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Non-Regulatory Guidance on

Title I, Part A Waivers

U.S. Department of Education

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PURPOSE OF THE GUIDANCE

The purpose of this guidance is to provide comprehensive information on how to request a waiver of specific statutory and regulatory provisions of Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA). The guidance does not impose any requirements beyond those included in the ESEA, the American Recovery and Reinvestment Act of 2009 (ARRA), and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The U.S. Department of Education (Department) will provide additional or updated program guidance as necessary. If you have any questions regarding the submission of requests to waive the statutory or regulatory requirements discussed in this document, please send an email to TitleIWaivers@ed.gov.

TITLE I, PART A WAIVER GUIDANCE

INTRODUCTION

The ARRA provides significant new funding for programs under Title I, Part A of the ESEA. Specifically, the ARRA provides $10 billion in additional fiscal year (FY) 2009 Title I, Part A funds to local educational agencies (LEAs) for schools that have high concentrations of students from families that live in poverty in order to help improve teaching and learning for students most at risk of failing to meet State academic achievement standards. In its Title I, Part A ARRA fact sheet and guidance, the Department indicated that the Secretary would consider certain waiver requests with respect to ARRA funding, such as waivers to permit an LEA to exclude ARRA funds when making certain fiscal and "set-aside" calculations, waivers related to the limitation on carryover for an LEA that has excess Title I, Part A funds, and waivers of maintenance-of-effort requirements.

In addition, in his April 1, 2009 letter to Chief State School Officers regarding the Title I regulations the Department issued in October 2008 [73 FR 64436 (Oct. 29, 2008), http://www.ed.gov/policy/elsec/guid/secletter/090401.html], Secretary Duncan noted that he would consider requests for waivers of two Title I regulatory provisions related to the implementation of public school choice and supplemental educational services (SES).

As a follow-up to the statements made in the Title I, Part A ARRA fact sheet and guidance and in his April 1, 2009 letter, the Secretary is now inviting specific waiver requests. In addition to the waivers referenced in prior documents, through this Guidance, the Secretary is also inviting requests for a waiver that would permit an LEA with one or more schools in improvement to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement.

This guidance document provides more detailed information about the provisions for which the Secretary is specifically inviting waiver requests, the entities the Secretary is inviting to request waivers, the contents of the invited waiver requests, the submission and approval process for the requests, notice-and-

comment requirements, reporting requirements, and the anticipated duration of the waivers for which requests are invited, as well as examples of acceptable formats for submissions of invited waiver requests. To the extent this guidance is inconsistent with statements made in prior guidance this document supersedes the earlier guidance (*see* Section F in *Guidance: Funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 Made Available Under the American Recovery and Reinvestment Act of 2009*, April 2009, http://www.ed.gov/policy/gen/leg/recovery/guidance/title-i.doc).

PART I: WAIVERS UNDER SECTION 9401 OF THE ESEA

This section provides general information about waivers under section 9401 of the ESEA and specific information about waivers of certain Title I, Part A statutory and regulatory provisions, including waivers that relate to certain Title I, Part A requirements that are affected by the availability of Title I, Part A funds under the ARRA. A discussion of waivers of maintenance-of-effort requirements under Title I, Part A is found in Part II of this document.

SECTION A: GENERAL REQUIREMENTS

A-1. May the Secretary grant a waiver of Title I, Part A statutory and regulatory requirements?

Yes. Under section 9401 of the ESEA, the Secretary has discretion to grant waivers of ESEA statutory and regulatory requirements, including Title I, Part A requirements, except as provided in section 9401(c) (see A-4). See B-1 and C-1 regarding the particular statutory and regulatory requirements for which the Secretary is specifically inviting waiver requests under section 9401.

A-2. Which entities may apply for a waiver?

Under section 9401 of the ESEA, a State educational agency (SEA), LEA, Indian tribe, or school that receives Title I, Part A funds may apply for a waiver of Title I, Part A statutory and regulatory requirements. A school that desires a waiver must submit its request for the waiver through its LEA. See B-2, B-8, B-16 and C-2 for information regarding the entities from which the Secretary is specifically inviting waiver requests under section 9401 of the ESEA. No SEA, LEA, Indian tribe, or school (through its LEA) is obligated to apply for a waiver of any statutory or regulatory provision.

A-3. May the Secretary waive Title I, Part A statutory or regulatory requirements for charter school LEAs or charter schools?

Yes. Consistent with an LEA's or school's charter, the Secretary may waive Title I, Part A statutory and regulatory requirements for a charter school LEA or school on the same basis as other LEAs or schools using the procedures required under section 9401.

A-4. Are there statutory or regulatory requirements that the Secretary may not waive under section 9401?

Yes. Under section 9401(c) of the ESEA, the Secretary may not waive any statutory or regulatory requirements relating to:

- Allocation or distribution of funds to States, LEAs, or other recipients of ESEA funds;
- Comparability of services;
- Use of Federal funds to supplement, not supplant, non-Federal funds;

- Equitable participation of private school students and teachers;
- Parental participation and involvement;
- Applicable civil rights requirements;
- Requirements for a charter school under subpart 1 of Part B of Title V of the ESEA;
- The prohibitions regarding: State aid in section 9522 of the ESEA, use of funds for religious worship or instruction in section 9505 of the ESEA, and activities in section 9526 of the ESEA; and
- Selection of school attendance areas or schools under section 1113(a) and (b) of the ESEA, except that the Secretary may grant a waiver to allow a school attendance area or school to participate in Title I, Part A activities if the percentage of children from low-income families in the school attendance area or who attend the school is not more than 10 percentage points below the lowest percentage of those children for any school attendance area or school of the LEA that meets the requirements of section 1113(a) and (b).

Note that, in addition, the Secretary may not waive maintenance-of-effort requirements under section 9401. However, the Secretary has specific authority to waive the Title I, Part A maintenance-of-effort requirement for SEAs under section 1125A(e)(3) of the ESEA and specific authority to waive the Title I, Part A maintenance-of-effort requirement for LEAs under section 9521(c) of the ESEA (see Part II of this document).

A-5. What information must be included in a waiver request?

Under section 9401(b)(1) of the ESEA, an SEA, LEA (on its own behalf or on behalf of a school), or Indian tribe seeking a waiver must submit a request that:

- Identifies the Federal program(s) affected by the requested waiver (ESEA section 9401(b)(1)(A));
- Identifies the particular statutory or regulatory requirement(s) for which the waiver is sought and describes how the waiver will increase the quality of instruction for students and improve the academic achievement of students (ESEA section 9401(b)(1)(B));
- Describes, for each school year, specific, measurable educational goals, in accordance with section 1111(b) of the ESEA, for the SEA and for each LEA, Indian tribe, or school that would be affected by the waiver and the methods to be used to measure annual progress for meeting those goals (ESEA section 9401(b)(1)(C));
- Explains how the waiver will assist the SEA and each affected LEA, Indian tribe, or school in reaching those goals (ESEA section 9401(b)(1)(D)); and
- Describes how schools will continue to provide assistance to the same populations served by the program(s) for which the waiver is requested (ESEA section 9401(b)(1)(E)).

In addition, an entity seeking a waiver must submit evidence that it has complied with the notice-and-comment requirements for a waiver request (see A-6) and must submit any comments it receives through the notice-and-comment process.

See B-4, B-18, C-7, C-15 and C-23 for additional information the Secretary will consider with respect to specific waiver requests.

A-6. What are the notice-and-comment requirements for a waiver request?

In the case of a waiver request submitted by an SEA, prior to submitting its request, the SEA must provide all interested LEAs in the State with notice and a reasonable opportunity to comment on the request (ESEA section 9401(b)(3)(A)(i)). The SEA must submit all comments it receives from those LEAs to the Secretary along with its waiver request (ESEA section 9401(b)(3)(A)(ii)). The Secretary will consider these comments when determining whether to grant the waiver request. The SEA must also

provide notice and information regarding the waiver request to the public in the manner in which the SEA customarily provides such notice and information to the public (ESEA section 9401(b)(3)(A)(iii)), such as through a public website.

In the case of a waiver request to be submitted to the Secretary by an LEA, the request must be reviewed by the SEA and be accompanied by the comments, if any, of the SEA (ESEA section 9401(b)(3)(B)(i)). The Secretary will consider these comments when determining whether to grant the waiver request. In addition, the LEA requesting the waiver must provide notice and information regarding the waiver request to the public in a manner in which the LEA customarily provides similar notice and information to the public (ESEA section 9401(b)(3)(B)(ii)).

A-7. To whom should a Title I, Part A waiver request be addressed?

Section 9401 of the ESEA vests the Secretary with the authority to grant a waiver. However, that authority has been delegated to the Assistant Secretary who administers the program for which a waiver is requested. Accordingly, a request for a waiver of a Title I, Part A requirement should be addressed to the Assistant Secretary for Elementary and Secondary Education via email at the following address: TitleIWaivers@ed.gov. Please note that, for ease of reference, this Guidance refers to the Secretary when discussing the submission and review of waiver requests.

A-8. How will the Secretary determine whether to grant a waiver?

The Secretary will review each waiver request to determine whether the SEA, LEA, or Indian tribe has complied with the requirements in section 9401(b) of the ESEA (see A-5 and A-6). The Secretary may also consider other relevant policy factors, as granting a waiver is ultimately a discretionary act of the Secretary.

A-9. Is there a deadline for the submission of a waiver request?

No. However, the Secretary encourages the submission of requests as soon as possible, particularly for requests to waive statutory and regulatory requirements that are effective at the start of the 2009–2010 school year. In considering when to submit a waiver request, bear in mind that compliance with the statutory and regulatory requirements for which the waiver is requested must continue until the waiver and, if necessary, approval to implement it are granted.

A-10. What are the reporting requirements with which a recipient of a waiver must comply?

LEA reports: In accordance with section 9401(e)(1), an LEA that receives a waiver must submit a report to the SEA that: (1) describes the uses of the waiver by the LEA or by its schools; (2) describes how schools continued to provide assistance to the same populations served by the program(s) for which the waiver was granted; and (3) evaluates the progress of the LEA and of schools in improving the quality of instruction or the academic achievement of students.

SEA reports: In accordance with section 9401(e)(2), an SEA that receives reports by LEAs (as described above) must annually submit a report to the Secretary that is based on those reports and contains such information as the Secretary may require. In addition, an SEA that receives a waiver must submit a report that contains such information as the Secretary may require.

Indian tribe reports: In accordance with section 9401(e)(3), an Indian tribe that receives a waiver must annually submit a report to the Secretary that: (1) describes the uses of the waiver by schools operated by

the tribe; and (2) evaluates the progress of those schools in improving the quality of instruction or the academic achievement of students.

See B-5, B-13, B-19, C-10, and C-17 for the information the Secretary requires an SEA to report for each specific waiver for which requests are being invited.

A-11. What is the duration of a waiver?

In general, the Secretary may grant a waiver for a period not to exceed four years (ESEA section 9401(d)(1)). The Secretary may extend the duration of a waiver if he determines that: (1) the waiver has been effective and has contributed to improved student achievement; and (2) extension of the waiver is in the public interest (ESEA section 9401(d)(2)).

However, the Secretary intends to grant the waivers invited in this Guidance for a period of less than four years. See B-6, B-14, B-20, C-11, C-18, and C-25 for additional information regarding the expected duration of the waivers for which requests are specifically invited by this Guidance.

A-12. May the Secretary terminate a waiver before its expiration date?

Yes, the Secretary must terminate a waiver if the Secretary determines, after notice and an opportunity for a hearing, that the performance of the SEA or other entity affected by the waiver has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purposes (ESEA section 9401(f)). For example, the Secretary may terminate a waiver if the SEA is not complying with the conditions of the waiver. Or, in the case of a waiver that is granted while the Department is proposing a rule, the waiver may be terminated once the rule is final and the waiver is no longer needed.

A-13. Must waiver requests be limited to those for the Title I, Part A statutory and regulatory requirements discussed in this Guidance?

No. Except as indicated in section 9401(c) (see A-4), an SEA, LEA, school (through its LEA), or Indian tribe that receives Title I, Part A funds may request a waiver of any Title I, Part A statutory or regulatory requirement.

A-14. May an SEA submit one consolidated request for waivers of more than one provision?

Yes, although an SEA may submit separate requests for each waiver if it so chooses.

SECTION B: WAIVERS OF TITLE I, PART A STATUTORY AND REGULATORY REQUIREMENTS RELATED TO SES AND PUBLIC SCHOOL CHOICE

B-1. For which specific Title I, Part A statutory and regulatory requirements is the Secretary inviting waiver requests under section 9401 of the ESEA?

As indicated in Secretary Duncan's April 1, 2009 letter to Chief State School Officers (http://www.ed.gov/policy/elsec/guid/secletter/090401.html), he is inviting SEAs to request waivers of the following two regulatory provisions:

- 14-day notice of public school choice. This provision requires an LEA to provide parents of eligible students with notice of their public school choice options at least 14 days before the start of the school year (34 C.F.R. § 200.37(b)(4)(iv)).

- Approval of identified LEAs and schools as SES providers. This provision prohibits an SEA from approving as a provider of SES a school identified for improvement, corrective action, or restructuring or an LEA identified for improvement or corrective action (34 C.F.R. § 200.47(b)(1)(iv)(A), (B)).

In addition, the Secretary is inviting requests to waive certain statutory and regulatory provisions regarding which funds may be counted toward an LEA's "20 percent obligation" for SES and choice-related transportation. (ESEA section 1116(b)(10)(A); 34 C.F.R. § 200.48(a)(2)). Specifically, the invited waiver would permit an LEA to offer SES in addition to public school choice to eligible students in Title I schools during the first year of school improvement and to count the funds spent on providing SES to eligible children in those schools toward meeting the LEA's 20 percent obligation.

Note that, although the Secretary invites SEAs to request waivers of these requirements, no SEA is obligated to apply for a waiver of any of the foregoing requirements.

Requests for Waivers of the 14-Day Notice Requirement

B-2. Which entities are invited to apply for a waiver of the 14-day notice requirement?

The Secretary invites an SEA to apply for a waiver of the 14-day notice requirement, on behalf of its LEAs, if the SEA would need to change its assessment schedule (including the schedule for scoring assessments and making adequate yearly progress (AYP) determinations based on the assessment results) or modify its existing contract with a test vendor for the 2008–2009 school year in order for its LEAs to comply with the requirement prior to the start of the 2009–2010 school year.

If the Secretary grants a waiver request that is submitted in response to this invitation, the waiver that is granted will benefit all LEAs in the State, to the extent they need the waiver.

B-3. What will be the scope of a waiver of the 14-day notice requirement?

A waiver of the regulatory requirement that an LEA provide notice of public school choice options at least 14 days before the start of the school year would apply only with respect to students in schools that are newly identified for improvement for the 2009–2010 school year, or that could possibly have exited improvement, corrective action, or restructuring for the 2009–2010 school year but did not (*i.e.*, the schools in improvement, corrective action, or restructuring that made AYP based on assessments administered in the 2007–2008 school year but do not yet have the results of the assessments administered in the 2008–2009 school year and thus do not know if they made AYP and exited improvement or missed AYP and must continue to offer public school choice). In a State that is granted this waiver, all LEAs with schools that cannot exit improvement, corrective action, or restructuring for the 2009–2010 school year (even if they met AYP) would still be obligated to comply with the 14-day notice requirement with respect to students in those schools. The scope of the waiver is limited in this way because, with respect to students in schools that cannot exit improvement, corrective action, or restructuring for the 2009–2010 school year, an LEA's ability to provide notice of public school choice options at least 14 days before the start of the school year is not dependent on the SEA's assessment schedule or its contract with a test vendor for the 2008–2009 school year.

In addition, all LEAs, including those covered by the waiver, would still need to meet the statutory requirement to provide notice of public school choice before the start of the school year (ESEA section 1116(b)(1)(E)(i)).

B-4. Is there additional information beyond that described in A-5 that an SEA seeking a waiver of the 14-day notice requirement must include in its waiver request?

Yes. In addition to the information described in A-5, an SEA that requests a waiver of this regulatory provision must include:

- Evidence that the State would have to modify its assessment schedule or test vendor contract for its LEAs to comply with the 14-day notice requirement for the 2009–2010 school year;
- An assurance that the SEA will ensure that its LEAs implement the waiver in accordance with the limitations set forth in B-3;
- An assurance that the SEA will encourage all LEAs within the State to provide notice of public school choice as early as possible and, ideally, at least 30 days before the start of the school year;
- An assurance that the SEA will take all steps necessary to ensure that its assessment schedule and test vendor contract for the 2009–2010 school year (and all subsequent school years) will permit LEAs within the State to provide notice of public school choice sufficiently in advance of, but no later than 14 days before, the start of the 2010–2011 school year (and all subsequent school years); and
- An assurance that the SEA will ensure that its LEAs that offer public school choice earlier to students in some schools than to students in other schools will reserve a portion of the available transportation slots for students who receive the later notice *(see* Question D-7 in the Department's Public School Choice Non-Regulatory Guidance, available at: http://www.ed.gov/policy/elsec/guid/schoolchoiceguid.pdf).

B-5. Is there specific information that an SEA that receives a waiver of the 14-day notice requirement must report to the Secretary?

Yes. An SEA that receives a waiver of the 14-day notice requirement must submit to the Secretary, by September 30, 2010, a report providing:

- The total number of LEAs within the State that had schools that could possibly have entered or exited improvement, corrective action, or restructuring for the 2009–2010 school year; and
- The total number of LEAs within the State that took advantage of the waiver and provided some parents notice of public school choice less than 14 days before the start of the 2009–2010 school year.

B-6. What will be the duration of a waiver of the 14-day notice requirement?

The Secretary intends to grant a waiver of the 14-day notice requirement for the 2009–2010 school year only. The Secretary is inviting this waiver request for the 2009–2010 school year because he understands that, given the date this requirement went into effect, it would have been extremely difficult, if not impossible, for an SEA to change its assessment timeline or modify its existing contract with a test vendor for the 2008–2009 school year so that its LEAs could comply with this regulatory provision for the 2009–2010 school year. However, the Secretary believes that all SEAs have had sufficient notice to make necessary changes to their assessment timelines and vendor contracts for the 2009–2010 school year. The Secretary does not intend to invite a waiver of this requirement for more than one year; accordingly, all LEAs must provide parents of eligible students with notice of their public school choice options at least 14 days before the start of the school year beginning with the 2010–2011 school year.

B-7. What might a request to waive the 14-day notice requirement look like?

For an example of a request to waive the 14-day notice requirement, see Appendix A.

Requests for Waivers of the Prohibition on Approving Schools and LEAs in Improvement, Corrective Action, or Restructuring as SES Providers

B-8. Which entities are invited to apply for a waiver of the provision that prohibits an SEA from approving as an SES provider a school or LEA in improvement, corrective action, or restructuring?

The Secretary invites any interested SEA to request a waiver of this provision so that the SEA may approve as an SES provider a school identified for improvement, corrective action, or restructuring or an LEA identified for improvement or corrective action ("identified school or LEA").

B-9. What is the effect of waiving the provision that prohibits an SEA from approving an identified school or LEA as an SES provider?

This waiver would allow, but not require, an SEA to approve identified schools or LEAs as providers. The decision about which SES providers to approve would remain a decision for the SEA. The Secretary's grant of a waiver would not constitute approval of a particular identified school or LEA to serve as an SES provider, nor would it constitute a waiver of any State law or policy that prohibits all or certain identified schools or LEAs from serving as an SES provider.

B-10. If an SEA has nearly completed or already completed its SES approval process for the 2009–2010 school year, how might it take advantage of a waiver of this provision?

If an SEA's "window" for submission of applications for approval to serve as an SES provider for the 2009–2010 school year is currently open but will close before an identified school or LEA has had a full opportunity to apply, the SEA might extend its application window so that identified schools and LEAs have such an opportunity. Similarly, if an SEA's window for submitting applications has already closed and the SEA is no longer accepting applications from prospective SES providers for the 2009–2010 school year, the SEA might re-open its application process so that identified schools and LEAs may apply. An SEA that extends or re-opens its application process specifically to take advantage of this waiver might limit the applications it will consider during the extended or re-opened application period to those from identified schools and LEAs, so long as it has previously offered other entities interested in providing SES in the 2009–2010 school year a full opportunity to apply for approval.

B-11. Until an SEA receives a waiver of the provision that prohibits an SEA from approving as an SES provider an identified school or LEA, may the SEA grant conditional approval to an identified school or LEA to be an SES provider?

Yes. An SEA that intends to apply for a waiver in response to this invitation may invite identified schools and LEAs to apply to the SEA for conditional approval to be an SES provider. To receive conditional approval, an identified school or LEA must, like any prospective SES provider, follow the SEA's application process and meet all of the SEA's customary approval requirements. Prior to granting conditional approval to identified schools or LEAs, the SEA and affected schools and LEAs should be aware that approval cannot become final unless and until the Secretary grants a waiver of the relevant provision. In other words, an identified school or LEA may not begin to serve as an SES provider until the SEA has received a waiver, but receipt of conditional approval may enable the school or LEA to begin planning its provision of services. Granting conditional approvals may also enable an SEA to avoid having to conduct a second approval process once it receives a waiver. SEAs, LEAs, and schools should understand that, although the Secretary is inviting requests for these waivers, no SEA is guaranteed that it will receive a waiver. If an SEA's waiver request is not approved by the Department, the SEA must consider the conditional approval granted to an identified school or LEA to be null and void.

B-12. Is there additional information beyond what is discussed in A-5 that an SEA must include in its waiver request if it seeks a waiver of the provision that prohibits an SEA from approving as an SES provider an identified school or LEA?

No.

B-13. Is there specific information that an SEA must report to the Secretary if it receives a waiver of the provision that prohibits an SEA from approving as an SES provider an identified school or LEA?

Yes. An SEA that receives this waiver must submit to the Secretary, by September 30, 2010, a report containing:

- The total number of LEAs identified for improvement or corrective action that were approved to be an SES provider for the 2009–2010 school year; and

- The total number of schools identified for improvement, corrective action, or restructuring that were approved to be an SES provider for the 2009–2010 school year.

B-14. What will be the duration of a waiver of the provision that prohibits an SEA from approving as an SES provider an identified school or LEA?

The Secretary intends to grant a waiver of the provision that prohibits an SEA from approving as an SES provider an identified school or LEA for the 2009–2010 school year only. For future years, as discussed in the April 1, 2009 letter to Chief State School Officers, the Secretary intends to propose a rule to amend or repeal the regulatory provision that prohibits an SEA from approving an identified school or LEA as an SES provider.

B-15. What might a request to waive the provision that prohibits an SEA from approving as an SES provider an identified school or LEA look like?

For an example of a request to waive the regulatory provision that prohibits an SEA from approving as an SES provider an identified school or LEA, see Appendix B.

Requests for waivers to allow an LEA to offer SES in addition to public school choice to eligible students in Title I schools in the first year of school improvement

B-16. Which entities are invited to apply for a waiver to allow an LEA to offer SES in addition to public school choice to eligible students in Title I schools in the first year of school improvement?

The Secretary invites any interested SEA to request a waiver to allow an LEA to offer SES in addition to public school choice to eligible students in Title I schools in the first year of school improvement.

B-17. What would a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement allow?

Under section 1116(b)(10) of the ESEA and 34 C.F.R. § 200.48, an LEA with one or more schools in improvement, corrective action, or restructuring must spend an amount at least equal to 20 percent of its Title I, Part A, Subpart 2 allocation on public school-choice related transportation and SES ("20 percent

obligation"). In determining whether an LEA has met its 20 percent obligation, an LEA may not count the funds that it spends on providing SES to students attending schools in the first year of improvement because the LEA has no statutory or regulatory obligation to provide SES to students attending those schools. (See ESEA section 1116(b)(5)(B), (b)(7)(C)(iii), and (b)(8)(A)(ii), requiring SES only for eligible students attending schools in the second year of school improvement, in corrective action, or in restructuring.)

This waiver would provide an LEA with the flexibility to offer SES to eligible students in Title I schools in year one of improvement (a year earlier than the law normally requires), in addition to offering public school choice options to students in those schools, and to count the costs of providing SES to those students toward meeting the LEA's 20 percent obligation. Note that, unlike past flexibility the Department has granted in this area, an LEA that implements this waiver may not offer *only* SES to eligible students in schools in the first year of improvement, but may offer SES *in addition to* public school choice to eligible students in those Title I schools.

B-18. Is there additional information beyond what is discussed in A-5 that an SEA seeking a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement must include in its waiver request?

Yes. An SEA must include an assurance that the SEA will implement the waiver only with respect to an LEA that will meet all statutory and regulatory requirements related to SES for the 2009-2010 school year (other than the particular requirement being waived).

B-19. Is there specific information that an SEA that receives a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement must report to the Secretary?

Yes. An SEA that receives a waiver allowing its LEAs to offer SES, in addition to public school choice, to eligible students in Title I schools in year one of school improvement must submit to the Secretary, by September 30, 2010, a report that includes the name and NCES District Identification Number for each LEA implementing the waiver. (Independent of this reporting requirement, the Secretary requires an SEA to submit information regarding LEAs' implementation of public school choice and SES requirements through ED*Facts*.)

B-20. What will be the duration of a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement?

A waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement will be granted for the 2009–2010 school year.

B-21. What might a request for a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement look like?

For an example of a request for a waiver related to the provision of SES to eligible students attending Title I schools in the first year of school improvement, see Appendix C.

B-22. Does an SEA that previously received flexibility related to the provision of SES to eligible students attending Title I schools in the first year of school improvement through a Department "pilot" need to submit a waiver request in accordance with this guidance to continue that flexibility?

An SEA[1] that was granted flexibility through an SES pilot to offer SES to eligible students in Title I schools in year one of improvement for the 2008-2009 school year may request to have this flexibility renewed for the 2009-2010 school year under the terms of the SEA's existing flexibility agreement. Additionally, an SEA[2] that previously was granted flexibility through the Differentiated Accountability Pilot does not need to request a waiver (or an extension of the existing waiver) because these SEAs have already been granted flexibility for the school years specified in their approval letters. An SEA not already approved to receive this flexibility may request a waiver in accordance with this guidance.

SECTION C: WAIVERS RELATED TO TITLE I, PART A ARRA FUNDS

C-1. For which specific requirements of Title I, Part A that are affected by the availability of Title I, Part A ARRA funds is the Secretary inviting waiver requests?

The Secretary is inviting requests for waivers related to the following Title I, Part A requirements that are affected by the availability of Title I, Part A ARRA funds:

- An LEA's obligation to spend an amount equal to at least 20 percent of its FY 2009 Title I, Part A, Subpart 2 allocation on transportation for public school choice and on SES (20 percent obligation) (ESEA section 1116(b)(10); 34 C.F.R. § 200.48).
- The responsibility of a school in improvement to spend 10 percent of its Title I, Part A funds on professional development (ESEA section 1116(b)(3)(A)(iii); 34 C.F.R. § 200.41(c)(5)).
- The responsibility of an LEA in improvement to spend 10 percent of its FY 2009 Title I, Part A, Subpart 2 allocation on professional development (ESEA section 1116(c)(7)(A)(iii); 34 C.F.R. § 200.52(a)(3)(iii)).
- The responsibility of an LEA to calculate the per-pupil amount for SES based on its FY 2009 Title I, Part A, Subpart 2 allocation (per-pupil amount for SES) (ESEA section 1116(e)(6); 34 C.F.R. § 200.48(c)).
- The prohibition on an SEA's ability to grant to its LEAs waivers of the carryover limitation more than once every three years (ESEA section 1127(b)).

The "set-aside" requirements referenced in this Guidance are the 20 percent obligation for public school choice-related transportation and SES and the professional development obligations listed above.

C-2. Which entities are invited to apply for a waiver of the Title I, Part A requirements listed in C-1?

The Secretary invites any interested SEA to apply, on behalf of its LEAs, for a waiver of one or more of the statutory requirements described in C-1.

C-3. For a waiver related to a "set-aside" requirement or the requirement for the per-pupil amount for SES, how does an LEA receive the benefit of a waiver granted to the SEA?

If the Secretary grants an SEA's request for a waiver related to one or more of the "set-aside" requirements or of the requirement for the per-pupil amount for SES, any LEA in the State interested in receiving the benefit of the waiver must apply to the SEA for approval to implement it. The SEA will then review the LEA's request in order to ensure that the LEA provides all required information in its request, as set forth below in C-7 and C-8, and that it plans to implement the waiver in accordance with

[1] These SEAs are Alabama, Alaska, Arkansas, North Carolina, Tennessee, Utah, and Virginia.
[2] These SEAs are Arkansas, Florida, Georgia, Indiana, Illinois, Louisiana, and New York.

the conditions of the waiver. An SEA may not deny a request from an LEA to implement the waiver if the LEA's request includes all of the required information and meets all conditions on the SEA's waiver.

For information on how an LEA may receive the benefit of a waiver granted to an SEA related to the carryover limitation, see C-21.

C-4. How is the process described in C-3, in which an SEA applies for a waiver on behalf of its LEAs, different from the process if an LEA were to apply directly to the Secretary for a waiver related to a "set-aside" requirement or the per-pupil amount requirement?

As described in A-2, an LEA may apply for a waiver directly from the Secretary. The process described in C-3 and invited by the Secretary, however, calls for an SEA, not an LEA, to apply for certain waivers related to the "set-aside" requirements and the per-pupil amount requirement, and for an LEA then to seek permission from its SEA to implement those waivers.

As described in A-5, an LEA applying for a waiver directly from the Secretary must include certain information in its waiver request. If an SEA applies for a waiver related to a "set-aside" requirement or the requirement for the per-pupil amount for SES on behalf of its LEAs, an SEA will include all of the information required by the statute in its request for the waiver. Therefore, an LEA seeking to implement the waiver need only include in its request to the SEA the limited information described in C-8 and C-16.

As described in A-6, an LEA applying for a waiver directly from the Secretary must comply with certain notice-and-comment requirements. If an SEA applies for a waiver related to a "set-aside" requirement or the requirement for the per-pupil amount for SES on behalf of its LEAs, an SEA will provide public notice and an opportunity to comment on the waiver request before it submits its request to the Secretary. Therefore, an LEA seeking to implement the SEA's waiver need not comply with the requirements described in A-6.

As described in A-10, an LEA that receives a waiver directly from the Secretary must comply with certain reporting requirements. If an SEA applies for a waiver related to the "set-aside" requirements or the per-pupil amount requirement on behalf of its LEAs, an LEA seeking to implement the SEA's waiver need not comply with the LEA reporting requirements described in A-10. Instead, it would need to provide to the SEA only the information the SEA needs in order to fulfill its reporting requirements as outlined in C-10 and C-17.

The Secretary encourages any LEA, Indian tribe, or school (through its LEA) that is contemplating applying directly to the Secretary for a waiver of one or more of the requirements listed in C-1 to communicate with its SEA (or, in the case of an Indian tribe, to communicate with the Department of the Interior/Bureau of Indian Education) to determine whether the SEA intends to seek such a waiver in response to this invitation.

C-5. May an Ed-Flex State waive the requirements set forth in C-1 that are affected by the availability of Title I, Part A ARRA funds?

A State that has waiver authority under the Education Flexibility Partnership Act of 1999 (Ed-Flex) (20 U.S.C. § 5891b) may request a waiver of the requirements in C-1 from the Secretary in the same way as other SEAs. However, an Ed-Flex State[3] is not permitted, among other things, to waive any statutory or regulatory requirement related to section 1111 or section 1116 of the ESEA using its Ed-Flex authority.

[3] The Ed-Flex States are Colorado, Delaware, Kansas, Massachusetts, Maryland, North Carolina, Oregon, Pennsylvania, Texas, and Vermont.

As a result, an Ed-Flex State may not waive for its LEAs most of the requirements set forth in section C-1 because they are requirements of section 1116 (*e.g.*, SES and professional development). An Ed-Flex State may waive the limitation on carryover more than once every three years using its Ed-Flex authority.

Requests for waivers to allow exclusion of Title I, Part A ARRA funds in "set-aside" calculations

C-6. What would a waiver related to the "set-aside" requirements of Title I, Part A allow?

As described in C-1, the Secretary is inviting requests for a waiver related to three "set-asides" or obligations in Title I, Part A. These requirements are:

- The requirement to calculate an LEA's 20 percent obligation for public school choice-related transportation and SES based on the LEA's total FY 2009 Title I, Part A allocation (regular allocation *and* ARRA).
- The requirement to calculate the 10 percent set-aside for professional development for an LEA in improvement based on the LEA's total FY 2009 Title I, Part A allocation (regular allocation *and* ARRA).
- The requirement to calculate the 10 percent set-aside for professional development for a school in improvement based on the total amount of FY 2009 Title I, Part A funds the school receives under section 1113 (from the LEA's regular allocation *and* ARRA).

Absent a waiver, an LEA's Title I, Part A ARRA funds would be included in the LEA's Title I, Part A, Subpart 2 allocation in determining the "set aside" amounts for the above requirements. A waiver related to either the 20 percent obligation for public school choice-related transportation and SES or the 10 percent set-aside for professional development for an LEA in improvement would permit an LEA, if it so chooses, to exclude some or all of its Title I, Part A ARRA funds in calculating these "set-aside" amounts. A waiver related to the 10 percent set-aside for professional development for a school in improvement would allow a school to calculate this set-aside in a way that takes into account some or all of the LEA's Title I, Part A ARRA funds, as described in C-9.

C-7. Is there additional information beyond what is discussed in A-5 that an SEA seeking a waiver related to the calculation of the "set-asides" must include in its waiver request?

Yes. For a request for a waiver related to either the 20 percent obligation for choice-related transportation and SES or the 10 percent professional development obligation for an LEA in improvement, an SEA must include the following assurances with respect to the specific "set-aside" requirement for which the waiver is requested:

- That the SEA will only implement the waiver for an LEA that provides assurances to the SEA that:
  - The LEA will comply with its statutory and regulatory obligations for the set-aside with respect to its regular Title I, Part A allocation;
  - The LEA will use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results;
  - The LEA will comply with all of its other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research"; and
  - The LEA will submit an application for Title I, Part A funds (referred to herein as "LEA application") or, if necessary, an amendment to its existing LEA application that describes the data on which it relied to identify needs that will be addressed using the funds freed up by the waiver and the evidence that supports the strategies it intends to use to address those needs.

- That the SEA will not approve an LEA's application or amendment to an LEA's application unless or until it determines, based on the LEA's description, that the LEA has satisfied its obligation to identify needs based on data and address those needs using evidence-based strategies.
- That the SEA will not approve an LEA to implement the waiver unless or until the LEA has an approved application (or amended application) that includes the required description of the data on which the LEA relied to identify needs and the evidence that supports the strategies to address those needs.
- That, if necessary to carry out the assurances above, the SEA will require an LEA seeking to implement the waiver to amend its application in accordance with the SEA's usual process for changing an LEA's application.

Please note that the Department does not expect the SEA, by making these assurances, to alter its usual process for approving LEA applications. Rather, the SEA is providing an assurance that it will meet its statutory and regulatory obligations for approving LEA applications for Title I, Part A funds.

For a request for a waiver related to the 10 percent professional development obligation for a school in improvement, an SEA must provide an assurance that it will only implement the waiver for an LEA that provides assurances to the SEA that:

- The LEA will ensure that its schools comply with their statutory and regulatory obligations for the set-aside with respect to the funds that are not "factored out" in accordance with C-9;
- The LEA will ensure that its schools use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results or;
- The LEA will comply with all of its other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research"; and
- The LEA will ensure that its schools will implement the waiver in accordance with C-9.

C-8. What information must an LEA include in its request to the SEA to implement a waiver related to the calculation of the "set-asides"?

An LEA must include in its request to implement a waiver related to the calculation of "set-asides" all of the assurances that are described as LEA assurances in the SEA's request to the Secretary (see C-7). In addition, in its request to implement a waiver related to either the 20 percent obligation or the LEA's professional development obligation, an LEA also must provide the amount of its Title I, Part A ARRA allocation (*i.e.*, the 20 percent obligation or the professional development obligation) that it seeks to exclude from the calculation for which the LEA is implementing the waiver. Similarly, in its request to implement a waiver related to the obligation of a school in improvement to reserve a portion of the Title I, Part A funds it receives for professional development, an LEA must provide the amount of its Title I, Part A ARRA allocation that it seeks to exclude from the calculation set forth in C-9. With respect to the amount of its Title I, Part A ARRA allocation that an LEA seeks to exclude from the calculation for the "set-aside" for which it seeks to implement the waiver, note that an LEA is not obligated to exclude the same amount of its Title I, Part A ARRA allocation from each calculation. For example, the LEA may request to exclude 100 percent of its Title I, Part A ARRA funds from the calculation for its professional development obligation but only 50 percent of its Title I, Part A ARRA funds from the calculation for its 20 percent obligation for choice-related transportation and SES.

An LEA does not need to include in its request to implement the waiver a description of the data on which it relied to identify needs that will be addressed using the funds freed up by the waiver and the evidence that supports the strategies it intends to use to address those needs. Instead, that description must be provided in the LEA's application for Title I, Part A funds.

C-9. What would a waiver related to the requirement in section 1116(b)(3)(A)(iii) of the ESEA that a school in improvement spend at least 10 percent of its Title I funds on professional development allow?

So long as it complies with the requirements of section 1113 of the ESEA with respect to serving eligible school attendance areas with its FY 2009 Title I, Part A allocation (consisting of Title I funds received through the ARRA and the regular FY 2009 appropriation), an LEA has discretion with respect to how it will allocate its Title I, Part A funds to its Title I schools. Accordingly, in implementing section 1113 of the ESEA, it is possible that some schools will receive a disproportionate amount of their Title I, Part A funds from the ARRA or from the regular FY 2009 appropriation compared to the proportion of FY 2009 Title I funds the schools' LEA receives through the ARRA and the regular FY 2009 appropriation. Given this situation, to ensure that all schools in improvement are treated equally with respect to the professional development requirement, this waiver does not eliminate the professional development requirement of section 1116(b)(3)(A)(iii) for schools in improvement. It does, however, factor out the effect that the portion of an LEA's FY 2009 Title I, Part A allocation received through the ARRA would have on establishing the amount such schools must spend on professional development from their Title I, Part A funds received under section 1113. Therefore, an LEA receiving the benefit of this waiver must ensure that each of its schools in improvement spends on professional development an amount at least equal to:

$$(a) * (b \div c) * (.10)$$

Where:

a = the total amount of FY 2009 Title I, Part A funds received by the school under section 1113 of the ESEA;
b = the portion of the LEA's FY 2009 Title I, Part A allocation provided through the regular FY 2009 appropriation; and
c = the LEA's total FY 2009 Title I, Part A allocation, including Title I, Part A ARRA funds.

For example, consider an LEA that has a total FY 2009 Title I, Part A allocation of $1,000,000, of which $600,000 is provided through the regular FY 2009 appropriation and $400,000 is provided through the Title I, Part A ARRA appropriation, and has a school in improvement receiving, under section 1113 of the ESEA, Title I, Part A funds in the amount of $200,000. To implement this waiver, the LEA must ensure that this school spends at least $12,000 on professional development out of the $200,000 it receives under section 1113 of the ESEA, as calculated below:

($200,000) * ($600,000 / $1,000,000) * (.10) = $12,000

C-10. Is there specific information that an SEA that receives a waiver related to the calculation of one or more of the "set-aside" requirements must report to the Secretary?

Yes. An SEA receiving a waiver related to one or more of the "set-aside" requirements described in C-1 must submit to the Secretary, by September 30, 2010, a report that includes the following information:

- 20 percent obligation for public school choice-related transportation and SES: For a waiver that allows the exclusion of some or all of the LEA's Title I, Part A ARRA funds in the calculation of the 20 percent obligation for choice-related transportation and SES, the SEA must report to the Secretary the name and NCES District Identification Number for each LEA implementing the waiver. The SEA must also indicate in its report to the Department the name and NCES District Identification Number for each LEA that requested but was denied permission to implement the waiver. Note that, independent of this reporting requirement, the Secretary requires an SEA to submit information

regarding LEAs' implementation of the 20 percent obligation for choice-related transportation and SES through ED*Facts*. In addition, each SEA is also required to post the 20 percent obligation for each LEA on its website (34 C.F.R. § 200.47(a)(1)(ii)(B)(*1*)). That information must reflect an LEA's implementation of this waiver.

- 10 percent set-aside for professional development for an LEA in improvement: For a waiver that allows the exclusion of some or all of the LEA's Title I, Part A ARRA funds in the calculation of the 10 percent set-aside for professional development for an LEA in improvement, the SEA must report to the Secretary the name and NCES District Identification Number for each LEA implementing the waiver. The SEA must also indicate in its report to the Department the name and NCES District Identification Number for each LEA that requested but was denied permission to implement the waiver.
- 10 percent set-aside for professional development for a school in improvement: For a waiver that allows a school to "factor out" some or all of its LEA's Title I, Part A ARRA funds in the calculation of the 10 percent set-aside for professional development for a school in improvement, the SEA must report to the Secretary the name and NCES District Identification Number for each LEA implementing the waiver with respect to its schools. The SEA must also indicate in its report to the Department the name and NCES District Identification Number for each LEA that requested but was denied permission to implement the waiver.

C-11. What is the duration of a waiver related to the calculation of one or more of the "set-aside" requirements?

A waiver of one or more of the "set-aside" requirements will be granted for FY 2009 (the 2009–2010 school year). Each set-aside obligation is determined based on an LEA's Title I, Part A, Subpart 2 allocation for a particular fiscal year. Because Title I, Part A ARRA funds are a part of an LEA's FY 2009 allocation only, the LEA needs the benefit of a waiver of any of the "set-aside" requirements only for FY 2009.

C-12. If an LEA receives a waiver related to one or more of the "set-aside" requirements, must the LEA include the Title I, Part A funds that are no longer subject to the set-aside in the calculation of the amount available for providing equitable services for eligible private school children?

Yes, to the same extent and under the same conditions as regular Title I, Part A funds are used for equitable services for eligible private school children.

C-13. What might a request for a waiver related to the calculation of a "set aside" look like?

For an example of a request to waive each specific "set-aside" requirement, see Appendices D, E, and F.

Requests for waivers to allow exclusion of Title I, Part A ARRA funds in determining the per-pupil amount for SES

C-14. What would a waiver related to the per-pupil amount for SES allow?

Under section 1116(e)(6) of the ESEA, an LEA must make available, for each student receiving SES, the lesser of: (1) the actual costs of the services; or (2) the LEA's Title I, Part A, Subpart 2 allocation divided by the number of children from families below the poverty level in the LEA, as determined by census data (*i.e.*, the "per-pupil amount for SES").

The requirement for the per-pupil amount for SES does not affect the amount an LEA must spend, in total, on SES. Rather, it affects the amount the LEA must spend for each student receiving SES. Absent a waiver, the ARRA funds would be included in the LEA's Title I, Part A, Subpart 2 allocation in determining the per-pupil amount, resulting in significantly higher per-pupil amounts for SES. Granting this waiver to an SEA would permit its LEAs, if they so choose, to exclude some or all of their Title I, Part A ARRA funds in calculating the per-pupil amount for SES and thus allow them to provide SES to a greater number of eligible students. Note that an LEA receiving this flexibility would not be required to exclude all of the ARRA funds from its calculation of the per-pupil amount or to provide the same per-pupil amount for all services. For example, an LEA might provide the per-pupil amount based on its regular FY 2009 allocation to most students but provide a higher amount (based on its regular allocation plus some or all of its ARRA allocation) to students for whom it is more costly to provide SES, such as students with disabilities, limited English proficient students, or students in remote rural areas.

C-15. Is there additional information beyond what is discussed in A-5 that an SEA seeking a waiver related to the per-pupil amount for SES must include in its waiver request?

Yes. An SEA must provide an assurance that it will only implement the waiver for an LEA that provides the following assurances to the SEA:

- That the LEA will comply with all of the statutory and regulatory requirements regarding the provision of SES with respect to its regular FY 2009 Title I, Part A allocation; and
- That the LEA will comply with all other Title I, Part A statutory and regulatory requirements (to the extent they are not waived), including the requirements in sections 1114 and 1115 of the ESEA to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research."

C-16. What information must an LEA include in its request to the SEA to implement a waiver related to the calculation of the per-pupil amount for SES?

An LEA must include in its request to implement a waiver related to the calculation of the per-pupil amount for SES both of the assurances that are described as LEA assurances in the SEA's request to the Secretary (see C-15). In addition, the LEA must include in its request the amount of its Title I, Part A ARRA allocation that it seeks to exclude from the calculation of the per-pupil amount for SES.

C-17. Is there specific information that an SEA that receives a waiver related to the per-pupil amount for SES must report to the Secretary?

Yes. An SEA that receives such a waiver must submit to the Secretary, by September 30, 2010, a report with the name and NCES District Identification Number for each LEA implementing the waiver. Note that, independent of this reporting requirement, an SEA must also post the per-pupil amount for SES for each LEA on its website (34 C.F.R. § 200.47(a)(1)(ii)(B)(*2*)). That information must reflect the implementation of this waiver by each LEA.

C-18. What will be the duration of a waiver related to the per-pupil amount for SES?

A waiver of the per-pupil amount for SES will be granted for FY 2009 (the 2009–2010 school year). The per-pupil amount for SES is determined based on an LEA's Title I, Part A, Subpart 2 allocation for a particular fiscal year. Because Title I, Part A ARRA funds are a part of an LEA's FY 2009 allocation only, the LEA will need the benefit of a waiver for only FY 2009.

C-19. What might a request for a waiver related to the per-pupil amount for SES look like?

For an example of a waiver request related to the per-pupil amount for SES, see Appendix G.

Waivers related to the carryover limitation in section 1127(b) of the ESEA

C-20. What would a waiver related to the carryover limitation in section 1127(b) of the ESEA allow?

Section 1127(a) of the ESEA prohibits an LEA from carrying over to the next fiscal year more than 15 percent of its Title I, Part A, Subpart 2 allocation. Section 1127(b) permits an SEA to waive this limitation once every three years if: (1) the LEA's request is reasonable and necessary; or (2) a supplemental Title I, Part A appropriation becomes available. The waiver for which the Secretary is inviting requests would enable an SEA to waive the carryover limitation more than once every three years for an LEA that needs the additional waiver because of the ARRA, which provided a supplemental Title I, Part A appropriation.

C-21. What is the process for an LEA to take advantage of a waiver related to the carryover limitation that is granted to its SEA?

An LEA that is interested in obtaining a waiver of the carryover limitation in section 1127(a) so that it may carry over more than 15 percent of its FY 2009 Title I, Part A, Subpart 2 allocation and has already received such a waiver within the prior three years must apply to its SEA in accordance with the SEA's regular procedures for granting a waiver of the carryover limitation.

C-22. May an SEA permit an LEA to apply for a waiver of the carryover limitation early in the 2009–2010 school year so that the LEA may plan to exceed the carryover limitation because of the availability of Title I, Part A ARRA funds?

Yes. In light of the exceptional nature and size of the supplemental appropriation for Title I, Part A under the ARRA, an SEA may permit an LEA to apply for a waiver of the carryover limitation early in the 2009–2010 school year so that the LEA may plan to exceed the carryover limitation if the LEA anticipates needing the waiver of the carryover limitation because of the availability of Title I, Part A ARRA funds. Allowing an LEA to apply for the waiver early in the 2009–2010 school year will provide the LEA with the ability to plan how it will spend its Title I, Part A ARRA funds over two years so that the LEA may ensure that it uses those funds in a prudent manner to improve the academic achievement of its students. An SEA that chooses to allow an LEA to apply for a waiver of the carryover limitation early in the 2009–2010 school year should grant this advance waiver only to an LEA that demonstrates that it has thoughtfully considered how it will spend its Title I, Part A ARRA funds over two years, and that demonstrates a reasonable basis for concluding early in the year that it will need to spend the funds over two years.

Note that even an SEA that does not receive a waiver related to the carryover limitation in section 1127(b) of the ESEA may wish to permit an LEA that has not received a waiver of the carryover limitation in the past two years to apply for a waiver of the carryover limitation early in the 2009–2010 school year so that the LEA may plan to exceed the carryover limitation so as to use its Title I, Part A ARRA funds in a prudent manner in order to improve the academic achievement of its students.

C-23. Is there additional information beyond what is discussed in A-5 that an SEA seeking a waiver related to the carryover limitation must include in its waiver request?

Yes. In addition to the information discussed in A-5 (required by ESEA section 9401), an SEA must provide an assurance that this waiver authority will be used only for an LEA that needs a second (or third) waiver within three years because of its Title I, Part A ARRA funds.

C-24. Is there specific information that an SEA that receives a waiver of the carryover limitation must report to the Secretary?

No.

C-25. How long will an SEA have the authority to grant a waiver of the carryover limitation more than once every three years?

If the Secretary grants an SEA's request for a waiver, the SEA will have the authority, for two years, to grant its LEAs a waiver of the carryover limitation more than once every three years. Although Title I, Part A ARRA funds must be obligated by September 30, 2011, it is possible that an LEA, particularly an LEA that receives a waiver of the carryover limitation with respect to its FY 2009 allocation, may also need a waiver of the carryover limitation with respect to its FY 2010 allocation because the LEA will likely have obligated its carried over ARRA funds before its regular FY 2010 funds, resulting in an excess of FY 2010 carryover funds. An LEA seeking a waiver of the carryover limitation in section 1127(a) must apply to its SEA for such a waiver for one fiscal year at a time.

C-26. May an SEA grant an LEA a waiver of the carryover limitation for three consecutive years if the SEA is granted this waiver?

Yes. The waiver effectively lifts the limitation in section 1127(b) of the ESEA and does not put any additional restrictions on the number of times an SEA may waive the carryover limitation, so long as the waiver is granted for the second (or third) time within three years only because the LEA has excess carryover funds because of the ARRA funds it received. Thus, for example, an LEA that received a waiver of the carryover limitation with respect to its FY 2008 allocation may also be able to receive a waiver of the carryover limitation with respect to its FY 2009 and FY 2010 allocations.

C-27. What might a request to waive the carryover limitation look like?

For an example of a waiver request related to the carryover limitation, see Appendix H.

PART II: WAIVERS OF MAINTENANCE OF EFFORT UNDER TITLE I, PART A

D. WAIVERS OF MAINTENANCE OF EFFORT FOR STATES UNDER SECTION 1125A(e) OF THE ESEA

D-1. Must a State maintain fiscal effort in order to receive Title I, Part A ARRA funds?

Yes. To receive Title I, Part A ARRA funds under the Education Finance Incentive Grant (EFIG) formula, a State must meet the maintenance-of-effort requirements in section 1125A(e) of the ESEA. A State maintains effort if either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year were not less than 90 percent of such combined fiscal effort or aggregate expenditures for the second preceding fiscal year (ESEA section 1125A(e)(1)).

D-2. May the Secretary waive the maintenance-of-effort requirement in section 1125A(e) of the ESEA?

Yes; however, the Secretary has determined, based on the information available to the Department, that no State has failed to meet the maintenance-of-effort requirement applicable to its FY 2009 Title I allocation, including Title I, Part A ARRA funds.

The Secretary intends to issue additional guidance regarding requests to waive the maintenance-of-effort requirement in section 1125A(e) for future fiscal years.

E. WAIVERS OF MAINTENANCE OF EFFORT FOR LEAS UNDER SECTION 9521(c) OF THE ESEA

E-1. Must an LEA maintain fiscal effort to receive Title I, Part A funds, including Title I, Part A ARRA funds?

Yes. Under sections 1120A(a) and 9521 of the ESEA, an LEA may receive funds under Title I, Part A, including Title I, Part A ARRA funds, for any fiscal year only if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of the LEA and the State with respect to the provision of free public education by the LEA for the preceding fiscal year were not less than 90 percent of such combined fiscal effort or aggregate expenditures for the second preceding fiscal year.

E-2. If an LEA's expenditures for free public education decrease in school year (SY) 2008–2009 or SY 2009–2010, for which years would this decrease affect the LEA's allocations for Title I, Part A and other covered programs?[4]

As defined by 34 C.F.R. § 299.5(c), "preceding fiscal year" as used in section 9521(a) of the ESEA means the fiscal year prior to the beginning of the fiscal year in which funds are available for obligation by the Department. Accordingly, if an LEA's expenditures for free public education in SY 2008–2009 are less than 90 percent of its expenditures in SY 2007–2008, the LEA has failed to maintain effort and its SEA must reduce its allocation of Title I, Part A funds that will become available on July 1, 2010 under the FY 2010 appropriation. Similarly, if an LEA's expenditures in SY 2009–2010 are less than 90 percent of its expenditures in SY 2008–2009, the LEA will not maintain effort and its SEA must reduce its allocation of Title I, Part A funds that will become available on July 1, 2011 under the FY 2011 appropriation. The SEA must also make comparable reductions with respect to the LEA's allocations under other covered programs.

E-3. May the Secretary waive the Title I, Part A maintenance-of-effort requirement in section 9521 with respect to an LEA that has failed to maintain effort?

Yes. Section 9521 of the ESEA gives the Secretary the authority to waive the maintenance-of-effort requirement for an LEA that the SEA has determined, in accordance with 34 C.F.R. § 299.5, failed to maintain effort. When an SEA determines which LEAs maintained effort in SY 2008–2009, SY 2009–2010, and SY 2010–2011 (affecting allocations for Title I, Part A and other covered programs that become available July 1, 2010, July 1, 2011, and July 1, 2012 respectively), it should bear in mind that, in any State that has received prior approval from the Secretary, an LEA may treat State Fiscal Stabilization Funds provided through the ARRA that are used for elementary and secondary education as non-Federal funds for the purpose of meeting the maintenance-of-effort requirement. This flexibility may reduce the incidence of an LEA's failing to maintain effort and, therefore, its need for a waiver of the maintenance-of-effort requirement. See C-6 of the Department's *Guidance regarding Funds under Title*

[4] See page 10 in ED's Title I, Part A Fiscal Guidance for the list of ESEA programs covered by the LEA-level maintenance-of-effort requirements: http://www.ed.gov/programs/titleiparta/fiscalguid.doc.

I, Part A of the Elementary and Secondary Education Act of 1965 Made Available Under The American Recovery and Reinvestment Act of 2009 for the criteria the Secretary will use to grant prior approval to an SEA to count State Fiscal Stabilization Funds as non-Federal funds (*see* http://www.ed.gov/policy/gen/leg/recovery/guidance/title-i.doc.).

E-4. What does it mean when the Secretary approves a maintenance-of-effort waiver?

A maintenance-of-effort waiver is for one year and allows an LEA to receive its full allocation for Title I, Part A and other covered ESEA programs for that year. A maintenance-of-effort waiver does not permit an LEA to fail to maintain effort in the future; the LEA has already failed maintenance of effort and the waiver does not change that fact. The waiver only removes for one year the statutory penalty for failing to maintain effort—*i.e.*, the proportionate reduction in the allocations of programs subject to the maintenance-of-effort requirements. In addition, for the year in which the LEA granted a waiver failed to maintain effort, the expenditure amount an SEA uses for computing maintenance of effort in subsequent years remains 90 percent of the prior year amount rather than the actual expenditure amount, in accordance with section 9521(b)(2) of the ESEA.

E-5. May the Secretary waive the Title I, Part A maintenance-of-effort requirement in section 9521 with respect to a charter school LEA that has failed to maintain effort?

Yes. Consistent with an LEA's charter, the Secretary may waive the Title I, Part A maintenance-of-effort requirement for a charter school LEA on the same basis as other LEAs under section 9521(c) of the ESEA.

E-6. May an SEA apply to the Secretary for a waiver of the Title I, Part A maintenance-of-effort requirement on behalf of its LEAs?

Yes. In fact, given the current economic situation and the likelihood that a large number of LEAs may fail to maintain effort in SY 2008–2009 and SY 2009–2010, the Secretary invites an interested SEA to apply for a waiver of the Title I, Part A maintenance-of-effort requirement on behalf of its LEAs. In its request, the SEA must submit relevant information for each of its LEAs seeking a waiver of the maintenance-of-effort requirement, as specified in E-7.

E-7. What information must an SEA include in a request that the Secretary waive the Title I, Part A maintenance-of-effort requirement with respect to one or more of its LEAs?

An SEA must include the following information in its request for a waiver of the Title I, Part A maintenance-of-effort requirement on behalf of one or more of its LEAs:

- The school years being compared to determine that an LEA failed to maintain effort (*e.g.*, SYs 2008–2009 and 2007–2008, affecting allocations for Title I, Part A and other covered programs that will become available July 1, 2010); and
- For each affected LEA, completed versions of forms 1, 2, and 3 for the appropriate years and, if appropriate, form 4 in the excel file attached to this guidance (Appendix I), including all of the LEA-specific information required by those forms.

E-8. If an SEA receives a waiver of the Title I, Part A maintenance-of-effort requirement on behalf of its LEAs, does that waiver extend to the other Federal education programs covered by section 9521 of the ESEA?

Yes. Note, however, that section 9521 of the ESEA does not cover the maintenance-of-effort requirements under the Individuals with Disabilities Education Act (IDEA) or the State Fiscal

Stabilization Fund under the ARRA. Guidance regarding maintenance-of-effort waivers for programs under the IDEA and the ARRA can be found at: http://www.ed.gov/policy/gen/leg/recovery/guidance/idea-guidance-070109.doc and http://www.ed.gov/policy/gen/leg/recovery/statutory/moe-guidance.pdf.

E-9. To whom should an SEA address its request for a waiver of the Title I, Part A maintenance-of-effort requirement on behalf of its LEAs?

Section 9521 of the ESEA vests the Secretary with the authority to grant a waiver of the Title I, Part A maintenance-of-effort requirement. However, that authority has been delegated to the Director of the Student Achievement and School Accountability (SASA) Programs in the Office of Elementary and Secondary Education. Accordingly, a request for a waiver of the Title I, Part A maintenance-of-effort requirement should be addressed to Zollie Stevenson, Jr., Director of SASA, via email at the following address: TitleIWaivers@ed.gov.

E-10. What is the duration of a waiver of an LEA's Title I, Part A maintenance-of-effort requirement?

One year. For example, if an LEA that fails to maintain effort in SY 2008–2009 receives a maintenance-of-effort waiver, its July 1, 2010 allocation for Title I, Part A and other covered programs would not be affected by the LEA's failure to maintain effort in SY 2008–2009. If the LEA fails to maintain effort in SY 2009–2010 also, it must request and receive another waiver to avoid having its July 1, 2011 allocations reduced.

E-11. May an Ed-Flex State waive the maintenance-of-effort requirement for its LEAs?

No. A State with authority under the Education Flexibility Partnership Act of 1999 (Ed-Flex) is not permitted, among other things, to use this authority to waive any statutory or regulatory requirement related to maintenance of effort. An Ed-Flex State, however, may request from the Secretary a waiver of the maintenance-of-effort requirement on behalf of its LEAs in the same way as other States.

Relationship of Failing to Maintain Effort to Other Selected Requirements

F-1. In a fiscal year when an LEA experiences a precipitous decline in its resources and fails to maintain effort, must the LEA comply with civil rights laws?

Yes. All LEAs must comply with civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability and age regardless of their financial circumstances. (Complying with civil rights laws includes, but is not limited to, providing a free appropriate public education to students with disabilities as required by the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 and meeting all requirements for serving limited English proficient students in accordance with *Lau v. Nichols*, 414 U.S. 563 (1974), and Title VI of the Civil Rights Act of 1964.) For information on applicable civil rights laws, see the Notice on Civil Rights Obligations Applicable to the Distribution of Funds under the American Recovery and Reinvestment Act of 2009 [available at: http://www.ed.gov/policy/gen/leg/recovery/notices/civil-rights.html].

F-2. In a fiscal year when an LEA experiences a precipitous decline in its resources and fails to maintain effort, must the LEA comply with the other Title I, Part A fiscal requirements?

Yes. An LEA must annually comply with the fiscal requirements regarding comparability of services and use of Federal funds to supplement, not supplant, non-Federal funds. In addition, like all LEAs that receive Title I, Part A ARRA funds, an LEA that experienced a precipitous decline in its resources that caused it to fail to maintain effort during SY 2008–2009 must comply with the ARRA requirement to report school-by-school listings of per-pupil expenditures from State and local sources during SY 2008–2009. (The Department will provide guidance in the near future on how States should report the school-by-school data.)

APPENDIX A:
EXAMPLE OF REQUEST TO WAIVE 14-DAY NOTICE REQUIREMENT FOR PUBLIC SCHOOL CHOICE

Dear [Assistant Secretary][5]:

I am writing on behalf of [State] to request a one-year waiver of the Title I, Part A requirement for a local educational agency (LEA) to provide parents of eligible students with notice of their public school choice options at least 14 days before the start of the school year (34 C.F.R. § 200.37(b)(4)(iv)). This waiver would apply only with respect to students in schools that are newly identified for improvement for the 2009-2010 school year or that could possibly have exited improvement, corrective action, or restructuring for the 2009-2010 school year but did not. [State] seeks a waiver of this provision because [*insert summary of basis for request, e.g., [State] would have had to modify its assessment schedule or [State] would have to modify its contract with [Company], the vendor that processes the results of [State]'s assessments*] for the 2008–2009 school year to ensure that all of its LEAs are able to comply with this requirement with respect to students in those schools. In particular, [State] established the following timeline for administering and scoring assessments, and for determining adequate yearly progress (AYP) based on those assessments:

[*Insert summary of assessment/AYP timeline*]

[State] would not be able to ensure that all LEAs within the State are able to comply with the 14-day notice requirement unless [State] [*did X*], which it is not possible for [State] to do [*because of Y*] (*see* attached documentation [*e.g., copy of contract with company scoring assessments; documentation sent to LEAs regarding timeline*]).

Thus, a waiver of the 14-day notice requirement is necessary to give [State] and its LEAs sufficient time to carry out the assessment timeline as planned and thereby ensure statistically valid and reliable AYP determinations. [State] must be able to ensure valid and reliable AYP determinations so that schools and LEAs can properly implement school improvement activities to increase the quality of instruction for students and ultimately improve the academic achievement of students.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2008–2009 and 2009–2010 school years:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2008–2009 and 2009–2010 school years in accordance with the requirements of section 1111(b)(2) of the Elementary and Secondary Education Act of 1965 (ESEA) [*and in accordance with the growth model approved by the Department*][6]. As stated above, [State] believes that providing [State] with the time necessary to carry out its assessment timeline as planned will allow the State to ensure that school improvement decisions for the 2009–2010 school year are based on valid and reliable AYP determinations.

[5] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.
[6] The language in brackets applies only to a State with a Department-approved growth model.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which [State] customarily provides such notice and information to the public [*insert description of public notice, e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it and its LEAs will meet the following conditions:

- LEAs within the State will provide notice of public school choice less than 14 days before the school year only with respect to students in schools that are newly identified for improvement for the 2009–2010 school year (based on results of assessments administered in the 2008–2009 school year) or that could possibly have exited improvement, corrective action, or restructuring for the 2009–2010 school year (based on results of assessments administered in the 2008–2009 school year) but did not;
- All LEAs within the State will comply with the 14-day notice requirement with respect to students in schools that are already identified for improvement, corrective action, or restructuring and cannot exit that status for the 2009–2010 school year;
- All LEAs within the State will comply with the statutory requirement in section 1116(b) to provide notice of public school choice before the start of the school year;
- The State will encourage all LEAs to provide notice of public school choice as early as possible and, ideally, at least 30 days before the start of the school year;
- LEAs that offer public school choice earlier to students in some schools than to students in other schools will reserve a portion of the available transportation slots for students in the schools who receive the later notice, in accordance with the Department's Public School Choice Non-Regulatory Guidance; and
- The State will take all steps necessary to ensure that its assessment schedule and test vendor contract for the 2009–2010 school year (and beyond) will permit LEAs within the State to provide notice of public school choice sufficiently in advance of, but no later than 14 days before, the start of the 2010–2011 school year (and all subsequent school years).

[State] will ensure compliance with these conditions by providing appropriate guidance regarding these conditions to its LEAs. In particular, [State] intends to [*insert summary of planned guidance documents and activities*].

[State] further assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that provides the total number of LEAs within the State that had schools that entered or exited improvement status in the 2009–2010 school year, and the total number of LEAs within the State that took advantage of the waiver and provided some parents notice of public school choice less than 14 days before the start of the 2009–2010 school year.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX B:
EXAMPLE OF REQUEST TO WAIVE PROHIBITION ON APPROVING AN IDENTIFIED SCHOOL OR LEA AS AN SES PROVIDER

Dear [Assistant Secretary][7]:

I am writing on behalf of [State] to request a one-year waiver of the Title I, Part A regulatory provision that prohibits a State from approving as providers of supplemental educational services (SES) schools identified for improvement, corrective action, or restructuring and local educational agencies (LEAs) identified for improvement or corrective action (34 C.F.R. § 200.47(b)(1)(iv)(A), (B)).

Under the law, [State] may approve as an SES provider only an entity that has a demonstrated record of effectiveness in increasing student academic achievement. [State] believes that identified schools and LEAs may be able to establish that they have an effective program that can help improve academic achievement of students and should not be prevented automatically from gaining approval simply because of their improvement status.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics, subjects that are among those covered by SES providers in [State] for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the Elementary and Secondary Education Act of 1965 (ESEA) [*and in accordance with the growth model approved by the Department*][8]. [State] believes that, ultimately, allowing some identified schools or LEAs to serve as SES providers may help more students within [State] to reach the State's proficiency objectives.

If [State] is granted the requested waiver, [State] will ensure that only those LEAs and schools that meet the State's requirements for SES providers are approved to be on the State's list of approved SES providers for the 2009–2010 school year.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to the notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which [State] customarily provides such notice and information to the public [*insert description of notice, e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that provides the total number of LEAs identified for improvement or corrective action that were approved to be an SES provider for the 2009–2010 school

[7] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.

[8] The language in brackets is only applicable to a State with a Department-approved growth model.

year and the total number of schools identified for improvement, corrective action, or restructuring that were approved to be an SES provider for the 2009–2010 school year.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX C:
EXAMPLE OF REQUEST TO ALLOW LEAS TO OFFER SES, IN ADDITION TO PUBLIC SCHOOL CHOICE, TO ELIGIBLE STUDENTS IN TITLE I SCHOOLS IN THE FIRST YEAR OF SCHOOL IMPROVEMENT

Dear [Assistant Secretary][9]:

I am writing on behalf of [State] to request a one-year waiver to allow local educational agencies (LEAs) within [State] with one or more schools in improvement, corrective action, or restructuring to offer supplemental educational services (SES), in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the funds spent providing SES to eligible students in those schools toward the LEA's obligation to spend an amount at least equal to 20 percent of its Title I, Part A, Subpart 2 allocation on SES and choice-related transportation (20 percent obligation). In the absence of such a waiver, an LEA may only count funds spent providing SES to eligible students attending schools in the second year of improvement, in corrective action, or in restructuring toward its 20 percent obligation (ESEA section 1116(b)(10); 34 C.F.R. § 200.48).

[State] believes that the requested waiver will increase the quality of instruction for students and improve the academic achievement of students by providing an incentive for an LEA to offer SES to eligible students one year earlier than the law requires, thereby enabling more students within an LEA to enroll in SES. [State] believes that parents of children attending schools in the first year of improvement will be eager to enroll their children in SES, and that the increased enrollment in SES thus enabled by the waiver will contribute to improving student achievement.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics, which are among the subjects that are covered by SES providers in [State], for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the ESEA [*and in accordance with the growth model approved by the Department*][10]. [State] believes that, ultimately, allowing LEAs to offer SES to eligible students in Title I schools in the first year of improvement and count the costs of providing SES to those students toward the LEA's 20 percent obligation may help more students within the State to reach the State's proficiency objectives.

[State] hereby assures that, if it is granted the requested waiver, [State] will ensure that it will implement the waiver only with respect to those LEAs that will meet all statutory and regulatory requirements related to SES in the 2009–2010 school year (other than the particular funding requirement being waived).

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the

[9] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.

[10] The language in brackets applies only to a State with a Department-approved growth model.

manner in which the State customarily provides such notice and information to the public [*e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its website*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that sets forth the name and NCES District Identification Number for each LEA implementing the waiver.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX D:
EXAMPLE OF REQUEST TO EXCLUDE TITLE I, PART A ARRA FUNDS IN DETERMINING AN LEA'S 20 PERCENT OBLIGATION FOR CHOICE-RELATED TRANSPORTATION AND SES

Dear [Assistant Secretary][11]:

I am writing on behalf of all local educational agencies (LEAs) in [State] that receive funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) to request a waiver for fiscal year (FY) 2009 of the requirement in section 1116(b)(10) of the ESEA and in 34 C.F.R. § 200.48(a)(2) to determine an LEA's "20 percent obligation" for public school choice-related transportation and supplemental educational services (SES) based on the LEA's total FY 2009 Title I, Part A allocation (*i.e.*, including both its regular Title I, Part A allocation and its Title I, Part A allocation under the American Recovery and Reinvestment Act of 2009 (ARRA)). Specifically, I am seeking this waiver to allow LEAs within [State] to exclude some or all of the Title I, Part A funds they receive under the ARRA in calculating their "20 percent obligation" for choice-related transportation and SES.

[State] believes that the requested waiver will increase the quality of instruction for students and improve the academic achievement of students by providing each LEA within [State] with flexibility to spend ARRA funds that the LEA would otherwise be obligated to spend on SES or choice-related transportation on other allowable Title I, Part A activities that the LEA believes best address the particular needs of its students.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the ESEA [*and in accordance with the growth model approved by the Department*][12]. [State] believes that, ultimately, the flexibility provided by the requested waiver with respect to how ARRA funds may be spent for allowable Title I, Part A activities may help more schools and LEAs within the State make AYP by enabling them to direct funds appropriately to help their students meet the AMOs set forth above.

[State] hereby assures that, if it is granted the requested waiver, [State] will implement the waiver only with respect to an LEA that provides assurances that:

- It will comply with its statutory and regulatory obligations for the provision of SES and public school choice with respect to its regular Title I, Part A allocation;
- It will use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results;
- It will comply with all of its other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs

[11] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.

[12] The language in brackets applies only to a State that has a Department-approved growth model.

that "use effective methods and instructional strategies that are based on scientifically based research;" and

- It will submit an application for Title I funds, or, if necessary, an amendment to its existing LEA application, that describes the data on which it relied to identify needs that will be addressed using the funds freed up by the waiver and the evidence that supports the strategies it intends to use to address those needs.

[State] further assures that it will not approve an LEA's application or amendment to an LEA's application unless or until it determines that, based on the LEA's description, the LEA has satisfied its obligation to identify needs based on data and address those needs using evidence-based strategies. [State] will not approve an LEA to implement the waiver unless or until the LEA has an approved application (or amended application) that includes the required description of the data on which the LEA relied to identify needs and the evidence that supports the strategies to address those needs. If necessary to carry out these assurances, [State] will require an LEA seeking to implement the waiver to amend its application in accordance with [State's] usual process for changing an LEA's application.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which [State] customarily provides such notice and information to the public [*e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its website*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to you, by September 30, 2010, a report that sets forth the name and NCES District Identification Number for each LEA implementing the waiver.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX E:
EXAMPLE OF REQUEST TO EXCLUDE TITLE I, PART A ARRA FUNDS IN DETERMINING THE 10 PERCENT PROFESSIONAL DEVELOPMENT SET-ASIDE FOR AN LEA IN IMPROVEMENT

Dear [Assistant Secretary][13]:

I am writing on behalf of all local educational agencies (LEAs) in [State] that are identified for improvement under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) to request a waiver for fiscal year (FY) 2009 of the requirement in section 1116(c)(7)(A)(iii) of the ESEA to determine an LEA's 10 percent professional development set-aside based on the LEA's total FY 2009 Title I, Part A allocation (*i.e.*, including both its regular Title I, Part A allocation and its Title I, Part A allocation under the American Recovery and Reinvestment Act of 2009 (ARRA)). In particular, I am seeking this waiver to allow LEAs within [State] that are identified for improvement to exclude some or all of the Title I, Part A funds they receive under the ARRA in calculating their 10 percent professional development set-aside.

[State] believes that the requested waiver will increase the quality of instruction for students and improve the academic achievement of students by providing each LEA within [State] with flexibility to spend ARRA funds that the LEA would otherwise be obligated to spend on professional development on other allowable Title I, Part A activities that the LEA believes best address its particular needs. [State] believes that the basic 10 percent set-aside, which LEAs will still have to provide, is substantial and that requiring significantly more funds to be spent on professional development, absent actual need, may actually be counter-productive by overwhelming teachers, many of whom are already over-scheduled and cannot meaningfully absorb substantially more professional development. Through the waiver, each LEA can determine whether its professional development needs warrant expending Title I, Part A ARRA funds to meet those needs.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the ESEA, [*and in accordance with the growth model approved by the Department*][14]. [State] believes that, ultimately, the flexibility provided by the requested waiver with respect to how ARRA funds may be spent for allowable Title I, Part A activities may help more schools and LEAs within the State make AYP by enabling them to direct funds appropriately to help their students meet the AMOs set forth above.

State hereby assures that, if it is granted the requested waiver, [State] will implement the waiver only with respect to an LEA that provides assurances that:

- It will comply with its statutory and regulatory obligations for the professional development set-aside with respect to its regular Title I, Part A allocation;
- It will use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results;

[13] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.

[14] The language in brackets applies only to a State that has a Department-approved growth model.

- It will comply with all of its other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research;" and
- It will submit an application for Title I funds (referred to herein as "LEA application"), or, if necessary, an amendment to its existing LEA application, that describes the data on which it relied to identify needs that will be addressed using the funds freed up by the waiver and the evidence that supports the strategies it intends to use to address those needs.

[State] further assures that it will not approve an LEA's application or amendment to an LEA's application unless or until it determines, based on the LEA's description, that the LEA has satisfied its obligation to identify needs based on data and address those needs using evidence-based strategies. [State] will not approve an LEA to implement the waiver unless or until the LEA has an approved application (or amended application) that includes the required description of the data on which the LEA relied to identify needs and the evidence that supports the strategies to address those needs. If necessary to carry out these assurances, [State] will require an LEA seeking to implement the waiver to amend its application in accordance with [State's] usual process for changing an LEA's application.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which the State customarily provides such notice and information to the public [*e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that sets forth the name and NCES District Identification Number for each LEA implementing the waiver.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX F:
EXAMPLE OF REQUEST TO EXCLUDE TITLE I, PART A ARRA FUNDS IN DETERMINING THE 10 PERCENT PROFESSIONAL DEVELOPMENT SET-ASIDE FOR A SCHOOL IN IMPROVEMENT

Dear [Assistant Secretary][15]:

I am writing on behalf of all local educational agencies (LEAs) in [State] with schools that are identified for improvement under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) to request a waiver for fiscal year (FY) 2009 of the requirement in section 1116(b)(3)(A)(iii) of the ESEA to determine a school's 10 percent professional development set-aside based on the total amount of funds made available to the school under section 1113 of the ESEA for FY 2009 (*i.e.*, including funds made available from both the LEA's regular Title I, Part A allocation and its Title I, Part A allocation under the American Recovery and Reinvestment Act of 2009 (ARRA)). In particular, I am seeking this waiver to allow Title I schools within [State] that are identified for improvement to calculate their 10 percent professional development set-aside in accordance with the following formula:

the amount of Title I, Part A funds received by the school under section 1113 of the ESEA

multiplied by

the portion of the LEA's FY 2009 Title I, Part A allocation provided through the regular FY 2009 appropriation / the LEA's total FY 2009 Title I, Part A allocation, including Title I, Part A ARRA funds

multiplied by

10 percent.

As long as it complies with the requirements of section 1113 of the ESEA with respect to serving eligible school attendance areas with its FY 2009 Title I, Part A allocation (consisting of Title I, Part A funds received through the ARRA and the regular FY 2009 appropriation), an LEA has discretion with respect to how it will allocate its Title I, Part A funds to its Title I schools. Accordingly, [State] believes that the requested waiver will increase the quality of instruction for students and improve the academic achievement of students by ensuring that no school within an LEA that implements this waiver will be obligated to spend a disproportionate amount of the Title I, Part A funds available to it on professional development activities. [State] believes that the basic 10 percent set-aside, which schools in improvement will still have to provide, is substantial and that requiring significantly more funds to be spent on professional development may actually be counter-productive by overwhelming teachers, many of whom are already over-scheduled and cannot meaningfully absorb substantially more professional development.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[15] As of the publication of this Guidance, Dr. Joseph C. Conaty is Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education. If your request for a waiver is submitted after the confirmation of a new Assistant Secretary for Elementary and Secondary Education, your request should be addressed to that individual; otherwise, your request should be addressed to Dr. Conaty.

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the ESEA [*and in accordance with the growth model approved by the Department*][16]. [State] believes that, ultimately, ensuring that a school is not obligated to spend a disproportionate amount of Title I, Part A funds on professional development may help more schools and LEAs within the State make AYP by enabling them to direct an appropriate portion of their funds to activities other than professional development that they believe will help their students meet the AMOs set forth above. Through the waiver, each school can determine whether its professional development needs warrant expending Title I, Part A ARRA funds to meet those needs.

State hereby assures that, if it is granted the requested waiver, [State] will implement the waiver only with respect to an LEA that provides assurances that:

- It will ensure that its schools will implement the waiver in accordance with the formula above;
- It will ensure that all schools in improvement within the LEA will comply with all statutory and regulatory requirements regarding their professional development obligations with respect to the funds that are not "factored out" in accordance with the formula above;
- It will ensure that its schools use the funds freed up by the waiver to address needs identified based on data, such as Statewide or formative assessment results; and
- It and its schools in improvement will comply with all of their other Title I, Part A statutory and regulatory obligations, including the obligations in sections 1114 and 1115 to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which the State customarily provides such notice and information to the public [*e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site*] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that sets forth the name and NCES District Identification Number for each LEA implementing the waiver.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

[16] The language in brackets applies only to a State that has a Department-approved growth model.

APPENDIX G:
EXAMPLE OF REQUEST TO EXCLUDE TITLE I, PART A ARRA FUNDS IN DETERMINING THE PER-PUPIL AMOUNT FOR SES

Dear [Assistant Secretary][17]:

I am writing on behalf of all local educational agencies (LEAs) in [State] that receive funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA) to request a waiver for fiscal year (FY) 2009 of the requirement in section 1116(e)(6)(A) of the ESEA and in 34 C.F.R. § 200.48(c)(1) to determine the per-pupil amount for supplemental educational services (SES) based on an LEA's total FY 2009 Title I, Part A allocation (*i.e.*, including both its regular Title I, Part A allocation and its Title I, Part A allocation under the American Recovery and Reinvestment Act of 2009 (ARRA)). Specifically, I am seeking this waiver to allow LEAs within [State] to exclude some or all of the Title I, Part A funds they receive under ARRA in calculating the per-pupil amount for SES. [State] believes that the requested waiver, by reducing the per-pupil amount, will allow LEAs to provide SES to a greater number of students.

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2009–2010 school year:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2009–2010 school year in accordance with the requirements of section 1111(b)(2) of the ESEA [*and in accordance with the growth model approved by the Department*][18]. [State] believes that, ultimately, allowing an LEA to exclude some or all of its ARRA funds in determining the per-pupil amount for SES and thereby allowing more students to receive SES may help more schools and LEAs within the State make AYP by enabling more students to receive services that will help them meet the AMOs set forth above.

If [State] is granted the requested waiver, [State] will implement the waiver only with respect to an LEA that provides assurances that:

(1) It will comply with all of the statutory and regulatory requirements regarding the provision of SES with respect to its regular FY 2009 Title I, Part A allocation; and
(2) It will comply with all other Title I, Part A statutory and regulatory requirements (to the extent they are not waived), including the requirements in sections 1114 and 1115 of the ESEA to have schoolwide and targeted assistance programs that "use effective methods and instructional strategies that are based on scientifically based research."

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by *[insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which [State] customarily provides such notice and information to the public [*e.g.*,

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[18] The language in brackets applies only to a State with a Department-approved growth model.

by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site] (*see* attached copy of public notice).

[State] hereby assures that, if it is granted the requested waiver, it will submit to the U.S. Department of Education, by September 30, 2010, a report that provides the name and NCES District Identification Number for each LEA implementing the waiver.

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.

APPENDIX H:
EXAMPLE OF REQUEST TO WAIVE THE PROVISION THAT PROHIBITS AN SEA FROM GRANTING TO AN LEA A WAIVER OF THE CARRYOVER LIMITATION MORE THAN ONCE EVERY THREE YEARS

Dear [Assistant Secretary][19]:

I am writing on behalf of [State] to request a waiver of the limitation in section 1127(b) of the Elementary and Secondary Education Act of 1965 (ESEA) that prohibits a State educational agency (SEA) from granting to a local educational agency (LEA) a waiver of the carryover limitation in section 1127(a) of the ESEA more than once every three years. Section 1127(b) permits an SEA to waive the limitation in section 1127(a) once every three years if: (1) the LEA's request is reasonable and necessary; or (2) a supplemental Title I, Part A appropriation becomes available. In accordance with these provisions, I am requesting a waiver to allow [State] to waive the carryover limitation more than once every three years for an LEA that needs the additional waiver(s) because of its Title I, Part A funds made available under the American Recovery and Reinvestment Act of 2009 (ARRA), which is, by definition, a supplemental Title I, Part A appropriation. I am requesting this waiver for a period of two years (*i.e.*, to apply to LEA requests to carry over fiscal year (FY) 2009 Title I, Part A funds and to LEA requests to carry over FY 2010 Title I, Part A funds in excess of the carryover limitation).

[State] has set the following annual measurable objectives (AMOs) in reading and mathematics for the 2010–2011 and 2011–2012 school years:

[*Insert table of [State]'s AMOs*]

[State] will determine adequate yearly progress (AYP) based on assessments administered in the 2010–2011 and 2011–2012 school years in accordance with the requirements of section 1111(b)(2) of the ESEA [*and in accordance with the growth model approved by the Department*].[20] [State] believes that the requested waiver will provide the State with the ability to grant an LEA the flexibility it needs to spend its Title I, Part A ARRA funds thoughtfully over the course of two years on activities that are most likely to improve the academic achievement of students. Accordingly, [State] believes that, ultimately, the requested waiver may help more schools and LEAs within the State make AYP by enabling them to direct their funds thoughtfully to activities that will help their students meet the AMOs set forth above.

[State] will ensure that an LEA that is interested in obtaining a waiver of the carryover limitation in section 1127(a) so that it can carry over more than 15 percent of its Title I, Part A FY 2009 or FY 2010 allocation and has already received such a waiver within the prior three years (or receives such a waiver with respect to its FY 2009 funds), applies to the SEA in accordance with [State's] regular procedures for waivers of the carryover limitation. [State] hereby assures that it will implement the requested waiver only with respect to an LEA that needs a waiver of the carryover limitation for the second (or third) time within three years because of its ARRA funds.

Prior to submitting this waiver request, [State] provided all LEAs in the State with notice and a reasonable opportunity to comment on this request. [State] provided such notice by [*insert description of notice, e.g., sending a letter to each LEA on [date] or sending an email to each LEA on [date]*] (*see* copy of notice

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[20] The language in brackets applies only to a State with a Department-approved growth model.

attached). Copies of all comments that [State] received from LEAs in response to this notice are attached hereto. [State] has also provided notice and information regarding this waiver request to the public in the manner in which the State customarily provides such notice and information to the public [*e.g., by publishing a notice of the waiver request in the following newspapers; by posting information regarding the waiver request on its Web site*] (see attached copy of State's public notice).

Please feel free to contact me by phone or email at [*contact information*] if you have any questions regarding this request. Thank you for your consideration.