a number of years before the student becomes proficient in reading and writing—over which time the demands of demonstrating age- and grade-appropriate listening and speaking skills will also change. While students may not lose acquired language skills over time, the annual ELP assessment of LEP students will ensure that LEP students do not lose ground in any of the domains as language demands increase in academic areas in each successive grade.

We believe that our explanation of this interpretation in the notice of proposed interpretations was clear that the banking of proficient scores in a particular domain for any period, including banking of scores within grade spans, would not be permitted. However, we are revising the interpretation to provide this clarification.

*Changes:* We have revised the interpretation to state specifically that the banking of the proficient scores of LEP students in particular domains in any given year, including banking of scores within grade spans, is not permitted.

*Comments:* One commenter contended that Title III does not require an assessment of each of the four domains of listening, speaking, reading, and writing.

*Discussion:* We disagree with the commenter. Section 3113(b)(3)(D) of the ESEA requires SEAs receiving grants under Title III, Part A to ensure that eligible entities receiving a Title III 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 each State, in its plan 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-designated students in the schools served by the SEA. We have added language to the interpretation to make this clear.

*Changes:* We have added a statement to the final interpretation that makes clear that the interpretation is consistent with the language of Title I and Title III of the ESEA.

*Comments:* A few commenters questioned whether recently-arrived LEP students and LEP students in the early grades should participate in an ELP assessment or be tested in all language domains. The commenters suggested that recently-arrived LEP students should not be tested in reading and writing, and that their scores should not be included in AMAOs until they can demonstrate speaking and listening skills. Another commenter suggested that children in the early grades should be assessed only in the domains of listening and speaking.

*Discussion:* The clearest reading of the plain language in section 3113(b)(3)(D) of the ESEA is that all Title III-served LEP students must be assessed each year in each domain. Moreover, section 1111(b)(7) in Title I requires an annual assessment of all LEP-designated students in oral language (listening and speaking), reading, and writing. Therefore, it would be inconsistent with the ESEA to permit exemptions from testing in certain domains based on a student's age, grade level, proficiency level, or length of time in the United States. We have made this clear in the final interpretation.

The purpose of an ELP assessment is to monitor student progress in attaining English language proficiency in each of the required domains. Under § 200.6(b)(4), a State may exempt a recently-arrived LEP student (a LEP student who has attended school in the United States for less than 12 months) from one administration of a State's content assessment in reading/language arts.[7] However, a recently-arrived LEP student, like all LEP students, is required to take the State's annual ELP assessment. Similarly, any LEP student receiving language instruction educational services funded by Title III must participate in an annual ELP assessment. (*See* sections 3113(b)(3)(D) and 1111(b)(7) of the ESEA).

*Changes:* We have revised the interpretation to clarify that a State may not exempt a LEP student from any portion of an annual ELP assessment.

*Comments:* Several commenters suggested that the final interpretation address exceptions to assessing all four domains for students with disabilities whose individualized education program (IEP) or 504 plan (under section 504 of the Rehabilitation Act of 1973, as amended) includes a recommendation for the student to be exempt from testing. The commenters stated that certain disabilities, such as a hearing impairment, are particularly relevant to second language learning.

*Discussion:* Title III does not provide exemptions from annual ELP assessments for any Title III-served LEP student. The requirement that all LEP students served by Title III participate in an annual ELP assessment does not preclude providing appropriate accommodations for assessing a LEP student who is also a student with disabilities under the Individuals with Disabilities Education Act (IDEA). For example, a student with a hearing impairment might need to be assessed in listening with the same accommodations that the student receives in the regular classroom (e.g., an assistive listening device). States and LEAs should provide appropriate accommodations for LEP students with disabilities to annually assess their language needs and ensure they attain English language proficiency in each of the required domains consistent with 34 CFR 200.6.

*Changes:* None.

*Final Interpretation.* The Secretary interprets section 3113(b)(3)(D) of the ESEA to require that all LEP students served by programs funded under Title III be assessed annually with an assessment or assessments that measure each of the language domains of speaking, listening, reading, and writing. States may not exempt LEP students from any portion of an annual ELP assessment, nor ''bank'' the proficient scores of LEP students in particular domains in any given year or within a specific grade span until such time as a student is proficient in all domains. This interpretation is consistent with the clear language of both Title I and Title III of the ESEA, which requires, without exception, that LEP students be assessed annually with an assessment that measures listening, speaking, reading, and writing skills.

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

*Background.* Section 3121(d)(1) in 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) in 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 how 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. Specifically, States have asked (1) whether students must make progress in and attain proficiency in each language domain required under Title III to be considered to have made progress or to attain proficiency overall for AMAO 1 and AMAO 2, respectively, and (2) whether a State may use a ''composite'' score across English language domains to demonstrate student progress and proficiency on State ELP assessments.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to allow States flexibility in determining whether

[7] For more information on the regulations related to recently-arrived LEP students *see: http://www.ed.gov/legislation/FedRegister/Finrule/2006-3/091306a.html.*

students who make progress in some (but not all) domains can be considered to have demonstrated progress for AMAO 1 purposes, but to require that students demonstrate proficiency in each and every language domain in order to be considered to have attained proficiency for AMAO 2 purposes. The proposed interpretation also allowed States to base their student performance expectations and accountability (i.e., AMAO 1 and AMAO 2 targets) 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 across domains, so long as such a composite score could be demonstrated to be a valid and effective measure of a student's progress and proficiency in each of the English language proficiency domains.

*Analysis of Comments and Changes*

*Comments:* None.

*Discussion:* In the notice of proposed interpretations, we included separate interpretations for AMAO 1 and AMAO 2. In our review of the proposed interpretations, we decided it was unnecessary to separate them and have combined them in the final interpretation.

*Changes:* We have consolidated the interpretations for AMAO 1 and AMAO 2 into one interpretation.

*Comments:* Several commenters opposed our proposal to allow States to use a composite score to measure English language progress or proficiency for Title III-served LEP students. The commenters expressed concern that a composite score may mask important information about a student's strengths and weaknesses and permit a student who is very weak in some domains, but strong in others, to obtain a proficient composite score on an ELP assessment. Some commenters expressed concern that the proposed interpretation was intended to allow States to disregard one or more domains or use one domain to define AMAOs and set targets. Other commenters expressed concern that progress in all domains would not be required to meet AMAO 1 under the proposed interpretation.

*Discussion:* The Secretary's interpretation should not be read as suggesting that States can disregard performance in any domain in measuring progress or in defining English language proficiency. Such an interpretation would be inconsistent with the ESEA and counterproductive; a State that defined AMAO 1 (progress) without considering all domains would likely find it difficult to ensure that students meet AMAO 2 (attainment of proficiency). The Secretary agrees that, in general, AMAO 1 determinations should be made with attention to progress in all of the language domains required by Title III. However, in recognition of the evidence that language development does not necessarily proceed at the same pace across all of the language domains, we wanted to provide each State with the flexibility to define its progress goals accordingly. It was our understanding that some States may have been advised that they were prohibited from counting a Title III-served LEP student as making progress for AMAO 1 purposes if the student had not made progress in each and every domain in a given school year.

The Department is not encouraging States to change their AMAO 1 determinations if those determinations are based on requiring student progress in all domains on annual State ELP assessments. The Department is simply recognizing that, given the nature of language acquisition, some LEP students may make meaningful progress in learning English without necessarily making progress in each and every domain in a given school year.

The Department's final interpretation gives each State discretion in how it defines progress and sets accountability targets for AMAO 1, so long as the targets provide for (1) meaningful progress toward attaining English language proficiency and (2) improvement in overall student performance on the State's ELP assessment. The final interpretation makes it clear that AMAO 1 targets must meet these two conditions.

With regard to the use of a composite score to demonstrate proficiency in English for AMAO 2 purposes, the Department recognizes the technical demands and testing burdens, described by numerous testing experts and States, of requiring States to have an independently valid and reliable ELP assessment score for each of the four language domains (plus comprehension, required under section 3121(d)(1)). With regard to the specific concern about composite scores masking very weak performance in some domains, the final interpretation is clear that—whether or not a State's ELP assessment yields separate domain scores or a composite score—the ELP assessment must meaningfully measure student proficiency in each of the language domains and, overall, be a valid and reliable measure of student progress and proficiency in English. Even if represented by a composite score, AMAO 2 must be a measure that demonstrates sufficient student performance in all required domains to consider a LEP student to have attained proficiency in English.

*Changes:* The Department added language to the final interpretation, which was included in the explanation section of the proposed interpretation, stating that AMAO targets must provide for (1) meaningful progress toward attaining English language proficiency and (2) improvement in overall student performance on the State's ELP assessment.

*Comment:* Several commenters noted that the proposed interpretation appears to prohibit States from using a ''compensatory model'' in defining English language proficiency and to require States to use a ''conjunctive model'' in which English language proficiency is determined by separate scores in each and every domain.

*Discussion:* The proposed interpretation was not meant to require a conjunctive model such that State ELP assessments would be required to generate separate and independently valid scores for each domain. We have changed the interpretation to make this clear. The proposed interpretation also was not necessarily meant to prohibit States from using a compensatory model, although the Secretary is concerned that compensatory models could be used to allow LEP students with weak performance in one or more English language domains—such as reading or writing—to still be considered to have attained proficiency in English.

The Secretary intends with this final interpretation to ensure that all English language domains required under Title I and Title III are assessed and that each State is prepared to provide evidence that its State ELP assessment provides valid and reliable measures of LEP student progress and proficiency, consistent with the purpose for which the assessment is used. For Title III, the purpose of the State ELP assessment is to evaluate subgrantee performance in ensuring that Title III-served LEP students are making progress toward and ultimately attaining proficiency in English by demonstrating performance in each of the English language domains that is sufficient to permit LEP students to participate effectively in grade-level instruction in academic content areas in English.

The Department recognizes that most States use some combination or composite of domain scores to define overall proficiency goals and targets for Title III accountability purposes. The Department also recognizes that there are a number of very important

technical issues related to how States develop and analyze individual test items, and combine, average, and weight scores across ELP domains to define progress and proficiency and set performance expectations (i.e., AMAO targets) for LEP students—whether they use individual domain scores or composite scores. While these numerous technical issues are not specifically addressed in this notice, the final interpretation is clear that, under the ESEA, each State must be prepared to provide evidence that the various technical aspects of its ELP assessment are consistent with the requirements in Title III and valid for the purposes for which the assessment is being used. This includes demonstrating that its ELP assessment measures all required domains and yields reliable information on a student's progress and proficiency in each of those domains.

*Changes:* To clarify that States are not required to use a conjunctive model with respect to their ELP assessments, we have made clear in the final interpretation that a State can use a composite score so long as the State can demonstrate that the composite score meaningfully measures student progress and proficiency in each of the language domains and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

We have also removed language in the proposed interpretation for AMAO 2, which stated that, ''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.'' This specific language appeared to signal to some commenters that the Department was systematically rejecting both compensatory models and composite scores by requiring ELP assessments to generate a separate and valid score for each language domain. Instead, the Department is requiring that each State be able to demonstrate that its ELP assessment meaningfully measures student progress and proficiency in each of the language domains, and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

*Comments:* One commenter noted that section 1111(b)(7) in Title I of the ESEA lists listening and speaking together under ''oral language'' rather than as separate domains and asked if States can treat these two domains as one domain.

*Discussion:* Consistent with the Secretary's interpretation, which allows States to use a composite score on ELP assessments to define progress and proficiency, there is nothing that would prohibit a State from treating oral language as a composite of listening and speaking. However, as noted earlier, each State must be able to demonstrate, with data and evidence, that its ELP assessment measures skills in each of the required domains, including listening and speaking, and that its score for ELP proficiency represents the acquisition of skills in each domain required under the law.

*Changes:* None.

*Comments:* A number of commenters cited the technical challenges States would have if the Department required separate performance standards for each domain. The commenters stated that separate standards for each domain would require States to redesign their assessments and include significantly larger samples and more items within each subdomain, which would result in a long and costly assessment. The commenters expressed preference for a more ''holistic'' judgment across all four subdomains in defining progress and proficiency under Title III.

*Discussion:* The Department is not requiring States that use composite ELP assessment scores for accountability determinations to redesign their assessments to generate separate valid and reliable ELP domain scores. States using composite ELP assessment scores must be able to demonstrate, with data and evidence, that their ELP assessment measures knowledge and skills in each of the required domains and that ELP proficiency scores reflect the acquisition of skills in each domain required under the law.

We recognize that the language in the notice of proposed interpretations may have been misinterpreted to mean that States may not use a composite score to define English language proficiency. Therefore, as stated above, we have removed this language from the final interpretation.

*Changes:* We have revised the interpretation to remove the language suggesting that States must have a separate, independent and valid score for each language domain in order to determine a student's English language proficiency.

*Final Interpretation.* The Secretary interprets Title III to allow States to base student performance expectations and accountability targets for progress and proficiency (i.e., AMAOs 1 and 2, respectively) on ELP assessments that provide either (1) separate student performance levels or scores in each of the language domains or (2) a single composite score. In either case, a State must be able to demonstrate that its ELP assessment meaningfully measures student progress and proficiency in each language domain and, overall, is a valid and reliable measure of student progress and proficiency in English, consistent with the purpose for which the assessment is used.

With regard to AMAO 1, the Secretary interprets Title III to allow States to determine AMAO 1 targets, where appropriate, 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 and student performance on the State's ELP assessment, overall, is improving.

With regard to AMAO 2, the Secretary interprets Title III to require—regardless of whether a State uses separate or composite domain scores—that ELP assessments meaningfully measure student proficiency in all language domains and, overall, provide for valid and reliable measures of student proficiency in English across the required domains.

3. *Students Included in Title III Accountability. Background.* Section 3122(a)(1) of the ESEA requires States to develop AMAOs for Title III-served LEP students. The AMAOs relate to students' progress and attainment of English proficiency and students' ability to meet challenging State academic content and student academic achievement standards required in 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 Title III-served LEP children making progress in learning English (AMAO 1); (2) at a minimum, annual increases in the number or percentage of Title III-served 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) of Title I of the ESEA (AMAO 2); and (3) making AYP for the LEP subgroup, as described in section 1111(b)(2)(B) of Title I of the ESEA (AMAO 3). States must set annual targets for each AMAO and determine whether each subgrantee is meeting the targets.

The Department is aware that some States systematically exclude Title III-served LEP students from Title III

accountability determinations in ways that are inconsistent with the law. For example, some States treat AMAO 1 and AMAO 2 as mutually exclusive, such that a Title III-served LEP student is 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 based on their expected performance on ELP assessments, which systematically excludes some Title III-served LEP students from AMAO targets, calculations, and determinations. Such practices are inconsistent with the AMAO provisions in Title III.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that all Title III-served LEP students be included in *all* AMAO targets, calculations, and determinations.

*Analysis of Comments and Changes*

*Comments:* A number of commenters expressed concern that the proposed interpretation would require all LEP students, not just Title III-served LEP students, to be included in AMAOs. However, another commenter stated that the Department was being overly restrictive and seemed to be prohibiting States from including LEP students not served by Title III in AMAOs.

*Discussion:* We acknowledge that the proposed interpretation was not clear and therefore, have revised the interpretation to make clear that AMAOs are only required to be applied to Title III-served LEP students. That said, and as discussed previously in this notice, the Department recognizes that States and districts vary in how they designate LEP students as ''Title III-served students.'' In many jurisdictions all LEP students are counted as Title III-served students because Title III funds are used for activities that benefit all LEP students. In other jurisdictions, it may be less burdensome to count all LEP students as Title III-served students than to track a subset of students receiving direct services under Title III. Regardless of how States and subgrantees designate students as Title III-served, AMAOs are only required to be applied to LEP students who are receiving Title III services. Accordingly, we have revised the interpretation to clarify that Title III requirements apply to States and subgrantees receiving Title III funds, and LEP students receiving Title III services. We note that by clarifying this language in this interpretation and elsewhere in this notice, the Department does not intend to prohibit or to discourage States from more broadly including all LEP students in AMAOs.

*Changes:* We have clarified in this interpretation and in other interpretations in this notice, where appropriate, that Title III requirements apply to States, to subgrantees receiving Title III funds, and to students served by Title III.

*Comments:* A few commenters expressed concern that the proposed interpretation would require AMAO calculations to include LEP students in non-public schools and schools and districts not receiving Title III funds.

*Discussion:* States are only required to make AMAO determinations for subgrantees that receive Title III funds. However, as noted earlier, some States include, in AMAO determinations, LEP students who are not in districts receiving Title III funds or students not directly served by Title III-funded programs. Regarding students in non-public schools, Title III AMAOs do *not* apply to LEP students served under that program through the equitable services provisions that attend non-public schools.

*Changes:* None.

*Comments:* A number of commenters argued that Title III-served LEP students who are not expected to reach proficiency in a given year should not be included in AMAO 2 calculations or that the performance of such students should be ''weighted'' so that their scores do not count as much as the scores of other students in AMAO determinations.

*Discussion:* As noted earlier, the Department is aware that some States treat AMAO 1 and AMAO 2 as mutually exclusive, such that Title III-served LEP students are included in either AMAO 1 or AMAO 2, but not both. We also understand that some States identify a subset of Title III-served students as ''eligible'' to be included in AMAOs and exclude some Title III-served LEP students from AMAO targets, calculations, and determinations.

The Secretary finds no justification or support in the statute for excluding a Title III-served student from AMAO 2 based on the student's current proficiency levels or on expectations for how long it will take the student to become proficient in English. In addition, the Secretary finds no justification or support in the statute for ''weighting'' student ELP assessment results so that students at lower English proficiency levels are discounted in accountability determinations. The final interpretation is consistent with the plain language of Title III, which makes no provision for defining AMAOs in ways that systematically exclude from or discount certain Title III-served LEP students in AMAO targets, calculations, and determinations.

*Changes:* None.

*Comments:* Several States pointed out that using Title I AYP determinations for AMAO 3 will not necessarily mean that all LEP students are included in AMAO 3 because, under Title I, the scores of some students (e.g., students who have not been in a school for a full academic year, recently-arrived LEP students) are excluded from AYP determinations. In addition, one State noted that it could not include all LEP students in AMAO 3 because it could only include in its AYP determination those LEP students in tested grades.

*Discussion:* The commenters are correct. In the final interpretation, we acknowledge that there are several exceptions to the requirement that *all* Title III-served LEP students be included in *all* AMAO targets, calculations, and determinations.

*Changes:* We have clarified in the final interpretation that the requirement to include all LEP students in AMAO 3 is subject to the exclusions permitted under Title I of the ESEA.[8] In addition, the final interpretation regarding AMAO 3 (Interpretation 7) allows States to make AMAO 3 determinations based on the entire LEP subgroup as defined by Title I or the group of Title III-served LEP students only.

*Comments:* One commenter questioned why the Department would require that a Title III subgrantee be held accountable for the whole LEP subgroup, in measuring AMAO 3, when the Title III program serves only a subset of LEP students.

*Discussion:* The statute is unclear about whether AMAO 3 must include the scores of all LEP students or only Title III-served LEP students. As a practical matter, the Department understands that most States calculate AMAO 3 based on all LEP students in

[8] We note that under our Title I regulations in 34 CFR 200.20(f), some LEP students may not be included in AYP determinations because of their recently-arrived status. Furthermore, for example, 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. For more information on recently-arrived LEP students *see* 34 CFR 200.20(f)(2)(i)(A) at: *http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html* and the Department's guidance on the regulations at: *http://www.ed.gov/policy/elsec/guid/lepguidance.doc.* The same regulations also include information on how States may choose 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. For more information on other exceptions permitted in AYP calculations, such as full academic year enrollment, *see* the Title I guidance at *http://www.ed.gov/policy/landing.jhtml.*

the State because it is not practical or cost effective to make a separate AYP determination for only Title III-served LEP students. However, the Secretary will permit, but not require, a State to base AMAO 3 on the performance of Title III-served LEP students, if a State is able and willing to calculate separate subgrantee- and State-level AYP determinations for this subgroup of students.

*Changes:* We have revised this interpretation, as well as Interpretation 7, to permit, but not require, a State to calculate separate subgrantee- and State-level AYP determinations for Title III-served LEP students for AMAO 3.

*Comments:* None.

*Discussion:* In clarifying the Department's intent with regard to Interpretation 4 to allow the exclusion, from AMAO 1 calculations, of students who have not participated in two administrations of the State's ELP assessment, the Department determined that this situation constitutes another exception to the general requirement that all Title III-served LEP students be included in all AMAOs. As discussed previously, the Department recognizes that our Title I regulations governing AYP calculations (such as full academic year) permit the exclusion of some students, including potentially some Title III-served LEP students, from AMAO 3 calculations. We, therefore, have revised the interpretations accordingly.

*Changes:* We have revised this interpretation to explain exceptions to the requirement to include all Title III-served students in all AMAO targets, calculations, and determinations. These exceptions are discussed in greater detail in Interpretations 4 and 7.

*Final Interpretation.* The Secretary interprets Title III to require that, in general, all Title III-served LEP students be included in all AMAO targets, calculations, and determinations. This interpretation is consistent with the plain language in Title III, which makes no provision for defining AMAOs in ways that systematically exclude any Title III-served LEP students from any AMAO targets, calculations, and determinations.

However, the Department acknowledges that, for certain Title III-served LEP students who have had limited participation in language instruction educational programs and State ELP assessments, or based on how States make AYP determinations, States may not have the requisite student assessment data to include these students in AMAO calculations. Therefore, there are two exceptions to the general requirement in this interpretation. First, a State is not required to include in its AMAO 1 calculation Title III-served LEP students who have not participated in two administrations of a State's annual ELP assessment consistent with Interpretation 4. Second, a State is not required to include in its AMAO 3 calculation the scores of Title III-served LEP students whose scores are excluded from the State's AYP determination under Title I and § 200.20(f).[9]

4. *Exclusion of Title III-Served LEP Students ''Without Two Data Points'' from AMAO 1.*

*Background.* Section 3122(a)(3)(A)(i) of the ESEA requires States to develop an AMAO that measures Title III-served 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 Title III-served LEP children making progress in learning English.

In Interpretation 3 of this notice, the Department's final interpretation is that all LEP students served by Title III must be included in Title III accountability determinations, subject to two exceptions. Interpretation 4 addresses one of these exceptions, i.e., the question of whether States are permitted to exclude from AMAO 1 calculations and determinations Title III-served LEP students who do not have ''two data points'' that can be used to measure progress; that is, students who have not participated in two administrations of a State's annual ELP assessment required under Title III.

States have, in general, operationalized AMAO 1 as a measure of individual student growth in English language proficiency. Therefore, States typically include in AMAO 1 determinations only Title III-served LEP students for whom States have at least two scores or data points from comparable assessments, so that ''progress'' or growth can be demonstrated for individual students over time.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to include all Title III-served LEP students in measures of student progress in learning English (AMAO 1), regardless of whether the students participated in at least two consecutive and consistent annual administrations of an ELP assessment required under section 3113 of the ESEA. For students who did not participate in two consecutive and consistent annual administrations of an ELP assessment, the proposed interpretation would have, in effect, required States to propose to the Department an alternative method of measuring progress in order to include such students in AMAO 1 determinations. The proposed interpretation also would have allowed States to include additional criteria, over and above ELP assessment results, in AMAO determinations.

*Analysis of Comments and Changes*

*Comments:* Several commenters expressed support for the opportunity to propose to the Department an alternative method of measuring student progress in learning English in order to calculate AMAO 1 for Title III-served LEP students who do not have scores from two administrations of the State's ELP assessment. The commenters noted, for example, that States should receive credit for the progress of LEP students in kindergarten and newly enrolled LEP students who make progress in language proficiency. However, the vast majority of commenters opposed including, in AMAO 1 determinations, students who do not have at least two scores on the State's annual ELP assessment. The commenters stated that using measures other than the State's ELP assessment to make accountability decisions may result in unreliable data from non-comparable assessments and may force States to misuse assessments for purposes for which they were not designed.

*Discussion:* The Department did not intend to suggest that States use unreliable, invalid, or inappropriate assessment data to make accountability determinations. The purpose of this interpretation is to ensure that States include as many Title III-served LEP students in AMAO 1 determinations as possible. The Department believes that some States were advised that they were prohibited from including in AMAO 1 determinations any student for whom the State did not have scores from two State ELP assessments, and we wanted to correct this misunderstanding.

The Department's intent was to ensure that States are measuring the

[9] We note that under our Title I 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 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.*

progress of all Title III-served LEP students in acquiring English and to address the large numbers of Title III-served LEP students who are not included in AMAO 1 calculations because States report them as not having participated in two administrations of the State's ELP assessment. We expect that some students will legitimately have only ''one data point'' on the State ELP assessment. For example, LEP students in kindergarten, or LEP students who are recent arrivals to the United States would likely only have participated in one administration of a State's ELP assessment. However, States should not exclude from AMAO 1 determinations, students who transfer across districts within States, for example, or are absent for an assessment without adequate opportunities for a make-up exam. According to data submitted by States for the 2007 Consolidated State Performance Report (CSPR), an average of 30 percent of Title III-served LEP students had only one State ELP assessment score, and therefore were not included in AMAO 1 determinations. Twelve States were unable to measure progress for 35 percent or more of their Title III-served LEP students. Nine States could not include 40 percent or more of their Title III-served LEP students in AMAO 1 because they did not have scores from two administrations of the State's ELP assessment.

These concerns remain. However, the Department is persuaded by the commenters' arguments and has changed this interpretation to require that States include in AMAO 1 the scores of Title III-served LEP students who have participated in at least two administrations of the State's annual ELP assessment. States also may include, in AMAO 1 determinations, progress measures for Title III-served LEP students who have participated in fewer than two administrations of the ELP assessment but are not required to do so. The final interpretation provides that States may propose to the Secretary alternative measures of progress for students who do not have scores from two administrations of the annual ELP assessment so that such students can be included in AMAO 1 determinations.

Regardless of whether a student has scores from two administrations of the State's ELP assessment, we note that under Title III States are accountable for all Title III-served LEP students. We will continue to require States to report the number of Title III-served LEP students who do not have two data points on the State's annual ELP assessment. States must be able to account for and explain to the Department during its regular Title III monitoring activities, the specific reasons why students' scores were not included in AMAO 1.

*Changes:* We have revised the interpretation to require States, in calculating AMAO 1, to include only the scores of Title III-served LEP students who have participated in two administrations of the State's ELP assessment. We also have revised the interpretation to provide that if a State does not have results from two administrations of the State's annual ELP assessment for some Title III-served LEP students, but wants to include those students in its AMAO 1 accountability determinations, the State may propose to the Secretary an alternative measure of progress for those students. The final interpretation specifies that an alternative measure of progress must be based on research on how LEP children acquire proficiency in English and be a reliable measure of growth in English language proficiency.

*Comments:* Several commenters stated that it was inappropriate for the Department to require States to make AMAO 2 determinations based on only ''one data point.''

*Discussion:* The Department wants to be clear that the lack of ''two data points'' does not affect AMAO 2 calculations of proficiency. AMAO 2 is not a progress measure, nor does it require multiple measures of student growth. Any Title III-served LEP student who participates in one administration of the State's ELP assessment must be included in AMAO 2 (proficiency) calculations.

*Changes:* None.

*Comments:* Numerous commenters expressed concern about including in AMAO 1 Title III-served LEP students who have received Title III services for less than a full academic year.

*Discussion:* There is no provision in Title III (unlike the explicit provision in section 1111(b)(3)(C)(xi) in Title I regarding AYP determinations) that provides for Title III-served LEP students to be excluded from AMAO determinations based on whether such students have attended a school or schools in a subgrantee's jurisdiction for less than a full academic year. Therefore, States may not apply Title I's full academic year policies to AMAO 1 and AMAO 2 determinations.

*Changes:* None.

*Comments:* None.

*Discussion:* The proposed interpretation allowed States discretion to use criteria in addition to performance on the State's ELP assessment in calculating AMAO 1 (*e.g.*, performance on State content assessments or other criteria similar to the criteria States use to define English language proficiency, which may involve data or information from multiple sources). While the Department recognizes that including additional criteria is not standard practice in States, it should be allowed as an option, just as the Department allows criteria, in addition to ELP assessment results, to be considered in AMAO 2 determinations so that ''attaining proficiency'' under Title III corresponds to how proficiency is defined for the purposes of exiting students from the LEP subgroup in Title I (see Interpretation 5).

*Changes:* We have clarified in the final interpretation that if a State uses additional criteria in calculating AMAO 1, such criteria may only be applied to Title III-served LEP students who have participated in two administrations of the State's annual ELP assessment and have demonstrated progress in learning English.

*Comments:* None.

*Discussion:* The proposed interpretation indicated that AMAO 1 determinations typically are made for Title III-served LEP students based on the results of two ''consecutive and consistent'' administrations of a State's ELP assessment.

Upon further review of this language, the Department has determined that it is not necessary for the ELP assessments to be ''consecutive'' to measure Title III-served LEP student growth in English language proficiency. So long as a Title III-served LEP student has participated in two administrations of a State's annual ELP assessment, whether or not those assessments are administered consecutively, progress can be measured and included in AMAO 1 determinations.

We also determined that the reference to two ''consistent'' administrations of a State's ELP assessment was vague and should be removed from the final interpretation. States change and improve their assessments over time and we do not want to imply that scores must be from the exact same test from one year to the next in order to be included in AMAO 1 determinations.[10]

[10] That said, the Department recognizes that States need to have a certain level of comparability in their ELP assessments each year in order to have valid and reliable measures of individual student progress. If a State makes significant changes to its assessment or adopts a new ELP assessment, such that the State faces difficulties in making AMAO 1 determinations, the State must propose to the Department how it will make required AMAO determinations during such assessment transition periods. *See* letter to States at: *http://www.ed.gov/about/offices/list/oela/funding.html* regarding the requirements that States make AMAO determinations each and every year and the

*Changes:* In the final interpretation we have removed the reference to two ''consecutive and consistent'' annual administrations of an ELP assessment in describing the type of ELP assessment in which a Title III-served LEP student must participate in order to be included in AMAO 1 determinations.

*Final Interpretation.* The Secretary interprets the requirement in section 3122(a)(3)(A)(i) of the ESEA to require States to include in AMAO 1, at a minimum, the scores of all Title III-served LEP students who have participated in at least two administrations of the State's annual ELP assessment. If a State does not have results from two administrations of the State's annual ELP assessment for some Title III-served LEP students, but wants to include such students in AMAO 1 accountability determinations, the State may propose to the Secretary an alternative method of measuring progress. The alternative method for measuring progress under AMAO 1 must be a valid and reliable measure of growth in English language proficiency.

The Secretary also interprets section 3122(a)(3)(A)(i) of the ESEA to permit States to allow criteria such as performance on local ELP assessments or content assessments—in addition to progress on an annual ELP assessment—to be factored into progress determinations for AMAO 1. However, if a State uses additional criteria, such criteria may not substitute for performance on the State's ELP assessment. Additional criteria are to be considered only over and above the basic AMAO 1 expectation that a subgrantee's Title III-served LEP students who have participated in two administrations of the State's annual ELP assessment have made progress.

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 students' attainment of proficiency in English, as determined through an assessment that meaningfully measures student proficiency in each language domain and, overall, is a valid and reliable measure of student proficiency in English. AMAO 2 requires that States and subgrantees, at a minimum, show annual increases in the number or percentage of Title III-served LEP students attaining English proficiency.

Notwithstanding the requirement in section 9101(25) of the ESEA for each State to adopt a single definition of limited English proficient, the Department understands that many States have two definitions of language proficiency for LEP students. In most cases, States use one definition of proficiency for purposes of Title III accountability determinations that is different than the definition of proficiency used under Title I to ''exit'' a student from the LEP subgroup. As a result, many students remain designated as LEP despite the fact that, by Title III standards, they have attained English language proficiency.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to require that a State's definition of English language proficiency for the purpose of setting targets for attaining English language proficiency (AMAO 2) be consistent with and reflect the same criteria the State uses to determine that students from the LEP subgroup no longer need language instruction educational services and will exit the LEP subgroup. In other words, a student considered to have attained proficiency in English for the purposes of AMAO 2 would also be considered ready to exit the LEP subgroup for Title I purposes under the proposed interpretation.

The purpose of the proposed interpretation was to ensure that all LEP students receive Title III services until such time that they are no longer designated LEP and that States do not prematurely designate a student as having ''attained proficiency in English'' for Title III accountability purposes before such students are truly considered proficient in English. As such, the proposed interpretation would have required any additional criteria a State uses under Title I for determining when a LEP student exits the LEP subgroup, to be incorporated into that State's criteria for AMAO 2. The Secretary believes that the lack of consistent criteria for determining proficiency across Title III and Title I creates confusion about eligibility for Title III services and results in improper implementation of Title I and Title III ELP assessment requirements and Title III accountability requirements.

*Analysis of Comments and Changes*

*Comments:* Many commenters opposed our proposal to require that a State's definition of attaining proficiency (AMAO 2) for Title III purposes be the same as the State's definition for exiting the LEP subgroup under Title I. The commenters' major concern was that LEP students would be exited from LEP status prematurely or made ineligible for language instruction educational services based solely on the results of a State's ELP assessment. Some commenters argued that Title III resources would be spread too thin and that subgrantees would be forced to serve too many students if subgrantees were required to serve Title III-served LEP students until those students meet a State's criteria for exiting students from the LEP subgroup under Title I. Other commenters expressed concern that States would relax their criteria to exit students from the LEP subgroup in order to meet AMAO 2 proficiency targets. One commenter argued that the statutory language in Title III does not require AMAO 2 to be linked to the criteria for exiting LEP students from the LEP subgroup under Title I.

*Discussion:* The purpose of the proposed interpretation was to ensure that all LEP students receive Title III services until such time that students are no longer designated LEP. The Department did not intend to require States to change their definition of students who are considered LEP (as per section 9101(25) of the ESEA) under Title I, prematurely exit students from the LEP subgroup, or change in any way the requirements for determining a student's eligibility for Title III or other language instruction educational services. Indeed, the Department proposed that States adopt a single and consistent definition of attaining proficiency in English so as to ensure that a LEP student receives the language instruction educational services needed to acquire proficiency in English as long as the student is identified as LEP.

As illustrated by many of the comments we received, the lack of consistent criteria across Title III and Title I results in confusion about who is eligible for services under Title III, obscures who ought to receive services under Title III, and has led to questions about how a LEP student who has ''attained proficiency'' under Title III is to be included in both Title III and Title I assessments and accountability determinations. For example, through its monitoring of Title III programs, the Department has found that a number of States fail to administer the annual ELP assessment required under Title I once a LEP student has scored proficient and met AMAO 2 under Title III, even though the student continues to be designated as LEP under Title I. In these States, a student who scores proficient on the State's ELP assessment does not continue to be assessed for Title III purposes. However, section 1111(b)(7) of the ESEA requires that as long as a student is LEP, the student must participate in an annual ELP assessment. In addition, a number of

procedures for States to propose to the Department how AMAO determinations will be made when there is a significant change in a State's ELP assessment.

States fail to include Title III-served LEP students in AMAO determinations once a student has ''attained proficiency'' on the State's ELP assessment. However, as long as a LEP student is receiving Title III services, such a student must be included in the annual assessment and accountability requirements in Title III.

The commenters who argued that Title III resources would be spread too thin if students were required to meet a State's criteria for exiting students from the LEP subgroup under Title I in order to be considered proficient under AMAO 2 appear to be confused about the requirements under Title I and Title III. A student is eligible for Title III services as long as the student is designated LEP. Accordingly, the fact that a student is considered to have ''attained proficiency'' under Title III is not the determining factor for whether the student is eligible for Title III services.

The Secretary believes that attaining proficiency in English for Title III purposes should not be a separate or lower standard than the criteria a State uses to determine that a student no longer needs to be designated LEP. However, given the overwhelming misunderstanding of and opposition to the proposed interpretation, as well as concerns raised by Congressional staff and other commenters that the intent of the law, despite the inconsistencies it may cause, is to allow separate measures of accountability for Title I and Title III, we have changed the interpretation. The final interpretation permits States to use a definition of ''attaining proficiency'' for AMAO 2 that differs from the definition the State uses to exit students from the LEP subgroup for Title I accountability purposes.

However, the Secretary wants to make clear that, consistent with the statutory language, students who remain in the LEP subgroup under Title I (regardless of whether they ''attain proficiency'' for AMAO 2 purposes) must continue to be eligible for Title III services and must participate in the State's annual ELP assessment, as required under Title I. The scores of Title III-served LEP students cannot be ''banked'' until such students meet other State or local criteria for exiting the LEP subgroup and must be included in all AMAO determinations as long as the student receives Title III services or is included in the State's or subgrantee's definition of Title III-served LEP students for accountability purposes.

The Secretary also urges Congress to carefully consider and address, during reauthorization of the ESEA, the inconsistency of English language proficiency definitions across Title I and Title III.

*Changes:* We have revised the interpretation to encourage, but not require, a State's definition of attaining English language proficiency, and its AMAO 2 targets, calculations, and determinations to be consistent with the criteria the State uses to determine that students are ready to exit the LEP subgroup under Title I.

We also have revised the interpretation to clarify that as long as a student is designated LEP, the student is eligible for Title III services, regardless of whether the student has ''attained proficiency'' based on the definition of AMAO 2 under Title III.

In addition, the final interpretation includes language providing that all students designated LEP are required, under Title I, to participate in an annual ELP assessment, regardless of whether, for Title III purposes, such students have ''attained proficiency'' in English and that every LEP student who is receiving Title III services must be included in AMAO determinations, regardless of whether the student has ''attained proficiency'' in English on the State's ELP assessment.

*Comments:* Several commenters asked whether the criteria States use to exit students from the LEP subgroup under Title I could include criteria in addition to performance on a State's annual ELP assessment. Many commenters expressed concern that if States were required to use only the results of the State ELP assessment to exit students from the LEP subgroup, many LEP students would be inappropriately exited from the LEP subgroup.

*Discussion:* Section 9101(25) of the ESEA provides States with flexibility in the criteria they use to define a LEP student. The Department requires States to submit their definitions of LEP and their criteria for exiting students from the LEP subgroup as part of their Title I Accountability Workbook. The Department has approved numerous States' definitions that include criteria in addition to performance on the State's ELP assessment, to exit students from the LEP subgroup. For example, some States use judgments from teachers and parents; other States use student performance on other assessments, including State content assessments in reading required under Title I. Neither the proposed nor the final interpretation challenges States' approved definitions of LEP students or suggests that States should use performance on a State's annual ELP assessment alone to exit students from the LEP subgroup; the proposal was to use the same approved criteria under Title I to define proficiency for Title III purposes.

*Changes:* None.

*Comments:* Several commenters expressed concern that the proposed interpretation excluded parents from the decision-making process regarding a student's LEP status.

*Discussion:* We did not intend in the proposed interpretation to challenge or change any requirements regarding the array of student performance data or teacher and parent judgments used to make decisions about students' need for language instruction educational services or exiting students from the LEP subgroup; nor does the final interpretation. The final interpretation focuses only on how States define, for the purposes of Title III accountability determinations, whether a student has ''attained English proficiency'' under AMAO 2.

*Changes:* None.

*Final Interpretation.* It is the Secretary's interpretation of section 3122(a)(3)(A)(ii) of the ESEA that a State may use a definition of attaining English language proficiency for purposes of Title III accountability determinations under AMAO 2 that differs from the definition of English language proficiency that the State uses to determine that students should exit the LEP subgroup for Title I accountability purposes. If a State uses different definitions, students who remain in the LEP subgroup—regardless of whether they ''attain proficiency'' for AMAO 2 purposes—continue to be eligible for Title III services, and must participate in the State's annual ELP assessment, as required under section 1111(b)(7) of the ESEA. In addition, any LEP student who continues to receive Title III services—regardless of whether they ''attain proficiency'' for AMAO 2 purposes—must be included in all AMAO determinations.[11]

However, the Secretary strongly encourages States to have a definition of attaining proficiency (AMAO 2) for Title III purposes that is consistent with the State's definition for exiting the LEP subgroup under Title I. A single definition of English language proficiency would result in a State setting its targets for AMAO 2 that are consistent with and reflect the same criteria it uses to determine that students are prepared to exit the LEP subgroup for Title I accountability purposes.

[11] 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.

The final interpretation has no bearing on the substance of the criteria States use to exit students from the LEP subgroup under Title I. The Secretary continues to permit States and subgrantees to use criteria in addition to performance on the State's annual ELP assessment to determine a student's LEP status, consistent with States' definitions of LEP in their Title I Accountability Workbooks, as long as those criteria are applied consistently across all subgrantees in a State.

6. *Use of Minimum Group Size in Title III Accountability.*

*Background.* Section 3122(a)(3)(A)(ii) of Title III requires that States' AMAOs be determined using 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 they may apply their minimum group size, used in Title I AYP determinations, to AMAO calculations and determinations. It is the Department's understanding that numerous States are already implementing minimum group size policies as part of their AMAO determinations.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III to permit a State to apply the same minimum group size to AMAO calculations and determinations that the State applies to AYP determinations and that have been approved by the Department in the State's Accountability Workbook for purposes of Title I of the ESEA. This interpretation was 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 group size reflects the number of Title III-served LEP students enrolled in a district who participate in the State's annual ELP assessment in order for the ELP assessment scores of those students, taken together, to be a reliable basis for making judgments about how a subgrantee is performing.

*Analysis of Comments and Changes*

*Comments:* None.

*Discussion:* In the course of our internal review of the proposed interpretations, we determined that we should refer to ''minimum group size'' rather than ''minimum subgroup size'' because AYP determinations are made for student subgroups and the ''all students group,'' which is not considered a subgroup.

*Changes:* We have changed the reference from ''minimum subgroup size'' to ''minimum group size'' throughout the interpretation.

*Comments:* The majority of commenters supported the proposed interpretation that would permit a State to apply a minimum group size to AMAO calculations and determinations under Title III, consistent with the minimum group size policies that the State applies to AYP determinations under Title I and that has been approved by the Department in the State's Accountability Workbook under Title I. However, a few commenters expressed concern that permitting a State to use its minimum group size would mean that some districts would not be held accountable under Title III.

*Discussion:* AMAO determinations must be made for all subgrantees receiving Title III funds. We share the commenters' concerns that the use of a minimum group size may mean that the scores of some students would not be included in AMAO determinations. We believe that this is a particular concern for subgrantees that use cohorts in making their AMAO determinations or are members of a consortium for Title III funding purposes.

In order to ensure that using a minimum group size in AMAO determinations does not render subgrantees unaccountable under Title III, we have clarified in the final interpretation that a State cannot apply its minimum group size to individual cohorts of LEP students in the State or in subgrantee jurisdictions for which the State has set separate AMAO targets for cohorts. Similarly, if a State's subgrantees have formed a consortium for funding purposes, a State's minimum group size may not be applied to an individual consortium member if it means that AMAO determinations would not be made for that member of the consortium or for the consortium as a whole. In such cases, the data must be aggregated and combined across some or all members in the consortium in order to make AMAO determinations.

*Changes:* We have revised the interpretation to make clear that a State's minimum group size may be applied to State-level AMAO determinations and to subgrantees' Title III-served LEP group—but not to AMAO determinations for separate ''cohorts'' of Title III-served LEP students for which the State has set separate AMAO targets for itself and its subgrantees.[12]

We also have clarified that if a State's subgrantees have formed consortia for the purposes of receiving Title III funding, a State's minimum group size may be applied to each consortium member only if AMAO determinations can be made for each member of the consortium; otherwise, the minimum group size may not be applied to an individual consortium member. Instead, data from at least some other members of the consortium must be aggregated to meet minimum group size requirements and make AMAO determinations.

*Comments:* Several commenters stated that the proposed interpretation seems inconsistent with our interpretation that requires all students to be included in AMAOs.

*Discussion:* A major purpose of these interpretations is to ensure that no State systematically excludes Title III-served LEP students from Title III accountability determinations. This is very different from supporting district and State efforts to ensure that accountability determinations are based on sound, stable, and reliable data. In fact, section 3122(a)(3)(A)(ii) of the ESEA specifically requires States' AMAOs for LEP student proficiency in English to be determined by a valid and reliable assessment of English proficiency consistent with section 1111(b)(7) of Title I of the ESEA.

The Department believes that in most cases, it is not necessary for States to apply a minimum group size to AMAO determinations because Title III accountability requirements apply only at the LEA/subgrantee and State levels. Title III accountability requirements do not apply to individual schools, where there are typically smaller numbers of LEP students or frequent fluctuations in student populations that make it necessary to use a minimum group size. However, we will permit a State to apply its minimum group size to AMAO determinations to ensure that judgments about a subgrantee's performance in serving LEP students are based on valid and reliable data. If a State uses a minimum group size in AMAO determinations, it must report this information as part of its Title III State plan.

*Changes:* As noted previously, we have clarified that a State's minimum group size may not be applied to AMAO determinations for separate cohorts. Likewise, a State's minimum group size

[12] Interpretation 8 addresses State use of ''cohorts'' in making AMAO determinations for Title III accountability purposes. In the end, a State is required to make a single AMAO determination for itself and for each subgrantee, regardless of how many ''cohorts'' it uses or separate AMAO determinations it makes for groups of Title III-served LEP students. For this reason, the Department believes it is appropriate to restrict the application of minimum group size criteria to the overall State or subgrantee AMAO determination, rather than to each individual cohort, which would severely restrict Title III accountability at the subgrantee level.

may be applied to each member of a consortium only if AMAO determinations can be made for each member. If AMAO determinations cannot be made for an individual consortium member, the State must not apply its minimum group size to the individual consortium member but must combine AMAO data with some or all consortium members for some or all AMAOs in order that AMAO determinations can be made for every member in a consortium.

*Comments:* None.

*Discussion:* In our explanation in the notice of proposed interpretations, we noted that the Department is not encouraging States to adopt minimum group size policies for purposes of complying with Title III's accountability requirements and that the Department does not believe it will be necessary for most States to adopt such policies. As we have stated previously in this notice, Title III accountability requirements apply only at the LEA/subgrantee and State levels, not to individual schools, where there are typically smaller numbers of LEP students or frequent fluctuations in student populations that might make use of a minimum group size necessary. Furthermore, LEAs with very small numbers of LEP students are not typically eligible for Title III grants, so they are unlikely to be affected by the final interpretation.

We emphasize that policies designed to ensure that assessment results are used to make valid and reliable accountability determinations must be applied consistently across the State for Title III subgrantees. Therefore, under no circumstances may a State allow one subgrantee to use a different minimum group size than another subgrantee in the State for Title III accountability purposes.

*Changes:* None.

*Final Interpretation.* The Secretary interprets section 3122(a)(3)(A) of the ESEA to permit a State to apply a minimum group size to AMAO calculations and determinations under Title III that is consistent with the minimum group size that the State applies to AYP determinations and that has been approved by the Department in the State's Accountability Workbook under Title I.

In order to ensure that a State's minimum group size does not decrease accountability for subgrantees receiving Title III funds, a State may apply its minimum group size only to the State's and subgrantees' Title III-served LEP students as a whole and not to separate ''cohorts'' of Title III-served LEP students if the State has established cohorts and has set separate AMAO targets for them.

If a State's subgrantees have formed a consortium for the purposes of Title III funding, a State's minimum group size may be applied to each consortium member only if AMAO determinations can be made for each member. If AMAO determinations cannot be made using the State's minimum group size for any member of the consortium, the State must not apply its minimum group size to the individual consortium member and instead must combine AMAO data across some or all consortia members for some or all AMAO determinations so that minimum group size requirements are met and AMAO determinations are made for every consortium member receiving Title III funds.

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 AYP for LEP students as described in section 1111(b)(2)(B) of Title I of the ESEA.

In Interpretation 3 of this notice, the Department has set forth its final interpretation that all LEP students served by Title III must be included in Title III accountability determinations. Interpretation 7 addresses the more specific question of whether States must include all LEP students—whether or not served by Title III—in determining whether a State or its subgrantees have met AMAO 3.

In the notice of proposed interpretations, the Secretary proposed to interpret Title III 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. The setting of targets, calculations, and determinations of AMAO 3, under this interpretation, would not be limited to, or based on, only the expectations for Title III-served LEP students.

*Analysis of Comments and Changes*

*Comments:* Many commenters supported the proposed interpretation to require that LEP students included in AMAO 3 be the same LEP students counted in the LEP subgroup for AYP purposes under Title I. Most of the commenters representing State Departments of Education acknowledged that the current practice for calculating AMAO 3 is to use the AYP calculation under Title I and include all LEP students in Title III-funded districts or all LEP students in the State. However several commenters questioned the Department's authority to require States to include in AMAO 3 all LEP students when section 3122(a)(1) in Title III of the ESEA clearly refers to LEP students ''served under this part.'' Some commenters also expressed concern about holding Title III programs accountable for the academic performance of all LEP students.

*Discussion:* We do not agree that Title III clearly addresses the issue of which LEP students are expected to be included in AMAO 3. Section 3122(a)(1) of the ESEA specifically notes that AMAOs apply to ''children served under this part.'' However, 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].'' Because of this ambiguity, we have revised the interpretation to permit a State and its LEAs to meet AMAO 3 if the State's AYP achievement targets for reading and mathematics are met by the LEP subgroup as a whole (the same AYP determination under Title I) or by the subgroup of Title III-served LEP students. If a State has the capacity and ability to reliably and accurately make AYP determinations at the LEA and State levels specifically for Title III-served LEP students, the State may do so. If, for practical reasons, a State decides to calculate AMAO 3 based on all LEP students in the State or based on all LEP students in Title III-funded subgrantee jurisdictions, the State may do so.

*Changes:* We have changed the interpretation to permit, but not require, States to calculate AMAO 3 using (1) the LEP subgroup as a whole or (2) the Title III-served LEP students if the State has the capacity and ability to reliably and accurately make AYP determinations at the LEA and State levels specifically for the Title III-served LEP students. In the final interpretation, we clarify that States must explain to the Department which method they are using to calculate AMAO 3 and apply the method consistently in making AMAO determinations for subgrantees.

*Comments:* A number of commenters noted that AMAOs are based on district, not school, performance and asked how they would use district-level AYP for AMAO 3. Specifically, the commenters asked how AMAO 3 should be determined when States calculate AYP for grade spans within districts and whether Title III subgrantees must meet AYP targets for LEP students in both language arts and mathematics to be considered to have met AMAO 3.

*Discussion:* In order to meet AMAO 3, the Title III-served LEP students or the LEP subgroup in general must meet

district-level AYP targets for all grade spans (if grade spans are used) for both mathematics and reading/language arts, as well as meet AYP participation requirements. We have added language to make this clear in the final interpretation.

*Changes:* We have revised the interpretation to clarify that meeting AMAO 3 requires States and subgrantees to meet State AYP targets for both reading and mathematics for the Title III-served LEP students or the LEP subgroup as defined under Title I. The final interpretation also clarifies that a State and its subgrantees must meet State AYP targets for both reading and mathematics, as well as the participation rates, for the Title III-served LEP students or the LEP subgroup under Title I in order to be considered to have met AMAO 3.

*Comments:* None.

*Discussion:* The Secretary believes that one of the key purposes of AMAO 3 is to tie accountability for English language acquisition under Title III to accountability for ensuring that all LEP students achieve to the same high standards as all students are expected to meet in the core content areas under Title I. Therefore, the Secretary's strong preference is that a State uses the same criteria for determining AYP under AMAO 3 as it uses to determine AYP for the LEP subgroup at the State and LEA levels under Title I. We have made this clear in the final interpretation.

However, given the lack of clarity in the statutory language, the final interpretation allows States the option, in calculating AMAO 3, to include (1) all LEP students—that is, the entire LEP subgroup as defined under Title I—in the subgrantee's jurisdiction or (2) only Title III-served LEP students.

*Changes:* The final interpretation notes the Secretary's strong preference that a State uses the same criteria for determining AYP under AMAO 3 as it uses to determine AYP for the LEP subgroup at the State and LEA levels under Title I.

*Final Interpretation:* The Secretary interprets section 3122(a)(3)(A)(iii) of the ESEA to permit a State and its subgrantees to meet AMAO 3 if the State's AYP achievement targets for reading and mathematics are met by the LEP group as a whole (the same AYP determination under Title I) or by the subgroup of Title III-served LEP students, if the State has the capacity and ability to reliably and accurately make AYP determinations at the State and LEA/subgrantee levels specifically for the Title III-served LEP subgroup. In either case, each State is required to provide information in its State Title III plan on how AMAO 3, as well as the other AMAOs, will be defined and determined consistently for all subgrantees in the State. However, the Secretary's strong preference is that the LEP students included in AMAO 3 be the same LEP students referenced in section 1111(b)(2)(B) of Title I of the ESEA—that is, all students included in the LEP subgroup at the State and LEA levels for AYP purposes under Title I.[13]

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 and instructional practices in setting overall AMAO targets for English language acquisition by Title III-served LEP students. To date, the Department also has allowed States to establish different AMAO targets for different ''cohorts'' of LEP students. The Department's intent in allowing cohorts was to help States implement AMAOs that reflect the amount of time students are enrolled in a language instruction educational program. However, we have learned that some States have implemented AMAO targets for cohorts based on characteristics of LEP students other than their access to English language instruction educational programs. For example, some States have established cohorts based on student performance on ELP assessments, the number of years students have been in the United States, or on the likelihood a student will reach proficiency in English in a given year. The Secretary believes that such practices are inconsistent with Title III and NCLB.

In the notice of proposed interpretations, the Secretary proposed 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 only set separate AMAO targets for separate groups or ''cohorts'' of LEP students served by Title III based on the amount of time (for example, number of years) such students have had access to language instruction educational programs. Under the proposed interpretation, States could not set separate AMAO targets for cohorts of LEP students based on a student's current language proficiency, time in the United States, or any criteria other than time in a language instruction educational program.

*Analysis of Comments and Changes.*

*Comments:* There was general opposition to the proposed interpretation which would allow States to 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. Most commenters argued that States should be allowed to use other criteria, such as students' current proficiency levels, to establish cohorts and set different expectations for students based on such criteria. Some commenters argued that States should be permitted to establish different cohorts and expectations based on a student's current proficiency levels so that States could hold districts accountable for higher rates of growth for students with the least proficiency in English.

*Discussion:* Section 3122(a)(2)(A) of the ESEA requires AMAOs to 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, for example, have appropriately considered empirical data and instructional practices in setting overall AMAO targets for English language acquisition by LEP students served under Title III.

Title III does not, however, support setting separate accountability targets for language proficiency based on a student's current proficiency level in English. Although some commenters argued that separate targets based on language proficiency levels would allow States to hold districts accountable for higher rates of growth for students with the least proficiency in English, the Department has no evidence that cohorts defined by variables other than the number of years of access to Title III services are being used by States to hold districts to higher standards for their LEP students at the lowest levels of English proficiency.

*Changes:* None.

*Comments:* Some commenters urged the Department to allow States to ''weight'' the scores of LEP students at the lowest proficiency levels in AMAO

[13] 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.

calculations because such students cannot be expected to attain proficiency.

*Discussion:* Section 3122(a)(1) is clear that all Title III-served LEP students must be included in AMAO determinations. It would be contrary to the goals and purpose of NCLB to weight students differently based on their abilities or to assume that some students cannot reach proficiency in English.

*Changes:* None.

*Comments:* Numerous commenters expressed concern that with this proposed interpretation, it appears the Department expects all students to learn English in the same amount of time.

*Discussion:* AMAOs are district- and State-level targets for the overall progress and attainment of proficiency in English among Title III-served LEP students. The interpretation does not address the pace at which any individual student will learn English or make predictions or assumptions about individual growth in English language acquisition. Furthermore, because Title III requires that AMAOs reflect students' access and time in language instruction educational programs, the interpretation expressly does not demand uniform language acquisition expectations for all students. Rather it recognizes that the amount of time LEP students participate in language instruction educational programs is an essential element to consider in Title III accountability determinations.

*Changes:* None.

*Comments:* One commenter expressed concern that the proposed interpretation would permit States to decide whether or not to factor time in a language instruction educational program into AMAO determinations.

*Discussion:* Section 3122(a)(2)(A) of the ESEA is clear that States *must* develop AMAOs in a manner that reflects the amount of time an individual student has been enrolled in a language instruction educational program. The Department requires States to implement this provision and the final interpretation should not be interpreted otherwise.

*Changes:* None.

*Comments:* One commenter asked whether cohorts can be established by grade level for AMAO 1 and AMAO 2.

*Discussion:* AMAOs 1 and 2 reflect overall LEA and State targets for the percent of students making progress and attaining English proficiency, respectively, each year. Under Title III, grade level is not considered in AMAO definitions and determinations and the Department sees no justification for creating grade-level cohorts for making AMAO determinations.

*Changes:* None.

*Comments:* None.

*Discussion:* In reviewing the proposed interpretation, we determined that it would be helpful to include information in the text of the final interpretation regarding the need for States and subgrantees using cohorts to meet all AMAO targets applied to each cohort in order to meet AMAOs for the State or subgrantee overall. 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 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 AMAO 1. 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. We have included this information in the final interpretation.

*Changes:* We have revised the interpretation to incorporate language, originally included in the explanation of the proposed interpretation, indicating that States and subgrantees using cohorts must meet all AMAO targets for each cohort in order to meet the AMAOs for the State or subgrantee overall.

*Final Interpretation.* The Secretary interprets Title III to mean that (a) States may, but are not required to, establish ''cohorts'' for AMAO targets, calculations, and determinations; and (b) if States set separate AMAO targets for separate groups or ''cohorts'' of LEP students served by Title III they may do so based only on the amount of time (for example, number of years) such students have had access to language instruction educational programs. The plain language in section 3122(a)(2)(A) of the ESEA specifically provides that, in developing AMAOs, States must take into account the time a student has spent in a language instruction educational program. It is the Secretary's interpretation that it would be inconsistent with this statutory language to set different expectations for different Title III-served LEP students on any other basis, such as students' current language proficiency, individual abilities, or time residing in the United States.

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 and subgrantees must meet all of the AMAO targets applied to each cohort of LEP students in order to be considered to have met AMAOs for the State or subgrantee overall.

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 of the ESEA.

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 all ELP assessment data and other applicable data from each of the members in a 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 a number of cases, have required States to aggregate and compile results across LEAs and compute a new ''consortium-wide AYP.'' The Department is also aware that some States use different methods to calculate AMAOs for various consortia within their States.

In the notice of proposed interpretations, the Secretary stated that States are required to hold consortia, like any other eligible subgrantee, accountable for meeting AMAOs. However, the Secretary proposed to interpret Title III to allow States discretion about whether to treat subgrantees that consist of more than one LEA as a single entity or separate entities for the purpose of calculating each of the three AMAOs required under Title III.

*Analysis of Comments and Changes*

*Comments:* The vast majority of commenters supported the proposed interpretation to give States discretion about whether to treat subgrantees that consist of more than one LEA as a single entity or as separate entities for the purpose of calculating the three AMAOs required under Title III. However, commenters requested clarification regarding whether a State can pool data for some AMAOs and not others, and

whether States can use a ''small district review,'' similar to what States are permitted to use under Title I, for LEAs that do not have enough LEP students to make separate AMAO determinations.

*Discussion:* The Department requires that States make AMAO determinations for all subgrantees, including all LEAs that are members of a consortium. This interpretation gives States discretion about whether to make ''stand alone'' AMAO determinations for some LEAs within a consortium and whether and how to combine data for consortium-wide AMAO determinations.

Under the final interpretation, States must adopt ''decision rules'' for making AMAO determinations for consortia. These decision rules need not be uniform across all consortia, but must be consistent for consortia that are made up of similar types of LEAs. That is, we would expect the same decision rules to apply, for example, to consortia made up of several small LEAs, or to consortia made up of one or more large LEAs with several small LEAs. States must be able to demonstrate that the decision rules maximize accountability for consortia in the State. If AMAOs can be calculated separately for some LEAs in a consortium, States may calculate AMAOs for those LEAs individually. For consortia in which some or all of the LEAs are too small to make individual AMAO determinations, States have the option of combining all data within the consortium or combining the data for all of the LEAs that are too small to calculate separate AMAO determinations. States also may propose, when appropriate, to combine data for some AMAOs but not others within a consortium. Note that, as described in Interpretation 6, in cases where use of a State's minimum group size renders AMAO determinations impossible for a consortium member, a State must not apply the State's minimum group size to an individual member and, instead, must combine or aggregate data with other LEAs in the consortium to ensure that AMAO determinations are made.

A State with consortia must include in its Title III State plans, the decision rules for how it makes AMAO determinations for consortia.

Finally, the Department is not permitting, with this interpretation, a small LEA review for Title III accountability purposes. It is unlikely that a district that is small enough to require a small LEA review would qualify for Title III funds. If such a small district is part of a consortium, the Department requires that AMAO determinations be made—whether that requires the district to pool AMAO data with other districts in the consortium or forgo using a minimum group size in order to make AMAO determinations.

*Changes:* We have added language to the final interpretation to emphasize that a State with consortia must include, in its Title III State plans, the decision rules for how it makes AMAO determinations for its consortia. We also have added language to require States to ensure that these decision rules maximize accountability under Title III.

*Comments:* None.

*Discussion:* The Department intends to ensure that consortia are held accountable for meeting AMAOs and believes this is best accomplished if States adopt a set of consistent decision rules for implementing AMAOs for consortia within each State. States should be prepared to demonstrate, with data, that the method used to calculate AMAOs for consortia will yield AMAO determinations for all subgrantees and hold all consortia members accountable for ensuring that Title III-served LEP students acquire English language skills and for making AYP.

If a State intends to, among other things, combine assessment or other data, apply a minimum group size, create a ''consortium AYP'' calculation, or treat individual LEAs separately for the purposes of calculating AMAOs, the State must 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 will require the State to submit, for approval, an amendment to its Consolidated State Plan, required under section 3113 of the ESEA.

*Changes:* We have revised the interpretation to emphasize that a State with consortia must include, in its Title III State plan, the decision rules for how it makes AMAO determinations for consortia. We also have added language to require States to ensure that these decision rules maximize accountability under Title III.

*Final Interpretation:* The Secretary requires States to hold consortia, like any other eligible subgrantee, accountable for meeting AMAOs. However, the Secretary interprets Title III to allow States discretion about whether to treat subgrantees that consist of more than one LEA/subgrantee as a single entity or as separate entities for the purpose of calculating the three AMAOs required under Title III. States will, 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. States also have discretion in determining how they separate or combine data for calculating each AMAO. States must develop decision rules for making AMAO determinations for consortia that maximize accountability for consortia; these decision rules must be included in their Title III State Plans.

10. *Implementation of Corrective Actions under Title III.*

*Background.* Section 3122(b) of the ESEA describes the actions that a State and its subgrantee must take if a 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.

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 the proposed interpretation was to make absolutely 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.

In the notice of proposed interpretations, the Secretary reinforced the proper implementation of the accountability provisions of Title III, which require that all States make determinations for each of three AMAOs—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. The Secretary also proposed to clarify States' responsibilities to communicate with parents and subgrantees about AMAO results.

*Analysis of Comments and Changes*

*Comments:* One commenter stated that it was unfair for the Department to conclude that a subgrantee has not made its AMAOs if it misses only one of the three AMAO targets. The commenter questioned whether this was a statutory requirement.

*Discussion:* Section 3122(a)(3)(A) of the ESEA states that AMAOs must provide for, at a minimum, increases in AMAO 1 and AMAO 2, *and* making AYP for the LEP subgroup (AMAO 3). Section 3122(b)(1) requires States to hold LEAs accountable for meeting AMAOs, and to require an LEA to adopt an improvement plan if the LEA fails to meet those AMAOs for two consecutive years. This statutory language supports the Secretary's interpretation that, each year, all of the AMAOs must be met. Furthermore, increases in proficiency, without increases in students attaining proficiency or subgrantees meeting AYP, would not be sufficient to achieve the goals of Title III.

*Changes:* None.

*Comments:* One commenter expressed concern that States would be required to retroactively apply the final interpretations to districts. The commenter argued that Title III subgrantees should have the opportunity to change the way they make AMAO determinations to be consistent with the final interpretations before a State takes enforcement action. Some commenters argued that the starting point or ''year 1'' for Title III accountability determinations and requisite sanctions should start when the final interpretations are issued because it would be unfair to apply the new interpretations retroactively.

*Discussion:* This interpretation was included in the notice of proposed interpretations because, in the Department's monitoring of States, we found that many States (23) had not made any or all AMAO determinations since NCLB was implemented in 2003. In addition, several States made AMAO determinations, but did not provide information about the determinations to LEAs/subgrantees or parents, as required in section 3302(b) of the ESEA. The Department has made clear to States that did not correctly make AMAO determinations in the past that they must ensure that LEAs/subgrantees and parents are informed that the State did not make AMAO determinations or did not make accurate AMAO determinations; make AMAO determinations for every year using at least AMAO 3; and make complete AMAO determinations moving forward.[14] That said, we are not requiring States to retroactively implement these interpretations. For example, States are not expected to recalculate AMAOs for past years; nor would we require States to change existing AMAO determinations based on the final interpretations. The interpretations simply reiterate what Title III already requires regarding implementation of Title III accountability provisions and what we are requiring of States and subgrantees going forward.

*Changes:* None.

*Final Interpretation.* Through this notice, the Secretary reinforces the proper implementation of the requirements in section 3122(b) of the ESEA. The Secretary interprets section 3122(b) to require that *all* States comply with Title III requirements and make determinations for each of the three AMAOs—making progress in English proficiency (AMAO 1), attaining English proficiency (AMAO 2), and making 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 Secretary also interprets 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.

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 the 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.

[14] *See: http://www.ed.gov/about/offices/list/oela/funding.html* for an explanation of conditions placed on State Title III, Part A grants regarding a State's failure to make AMAO determinations or making incomplete AMAO determinations for school years 2002–2003, 2003–2004, 2004–2005, and 2005–2006 and the Department's expectations for State corrective actions to ensure that all AMAO determinations are made and that all States are in compliance with the accountability requirements of Title III moving forward.

**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 solicited public comment on these interpretations in order to consider public input, and is providing additional details and clarifications in this 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.

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Dated: October 14, 2008.

**Margaret Spellings,**

*Secretary of Education.*

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