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ESEA Waivers 101

Explaining the Secretary of Education's Waiver Authority

Anne Hyslop, All4Ed

Dave Powell, Education First

March 2025

In our K12 education system, most policy decisions—as well as roughly 90 percent of the funding—stem from state and local governments, not Congress or the U.S. Department of Education (ED). This is especially true after a bipartisan effort in Congress to rewrite the Elementary and Secondary Education Act (ESEA) in 2015 with an explicit goal of [giving more flexibility](#) to states and school districts, while maintaining key federal guardrails on assessments, accountability, and school improvement. The 2024 Supreme Court [decision](#) in *Loper Bright Enterprises v. Raimondo* further limited some of the power of federal agencies to regulate. That said, even though the policymaking mechanisms available to ED are constrained, one of the more expansive and powerful of these mechanisms is the Secretary’s ESEA waiver authority.

This power, laid out in Title VIII of ESEA, allows the Secretary to waive certain ESEA statutory and regulatory requirements. And every administration, Republican or Democrat, over the last 25 years has used this authority to grant states flexibility. But it cannot—and should not—be used indiscriminately. **The law lays out limitations on how the Secretary can use the waiver authority and includes specific requirements waiver requests and approvals have to meet.**

We developed this brief to help the field understand (1) what states need a waiver to do and what they can do without a waiver, (2) what requirements can and cannot be waived, and (3) what the waiver request process looks like.¹

Executive Summary

What’s the purpose of waivers? *Waivers are intended to “advance student academic achievement” by providing flexibility from certain ESEA requirements. The Secretary’s decision to grant a waiver to a state, Indian tribe, district, or school is made on these grounds.*

- If the waiver request is related to state testing or data reporting, states must also show how the waivers will “maintain or improve transparency in reporting to parents and the public on student achievement and school performance.”² The statute specifies the requirement for maintaining or improving transparency includes ESEA’s reporting requirements for students from each major racial and ethnic group; economically disadvantaged students compared to students who are not economically disadvantaged; students with disabilities compared to students without disabilities; and for students on the basis of gender, English language proficiency status, and migrant status.

¹ We strive to provide the most useful, accurate and actionable information possible to support education policymakers, practitioners, and advocates, but the information provided in this brief is not legal advice and education leaders should consult their own counsel. Nonetheless, we hope this information is helpful.

² ESEA section 8401(b)(1)(F)

Which laws are affected? *The waiver authority outlined in section 8401 of the ESEA does not give the Secretary the ability to permit states or districts to bypass requirements and conditions of different federal education laws and regulations, such as the Individuals with Disabilities Education Act (IDEA), the McKinney-Vento Homeless Assistance Act or the Higher Education Act (HEA).*

Which provisions cannot be waived? *The Secretary is prohibited, by law, from waiving ten fundamental provisions of ESEA—including the formulas and distribution rules for Title funds, the rules defining Title I schools and serving them in rank order, other key fiscal requirements, civil rights protections, and limitations on the Secretary’s executive authority. The ten ESEA provisions the Secretary cannot waive are listed in **Table 1** on the next page and described further in “What Cannot Be Waived: The Un-Waive-Ables.”*

When is a waiver required? *States often do not need waivers to accomplish their policy goals, given the flexibility already included within the bipartisan Every Student Succeeds Act (ESSA) in 2015—such as the ability for states to set their own academic targets, select certain accountability indicators, and develop unique school improvement strategies. We provide examples of when states must request a waiver—and actions they can pursue without a waiver—in “What Do States and Districts Need Waivers For?”*

Who can ask for a waiver? *Only State educational agencies (SEAs) and Indian tribes—not local educational agencies (LEAs, i.e., school districts)—may request waivers of ESEA requirements and regulations; however, SEAs may request waivers on behalf of LEAs. Further, SEAs and tribes must gather and address public and LEA input before submitting a request to ED; failure to seek public comment on a waiver submission would be grounds for ED to deny an SEA or tribe’s request.*

How does a waiver get approved? *ED has 120 days to respond to a state’s waiver request, and there is a process for a State to revise and resubmit their request if it is not approved. Waiver requests cannot be rejected “based on conditions outside the scope of the waiver request,” and the Secretary cannot require states to include or delete “specific” academic standards, academic assessments and items, elements of state accountability systems, or elements of teacher and school leader evaluation systems as a condition of approving a waiver.³ We provide more detail in “The Waiver Process.”*

³ ESEA section 8401(b)(4)(D)

Table 1: The ten ESEA provisions the Secretary cannot waive

Un-Waive-Able Provision	Description Of What Cannot be Waived
1. The allocation or distribution of funds to states, LEAs, Indian tribes, or other grant recipients	The statutory formulas and processes for determining grant allocations to recipients in the ESEA under Title I, Title II, or any other program.
2. Maintenance of effort	Fiscal requirements to maintain state and local spending as a condition of receiving funds, outside of two specific situations where an LEA may receive a waiver. In general, grantees must maintain state and local spending at roughly 90 percent of what they spent in the prior year to continue receiving federal Title funds.
3. Comparability of services	Fiscal requirement for LEAs to provide comparable services in Title I and non-Title I schools as a condition of receiving Title I funds (e.g., by demonstrating they use a district-wide salary schedule).
4. Supplement, not supplant	Fiscal requirements for states and LEAs to demonstrate that federal funds provide additional resources and do not supplant state and local funds (e.g., in Title I by showing the LEA's method of allocating state and local funds leads to each Title I school getting all state and local funding it would receive if it were not a Title I school).
5. Equitable participation of private school students and teachers	Provisions that ensure LEAs provide services to support private school students and educators under certain ESEA programs, including Title I.
6. Parental participation and involvement	Statutory requirements for parent and family involvement included in ESEA programs.
7. Civil rights requirements	Civil rights requirements in other laws that apply to education, like the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Americans with Disabilities Act.
8. The requirement for a "charter school" in Title IV, Part C of ESEA	The definition of a "charter school;" federal funds cannot support entities that are religious or sectarian, noncompliant with State charter laws and federal civil rights laws, or refuse to be subject to the same accountability and oversight as other public schools.
9. Prohibitions in Title VIII of ESEA	Multiple limitations on executive authority outlined by Congress in Title VIII of the ESEA (e.g., that ED cannot "mandate, direct, or control" state and LEA curricula and instructional content).
10. The selection of a school attendance area under Title I, Part A	The rank-and-order procedure an LEA uses to determine which schools are eligible for, and can be served by, Title I funds (with one narrowly defined exception); this keeps LEAs from using Title I funds in schools that do not serve the highest shares of students from low-income families.

What do states & districts need waivers for?

When passing the Every Student Succeeds Act (ESSA) in 2015, the latest iteration of the ESEA, members of Congress from both parties agreed to provide more flexibility to states and districts than they had previously under No Child Left Behind (NCLB), while maintaining key federal guardrails related to assessments, accountability, and school improvement. For example, ESSA consolidated multiple, small grant programs with discrete purposes into a single, larger [flexible grant](#) for “student support and academic enrichment” (Title IV, Part A). Likewise, ESSA added a provision that enables SEAs to set-aside 3% of the state’s overall Title I, Part A grant to provide funds to LEAs for Direct Student Services (DSS), prioritizing services for low-achieving students in low-performing schools. These services could include helping families pay for advanced coursework not offered by their child’s school, high-quality tutoring, or transportation to allow a student enrolled in a school identified for comprehensive support and improvement (CSI) to transfer to another higher-performing public school.⁴ ESSA also gave states more [flexibility](#) to choose their own academic targets, accountability indicators and school improvement strategies, so long as those choices meet key federal guardrails.

Because of the flexibility inherent to ESSA, states often do not need a waiver to accomplish their policy goals; the law gives significant leeway for states to proceed without waivers in many cases. Table 2 below (“Does this require a waiver?”) provides a few examples of flexibilities and innovations states can pursue on their own without a waiver, as well as activities that do require waivers from the Secretary.

To be clear, **the waiver authority outlined in Title VIII of ESEA (section 8401), does not give the Secretary the ability to permit states or districts to bypass requirements and conditions of different federal education laws**, such as the McKinney-Vento Homeless Assistance Act (which contains no waiver authority). This paper only describes waiver authority under ESEA; it does not address other laws. In addition, the Secretary is prohibited from granting waivers of ten ESEA requirements, including funding and allocation formulas, which we describe in greater detail in “What Cannot Be Waived: The Un-Waive-Ables.”

Table 2: Does this require a waiver?

States <u>do not need</u> a waiver...	States <u>need</u> a waiver...
<p>... to administer a computer-adaptive math assessment that includes assessment items above and below a student’s grade level, but produces a summative score based on the student’s achievement of grade-level standards. ESSA explicitly allows adaptive testing under</p>	<p>... to administer the statewide 8th grade math assessment to an advanced student in 7th grade to prepare them to take Algebra I before high school. While states do <u>not</u> need a waiver to assess 8th grade students enrolled in Algebra I on the statewide Algebra I test (if that’s the statewide</p>

⁴ ESEA section 1003A. States using DSS to pay for high-quality tutoring must create a list of state-approved providers that meets several requirements outlined in the law. States using DSS to support transportation costs associated with school choice can do so only if the LEA does not already reserve Title I, Part A funds for this purpose.

States <u>do not need</u> a waiver...	States <u>need</u> a waiver...
these conditions. ⁵ States would need to submit their adaptive assessments for federal peer review, like all federally required state tests.	test typically given in high schools), they would need a waiver to give a 7th grader who is on track for that math pathway the 8th grade math test a year early. The “8th grade math exception,” which states can opt into in their state plans, only applies to administering high school math assessments to grade 8 students. ⁶
<p>... to administer and report results from a statewide through-year assessment, aligned to the state’s academic standards, in grades 3-8 to all students in ELA and math. ESEA makes clear that statewide tests may take the form of “multiple statewide interim assessments during the course of the academic year that result in a single summative score.”⁷ States would need to submit their through-year assessments for federal peer review, like all federally required state tests.</p>	<p>... to field test a through-year assessment, aligned to the state’s academic standards, in grades 3-8 in ELA and math with some (but not all) school districts—and not also administer the preexisting statewide test to field-tested students, nor publicly report test results from field-tested students or use the field test results for accountability decisions. This is the “field test flexibility” request Montana was granted in 2023.</p>
<p>... to administer an alternate academic assessment, aligned to alternate academic achievement standards, for students with significant cognitive disabilities. Students with significant cognitive disabilities who receive alternate diplomas may also be counted in the federal graduation rate <u>if</u> the state’s alternate diploma has been approved as meeting ESEA requirements in its state plan.⁸ States need to submit alternate assessments for federal peer review, like all federally required state tests.</p>	<p>... to administer an alternate academic assessment, aligned to alternate academic achievement standards, for students with significant cognitive disabilities <u>and</u> administer that test to more than 1% of enrolled students statewide. This is the most commonly requested—and granted—waiver each year since ESSA passed. Federal regulations describe what states must submit to receive a waiver.⁹</p>
<p>... to use student results from a student engagement survey in middle and high schools as a school quality or student success (SQSS) indicator for accountability. As long as the survey is given to all students statewide in those grades; produces valid and reliable results that can be disaggregated by student groups and that differentiate school performance; and is publicly reported, a state can submit an amended state plan to ED for approval to use the survey as a new SQSS indicator.</p>	<p>... to use school results from a teacher engagement survey in middle and high schools as a school quality or student success indicator (SQSS) for accountability. Because the results of the teacher survey are reported at the school level only and not able to be disaggregated by student group, a state would need a waiver to use the survey as an accountability indicator, even if the survey was administered to all teachers in middle and high school grades.</p>
<p>... to identify schools for additional targeted support and improvement (ATSI) every four</p>	<p>... to identify schools for comprehensive support and improvement (CSI) every four years. ESSA is</p>

⁵ ESEA section 1111(b)(2)(J)
⁶ ESEA section 1111(b)(2)(C)
⁷ ESEA section 1111(b)(2)(B)(viii)(II)
⁸ ESEA section 8101(25)
⁹ 34 CFR § 200.6

States <u>do not need</u> a waiver...	States <u>need</u> a waiver...
<p>years. ESSA does not specify a particular cadence for identifying ATSI schools, though most states choose to identify ATSI schools at the same time they identify CSI schools because the CSI identification criteria are also used to identify ATSI schools. A state wanting to identify ATSI schools every four years would just need to explain its methodology in an amended ESSA state plan and submit the amendment for approval.</p>	<p>clear that CSI schools must be identified at least once every three years.¹⁰ But, if a state that typically identifies CSI schools once every three years wanted to delay identification for a year as it implemented a new accountability system (so that CSI identification occurred in the second year the new system was operational, rather than the first), it would need to request a waiver to do so.</p>
<p>... to require school districts with schools identified for comprehensive support and improvement (CSI) to describe how they are using high-quality instructional materials in their school improvement plan. States have the ability to develop templates for school improvement plans and must approve CSI plans submitted by districts; if an SEA believes CSI plans should address the role of high-quality curriculum in improving student outcomes in the school, they can verify all CSI schools have adopted these instructional materials.</p>	<p>... to prohibit school districts with schools identified for comprehensive support and improvement (CSI) from implementing Tier 4 evidence-based interventions. ESSA specifies that CSI plans must include “evidence-based” interventions,¹¹ which includes interventions in Tier 4 with a demonstrated rationale (requiring a well-defined logic model based on research and a planned effort to study the intervention’s effects). If a state wanted to limit evidence-based interventions in CSI schools only to those in the highest three tiers of evidence, it would need to ask for a waiver.</p>
<p>... to permit a district to transfer funds from Student Support and Academic Enrichment grants (Title IV, Part A) to Title I, Part A. Under the “Transferability” provisions in Title V of the ESEA, an LEA can transfer any, or even all, of its formula grant funding for Student Support and Academic Enrichment grants to Title II, Part A funding for Supporting Effective Instruction—or vice versa. Likewise, any or all formula funding from Title IV, Part A or Title II, Part A can be transferred to the Title I program.¹² An SEA or LEA is prohibited, however, from transferring Title I funds to other programs.</p>	<p>... to permit a district to spend more than 15 percent of its Student Support and Academic Enrichment (Title IV, Part A) grant to purchase technology infrastructure. Under ESSA, if an LEA receives more than \$30,000 in Title IV, Part A funds, it must divide spending across three areas, including the use of technology, and cannot use more than 15% to purchase technology infrastructure. A waiver of this limitation was widely offered to SEAs at the beginning of the Covid-19 pandemic, when many states and districts abruptly transitioned to online-only instruction and needed to purchase devices and wifi hotspots for their students.</p>

¹⁰ ESEA section 1111(c)(4)(D)(i)
¹¹ ESEA section 1111(d)(1)(B)(ii)
¹² ESEA section 5103(b)

What cannot be waived: The un-waive-ables

The parameters for what provisions the Secretary can and cannot waive are laid out in Title VIII of ESEA (specifically, section 8401). **This includes a list of ten requirements the Secretary has no authority to waive across the entire ESEA statute and its regulations.** This list of ten “un-waive-able” requirements has not changed for more than 20 years, and nine of the ten provisions were also included in the Improving America’s Schools Act of 1994. Many of these provisions are fiscal requirements in the statute.

Outside of the following ten provisions, the Secretary can consider waiver requests from states, though there are many innovative practices that do not require waivers (as discussed in “What Do States and Districts Need Waivers For?”).

- 1. The allocation or distribution of funds to states, school districts (local educational agencies), Indian tribes, or other grant recipients.** Most of the largest federal programs in ESEA—like Title I, Part A to support the education of children living in poverty, Title II, Part A to support educator professional development, and Title III to support students learning English—are **formula grant programs**. Each state’s consolidated plan (which must be approved by ED) describes how it will meet ESEA’s requirements and use funds across each of these formula grants. Likewise, each LEA develops a similar consolidated plan for the same purpose (which must be approved by its SEA). States do not have to submit an application to receive formula funds each year once their consolidated plans and assurances have been approved (though states can, and should, amend their plans as they implement significant changes and continuously improve implementation of federal programs).

Other (typically smaller) federal programs, like Education Innovation and Research (EIR) grants, are **competitive grants**—meaning that ED determines priorities for how these funds are spent, selects the grantees who best meet those priorities, and sets how much funding each grantee receives depending on how much money Congress has made available through the annual appropriations process. States, LEAs, and other eligible recipients submit a separate application for each competitive grant they wish to receive each year.

Formula grant programs got that moniker because there are specific formulas in the law dictating how much an individual grantee will receive, depending on the total amount of money Congress appropriates each year. Grantees will receive this amount, so long as they demonstrate (through their consolidated plan) that they’ve met the program’s requirements and conditions. **This part of the waiver authority clarifies that states and LEAs cannot use waivers to change the funding formulas and distribution rules for ESEA formula grant programs.**

2. **Maintenance of Effort (MOE).** Many formula grant programs require the grantee (e.g., the school district or state) to maintain a certain level of state and local spending each year in order to continue receiving federal funds—roughly 90% of what it spent from state and local sources in the prior year. This is intended to prevent state and local disinvestment in education as a result of federal funding, while recognizing that natural fluctuations may occur over time due to changes in student enrollment, economic downturns, and other situations. **While this provision is clear that the Secretary in general cannot waive the MOE requirement across formula grants, there are two specific situations enumerated in the law where the Secretary may waive MOE for an LEA.**¹³

3. **Comparability of Services.** Title I, Part A also requires LEAs to show that state and local funds provided to Title I schools will be used to “provide services that, taken as a whole, are at least comparable to services” in non-Title I schools.¹⁴ This can be demonstrated by showing the LEA has three key policies in place:
 - a. a district-wide salary [schedule](#) (even if non-Title I schools, on the whole, employ teachers who are higher on the salary schedule than Title I schools);
 - b. a policy to “ensure equivalence” among schools in teachers, administrators, and other staff (e.g., having a policy regarding student:teacher ratios); and
 - c. a policy to “ensure equivalence” in curriculum materials and instructional supplies (again, the policy’s existence is what counts, not the quality of its implementation).

This provision in the waiver authority further reiterates that formula grant fiscal requirements (notably in Title I, Part A) cannot be waived by the Secretary, including the requirement to demonstrate comparable services in Title I and non-Title I schools.

4. **Supplement, not Supplant (SNS).** SNS requirements in some form appear in virtually all federal formula programs—and have been included in ESEA since its inception in 1965. SNS is intended to ensure that recipients of federal funds receive all of the state and local funds they would have received in the absence of federal dollars. In the simplest terms, federal funding should be *in addition to* state and local funding so that schools can provide extra resources and supports their students would not otherwise have gotten. To meet [SNS](#) under Title I, Part A, an LEA shows that its method of allocating state and local funds results in each Title I school receiving all of the state and local funds it would have received if it were a non-Title I school. LEAs do not have to prove that each and every cost or service supported by federal funds is supplemental. **Like the prior requirements on the un-waive-ables list, SNS is one of the main fiscal requirements attached to most formula grants, but unlike MOE and comparability, in the Title I, Part A program, SNS applies to states as well as LEAs.**

¹³ These situations include “exceptional or uncontrollable circumstances, such as a natural disaster or change in the organizational structure of the local educational agency” or “a precipitous decline in the financial resources” of the LEA (ESEA Section 8521).

¹⁴ ESEA section 1118(c)

5. **Equitable participation of private school students and teachers.** Since ESEA was first passed in 1965, certain federal programs¹⁵ have included [equitable participation](#) provisions to ensure that a child who meets eligibility requirements for a program may receive services regardless of the school they attend (an LEA’s allocation of Title I-Part A funds, for example, is based on an estimate of eligible children *residing* within the LEA, not *enrolled* in the LEA). To be clear, **private schools do not receive federal funds** under this provision. Instead, the services are provided (after meaningful consultation between the LEA and private schools) to private school students and staff—for example, in the form of professional development. All services must be “secular, neutral, and non ideological.” **The Secretary cannot waive these provisions that ensure services for private school students and educators.**
6. **Parental participation and involvement.** Requirements related to parent involvement are included throughout many federal formula programs in the ESEA. For example, under Title I, Part A, LEAs must communicate with parents of students learning English to explain and discuss how the parent can be involved in the education of their child and support their child in attaining English language proficiency and meet the state’s academic standards in core subject areas. This outreach must include holding regular meetings to hear and respond to recommendations from parents.¹⁶ Likewise, Section 1116 of the ESEA requires each LEA receiving Title I to have a school parent and family engagement policy. **These are the types of provisions and requirements that the Secretary has no authority to waive with regard to parents and families.**
7. **Applicable civil rights requirements.** ED, through the Office for Civil Rights, enforces Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance. ESEA prohibits the Secretary from waiving “applicable civil rights requirements” articulated in other laws, like the Civil Rights Act and the Americans with Disabilities Act. **Given the roots of ESEA as a civil rights law and ED’s long-standing focus on equal access to education, lawmakers in 2015 affirmed that these fundamental civil rights requirements and protections cannot be unilaterally waived by the Secretary of Education.**
8. **The requirement for a charter school under Title IV, Part C.** This prohibits the Secretary from waiving the statutory definition of a “charter school” outlined in Title IV, Part C of the ESEA—which is the section of the law authorizing the competitive grant programs

¹⁵ Under ESSA, these programs include Title I, Part A; Title I, Part C (education of migratory children); Title II, Part A (supporting effective instruction); Title III, Part A (English language acquisition, language enhancement, and academic achievement); Title IV, Part A (student support and academic enrichment); Title IV, Part B (21st century community learning centers); and Title IV, Part F (national activities). For all of these programs, except Title I, Part A, all private school students in an LEA are eligible for equitable services regardless of where they reside in the LEA.

¹⁶ ESEA section 1112(e)(3)

that provide funding to start new charter schools and replicate or expand high-quality charter schools, as well as assist charter schools in accessing credit to secure and renovate facilities and other national activities. The definition,¹⁷ among other specifications, requires that charter schools must:

- a. Not charge tuition and be operated under public supervision and direction.
- b. Use lotteries if more parents choose to enroll their students than there are available spots.
- c. Be nonsectarian in their “programs, admissions policies, employment practices, and all other operations” and unaffiliated with a sectarian school or religious institution.
- d. Comply with federal civil rights laws.
- e. Have a performance contract with the authorized public chartering agency that describes how student performance will be measured in charter schools with the statewide assessments that are required of other public schools.

In simplest terms, this prohibits the Secretary from waiving the definition of a charter school to permit funds to support entities that are religious in nature, noncompliant with State charter laws and federal civil rights laws, or refuse to be subject to the same accountability and oversight as other public schools.

- 9. Prohibitions in subpart 2 of Part F of Title XIII and prohibitions on the use of funds for religious worship and instruction and other prohibited uses of funds.** ESEA includes many restrictions on what grantees, the Secretary, and/or ED can do, and many of these were newly added to, or expanded, in ESSA to prevent executive overreach and maintain state and local control of **Congress has explicitly prohibited the Secretary from waiving these limitations on executive authority.** These restrictions include:

- a. A prohibition on ED from using grants or contracts to “mandate, direct, or control” specific instructional content, academic standards and assessments, curricula, or programs of instruction in states, districts, and schools. Similarly, ED cannot condition or incentivize (1) the receipt of grants and contracts; (2) the receipt of any priority or preference in a grant or contract; or (3) a waiver on adoption of specific instructional content, academic standards and assessments, curricula, or programs of instruction. This prohibition explicitly mentions the Common Core—and was added to the ESEA as a direct response to the NCLB waivers offered to states by the Obama administration in 2011. ED is also prohibited from officially approving or certifying state standards or from developing, incentivizing, pilot or field testing, implementing, administering, or distributing any “federally sponsored national test” in reading, math, or other subjects unless explicitly authorized by law (like NAEP and international tests like PISA).
- b. A prohibition that ED may not use federal funds to “endorse, approve, develop, require, or sanction” any curriculum and that ED’s employees cannot (through

¹⁷ ESEA Section 4310(2)

grants or contracts) “mandate, direct, review, or control” states’ and school districts’ instructional content and curricula.

- c. A prohibition that federal funds may not be used for any purpose related to mandating nationwide tests or certification of educators and that ED may not withhold funds from a state or district if it does not adopt a specific method of educator certification.
- d. A prohibition that ED may not “mandate, direct, or control” the allocation of state or local resources or mandate states to spend any funds or incur any costs not paid for by the ESEA.
- e. A prohibition that the Secretary cannot issue regulations without following federal rules for administrative procedure, issue non-regulatory guidance without “to the extent feasible” considering stakeholder input, or exercise “governance or authority” over school administration, including school budgets.
- f. A prohibition on states considering the receipt of federal aid under ESEA programs, in general, as a factor in determining eligibility for, or the amount of, state aid school districts receive.
- g. A prohibition on using federal funds “for religious worship or instruction” or to support (1) construction, repair, or renovations of school facilities (except where authorized explicitly); (2) transportation (except where authorized explicitly); (3) certain kinds of sex education (such as programs that do not include the benefits of abstinence and programs that distribute contraception); and (4) purchases of, or training to use, weapons (except in limited cases where it is consistent with the educational purpose of the program, such as culinary arts programs).
- h. A prohibition that the Secretary cannot limit a child from walking to school or traveling by car, bus, or bike to school if the parents have given permission and cannot bring civil or criminal charges against parents for the means that their child travels to school.

10. The selection of a school attendance area under Title I, Part A.¹⁸ Title I, Part A funds may only be used by LEAs in “eligible” school attendance areas, which are defined by law as any school where the percentage of children from low-income families is at least as high as the percentage of children from low-income families served by the LEA as a whole. In general, if an LEA has insufficient Title I, Part A funds to serve all eligible schools (which is common), LEAs rank order their eligible schools with rates over 75% to determine which “eligible” Title I schools receive funds (they must be served in rank order, and LEAs may lower the 75% threshold to 50% for high schools during this initial rank ordering). If funds remain after serving all eligible schools with rates over 75%, an LEA can then rank order the remaining eligible schools in terms of the percentage of low-income children served (either by grade span or not) and must serve them in rank order. **The only waiver ED can give an LEA that would permit them to use a different procedure to determine and rank order which schools can be served by Title I, Part A is**

¹⁸ ESEA section 1113

quite limited (and specified in the waiver authority); the Secretary can issue a waiver so that an LEA can use Title I, Part A funds in a school if the percentage of children from low-income families in the school is no more than 10 percentage points below the Title I school with the lowest percentage of children from low-income families in the LEA.

Again, beyond these ten provisions, the Secretary can consider waiver requests of other statutory and regulatory requirements from states, though there is a specific process states and ED must follow, which we describe in the final section.

The waiver process

Historically, waiver requests have originated in two ways:

1. The more common way is individual SEAs submit one-off requests unique to their state.
2. Less commonly, under very specific or extraordinary circumstances, the Secretary “invites” SEAs to submit waivers of certain ESEA provisions.

Who may request waivers

Unlike NCLB, under ESSA only SEAs and Indian tribes can submit a waiver request to ED. While the ESEA makes clear that waivers may be granted to a state, school district, or individual school, the state or tribe must make the request. This gives an SEA the final decision to determine whether or not to submit a request to ED for flexibility an LEA or school would like.

States routinely submit waiver requests, and ED staff regularly review and approve them with any assurances and conditions the agency deems necessary (and relevant) to the scope of the particular request. For example, in 2024, 21 [waiver requests](#) related to school support and accountability were submitted. All but three of these asked to waive ESEA’s 1% cap on student participation in alternate assessments aligned to alternate academic achievement standards. One of the conditions on these routine waiver requests is an assurance that the SEA assessed at least 95% of all students and all students with disabilities enrolled in grades for which assessments are required in the prior year.

However, over the last 20 years, Secretaries also invited waiver requests in response to national events or widespread challenges with implementing the law. For example, during the Covid-19 pandemic, both the Trump and Biden administrations invited SEAs to submit waivers related to assessments and school accountability that were necessary following the widespread closures of public schools. And as NCLB began to show its age, former Secretaries Margaret Spellings and Arne Duncan both offered to waive school accountability provisions to permit states, for example, to use [growth](#) measures and [multiple measures](#) to identify low-performing schools.

The call for these waiver requests generally took the form of a letter to state chiefs, accompanied by guidance and templates. These invitations also placed conditions on states seeking the waiver package. For example, under the Obama administration, in order to receive a waiver from NCLB's requirement that states set targets for 100% of students to be proficient by the 2013-14 school year, states had to "raise the bar" on what proficiency meant by adopting academic standards and tests aligned with college and career readiness (which most, but not all, states did by adopting the Common Core State Standards and joining one of the two related assessment consortia). Secretary Duncan's waiver package was also an all-or-nothing bargain, meaning that states had to meet each of the administration's three priority areas, even if they only wanted a waiver related to one or two of them.

What strings can be attached

Backlash against this practice—particularly the Obama administration's insistence that states adopt [teacher evaluations](#) that relied, in part, on state assessment data in exchange for a waiver of NCLB's "highly qualified teacher" provision—led the 2015 reauthorization to add provisions to the ESEA limiting the Secretary's discretionary authority around these types of broad-scale waiver requests. This was intended to prevent the Secretary from leveraging waivers to coerce states into adopting an administration's policy priorities or views. Under ESSA, waiver requests cannot be rejected "based on conditions outside the scope of the waiver request" and can only include information "directly related to the waiver request."

Furthermore, the law now names several specific policies the Secretary cannot require as a condition of approval of a waiver—such as requiring a waiver request to include or delete "specific" academic standards, academic assessments and items, elements of state accountability systems, or elements of teacher and school leader evaluation systems.¹⁹

What must be included

Before a state or tribe can submit a waiver request, it must first provide the public and local education agencies with "notice and a reasonable opportunity to comment and provide input" using its customary procedures.²⁰ These comments are then shared with the Secretary as part of the request, along with a description of the comment process and how the state or tribe addressed the input received.

Additionally, ESEA requires²¹ the request to:

- Identify the affected federal programs
- Describe what statutory or regulatory requirements would be waived

¹⁹ ESEA section 8401(d)(3)

²⁰ ESEA section 8401(b)(3). If an LEA is requesting the waiver through an SEA, then this public comment period includes comments and input from the SEA.

²¹ ESEA section 8401(b)(1)

- Describe “how the waiving of such requirements **will advance student academic achievement**”
- Describe the methods that will be used to “monitor and regularly **evaluate the effectiveness of the implementation of the plan**”
- Describe “how schools will **continue to provide assistance to the same populations** served by programs for which waivers are requested.”

Further, if the request would waive Title I, Part A requirements related to state assessment or state and district report cards (ESEA section 1111(b) and 1111(h)) then the request must also:

- Describe how the waiver will “**maintain or improve transparency in reporting to parents and the public on student achievement and school performance**, including the achievement of ... subgroups.” This must include reporting for students from each major racial and ethnic group; economically disadvantaged students as compared to students who are not economically disadvantaged; children with disabilities as compared to children without disabilities; and for students on the basis of gender, English language proficiency status, and migrant status.

This provision was especially important when ED waived many state assessment and reporting provisions due to Covid-19 school closures in the 2019-20 school year. ED worked with states to maximize the information on student learning and progress that was provided to parents and the public even when statewide assessment could not be safely administered.

Timeline and approval

After receiving a waiver request from a state, the Secretary must determine whether to approve or reject the request within 120 days. Substantively, the Secretary can reject waivers because of “insufficient information to demonstrate that the waiving of such requirements will advance student achievement” or that the evaluation plan is inadequate. Waivers can also be disapproved because the request is to waive one of the un-waive-able provisions or the request doesn’t meet requirements, including the requirement to seek public input and comment.

Disapproval of a waiver request *cannot* be “based on conditions outside the scope of the waiver request.” Again, this provision—added during the 2015 reauthorization—is meant to prevent the Secretary from using the waiver process to lure or incentivize states into adopting an administration’s policy and political priorities.

If a waiver request is initially disapproved, ED must publicly provide detailed, written reasons to the state or tribe, so that the state or tribe can decide whether to re-submit their request within 60 days. If the Secretary rejects a re-submitted waiver, the state or tribe can then request a hearing with the Secretary within 30 days. The Secretary’s decision at the hearing is final.

Conclusion

We hope this brief helps clarify for policymakers, practitioners, and advocates what the waiver authority provided to the Secretary under section 8401 of the ESEA enables states, Indian tribes, school districts and schools to do, in particular:

- The purpose of waivers and parameters ED uses for determining when waivers can be granted.
- The laws and provisions the Secretary can—and cannot—waive and limitations on the Secretary’s waiver authority under ESSA.
- Instances in which a waiver is required for a state or district and when a waiver is not necessary to pursue an innovative policy or practice.
- who can request waivers and the process for submitting and evaluating a request.

If you have questions, want more information, or would like to discuss a specific scenario where the waiver authority may—or may not—be appropriate, please reach out to Anne Hyslop (ahyslop@all4ed.org) and Dave Powell (dpowell@education-first.com).

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About the Authors

Anne Hyslop is Director of Policy Development at All4Ed, where she leads the organization’s policy research, analysis and evaluation efforts. From 2015–2016, Anne served as Senior Policy Advisor at the U.S. Department of Education, leading the agency’s efforts to write regulations, guidance, and policy for accountability, school improvement, and innovative assessments during and immediately following the passage of the Every Student Succeeds Act. Through her past work for Chiefs for Change, Bellwether, and New America, she has provided technical assistance to federal and state policymakers, conducted research, and written extensively on school accountability, assessments, high school graduation requirements, and college and career pathways.

Dave Powell is a Senior Consultant at Education First where he collaborates with states, advocates and funders on assessment and accountability practices and policies. Previously, he spent 10 years leading government affairs for Stand for Children in Washington State; where he led the campaign establishing the state’s charter school law and passed the nation’s first law requiring qualified students to be automatically enrolled in advanced classes.