

Education Policy Alert

ESEA Flexibility: U.S. Education Department Responds to State Leadership and Invites State Waiver Requests

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On September 23, 2011, President Obama announced that states may apply for Elementary and Secondary Education Act (ESEA) flexibility in exchange for committing to implement several college and career ready reforms. In justifying this new “waiver” strategy, U.S. Secretary of Education Arne Duncan cited the delay in congressional reauthorization of ESEA – and the leading role states have played in moving beyond NCLB to develop college and career ready standards and assessments, next generation accountability systems, and new educator evaluations systems based significantly on student achievement. This approach presents states with a significant opportunity and responsibility to continue leading on college and career ready reforms, and signals a significant shift in the role of federal law from a focus on compliance to a focus on innovation and continuous improvement in education reform.

This paper provides an initial analysis of the Administration's announcement and reform opportunity, including a summary of the requirements, process, timeline, and next steps for states to apply for ESEA flexibility.¹

ESEA Flexibility Program Summary

The Department's NCLB flexibility package represents a turning point in federal education policy. First, it creates a formal process and guidelines by which states can propose and the Secretary will approve waivers from core NCLB requirements in exchange for state and district leadership in driving college and career ready reforms. In sum, each state seeking flexibility must adopt and implement college and career ready standards; design and implement college and career ready systems of accountability and improvement; design and ensure district implementation of new systems of educator evaluation based on student achievement; and identify and eliminate unnecessary district reporting requirements. In exchange, states may waive and move beyond current NCLB requirements, including outdated, rigidly defined Adequate Yearly Progress requirements, school improvement requirements, and more. And states may include other NCLB areas in their waiver proposals, such as expanding uses of afterschool funds to support expanded learning time.

Beyond immediate relief from NCLB, the Department's flexibility strategy is of greater potential importance because it could usher in a new era in the role of federal law to encourage state and local innovation and control. For the last decade, NCLB has focused on compliance with federal law as its

¹ Full guidance and supporting materials are available on the U.S. Department of Education website at: <http://www.ed.gov/esea/flexibility>. Waivers will be granted pursuant to section 9401 of the No Child Left Behind Act.

main theory for advancing student achievement. While NCLB has advanced some important reforms (including accountability for all students and focus on subgroup performance), it has resulted in marginal student achievement gains at best. Meanwhile, states have moved well beyond NCLB to advance college and career ready reforms. At its best, the goal of the Administration's waiver strategy is to move beyond a federal compliance model to an approach aimed at fostering state and local innovation, evaluation, and continuous improvement.

Many states, districts, and schools are already moving on the college and career ready reforms outlined in the Secretary's waiver package. In particular, the Council of Chief State School Officers (CCSSO) recently published principles for state leadership in college and career ready accountability systems, which have been endorsed by nearly all states and formed a basis for the Department's waiver strategy. This ESEA flexibility puts a new opportunity and responsibility on states to raise the bar on education policies, promote dramatic increases in student achievement, and set the table for a future ESEA reauthorization anchored in state leadership and innovation. States will have to be deliberate in the processes they establish, the timelines they follow, and the policies they propose. Interested states must file an "ESEA Flexibility Request" form with the Department, providing detailed information including: (1) key milestones and activities; (2) detailed project timelines; (3) parties responsible for execution; (4) evidence; (5) resources; and (6) significant obstacles. State requests must address all aspects of the principles and waivers, and include a "high quality" plan. "High quality" means the state must describe how it has already met a required principle or how it will meet the principle on the required timelines (including progress to date).

The Department has committed to providing additional information to help SEAs prepare their requests, including providing transparent peer review guidance (the process will utilize both external and internal peer reviewers). The Department is expected to publish the peer review guidance before October 1, but no firm release date has been established.

Finally, the Department has set various timelines for state action, and their implications are not fully clear. Best read, state waiver requests will be reviewed and approved on a rolling basis. States seeking flexibility for the current school year must apply by mid-November 2011 or mid-February 2012. But states may seek waivers beyond those dates, with transition options available for the 2012-13 school year, and timelines for development and implementation of reforms would shift as well.

Overview of ESEA Flexibility Package Requirements

To apply for this new ESEA flexibility, states must address ALL of four major areas regarding college and career ready reforms established in the Department's waiver package. The State Education Agency (SEA) must describe how it will fully implement each of the following consistent with several core principles:

1. college and career ready standards and aligned assessments (Common Core/assessment consortia or aligned with state institutions of higher education);
2. a rigorous state accountability system (based largely on principles articulated by the CCSSO);

3. a commitment to design, pilot, and implement a system educator evaluation based on multiple measures, including student growth measures; and
4. a commitment to evaluate and adjust as necessary state-level administrative and reporting requirements to reduce burden on districts and schools.

States must meet each of the above requirements in order to receive flexibility—they are not able to request a limited waiver based on meeting parts of these requirements. In exchange, states are able to receive flexibility through waivers of ten provisions of NCLB:

1. 2014 timeline for achieving 100% proficiency (section 111(b)(2)(E));
2. school improvement and accountability requirements (section 1116(b));
3. district improvement and accountability requirements (section 1116(c));
4. rural LEA fund restrictions (section 6213(b) and 6224(e));
5. Title I schoolwide program restrictions (section 1114(a)(1));
6. school improvement fund restrictions (section 1003(a));
7. school support and recognition fund restrictions (section 1117(c)(2)(A));
8. improvement plan requirements and Title I and Title II fund restrictions for districts that miss HQT requirements (section 1111(b)(8)(C));
9. restrictions on transfer of funds to Title I, Part A (section 6123); and
10. School Improvement Grant (SIG) fund restrictions (section 1003(g)).

Additionally, states have the option to request flexibility in the use of funding for 21st Century Community Learning Centers. This optional additional waiver allows states to use funds allocated to this program to support expanded learning time during the school day or year. Finally, NCLB section 9401 would allow states to include requests for flexibility in other areas of the law, and states could seek to link federal funding flexibility as well. But it is unclear how the Department would respond to these requests.

Details on Required Principles

(1) College and Career Ready Standards and Assessments for All Students

(A) Adopt College and Career Ready Standards

States must show evidence of having adopted college and career ready standards in at least reading/language arts and math – standards that reflect rigorous content knowledge and application of knowledge through advanced skills. This can include adoption of the Common Core State Standards (CCSS) or other college and career-ready standards. If states develop their own college and career-ready standards, they must provide evidence of approval and certification by a state network of institutions of higher education (IHEs) that acknowledge students meeting the standards will not require postsecondary remedial coursework. States must also develop by 2013-14 English Language Proficiency (ELP) standards that correspond to college and career-ready standards.

(B) Transition to College and Career-ready Standards

States must articulate a plan for transitioning to and implementing college and career ready standards by the 2013-14 school year. This must include an explanation of how all students,

including English Language Learners (ELLs) and students with disabilities, will access learning content aligned to these standards.

(C) Develop and Administer Annual, Statewide, Aligned, High-Quality Assessments that Measure Student Growth

States must establish high-quality assessments aligned with college and career ready standards that measure student knowledge and skills. States may meet this requirement through membership in either assessment consortia that received funding under the Race to the Top (RTTT) Assessment Competition—the Smarter Balance Assessment Consortium (SBAC) or the Partnership for Assessment of Readiness for College and Careers (PARCC). States not participating in either assessment consortia must submit a plan for developing and administering an assessment system and/or a timeline of when the system will be submitted to the Department for peer review. States must develop and administer assessments in at least grades 3-8 and once in high school. These assessments must be piloted by 2013-14 and implemented by 2014-15. States must also develop and administer ELP assessments by 2014-15.

(2) State-Developed, Differentiated Systems of Recognition, Accountability, and Support

(A) Develop and Implement a State-Based System of Differentiated Recognition, Accountability, and Support.

States must design an accountability system that promotes college and career readiness based on multiple measures of student achievement for all schools and subgroups, including but not limited to high-quality assessments and accurate graduation rates. State accountability systems must (1) recognize student growth and school progress; (2) align accountability determinations with support and capacity-building efforts; and (3) provide for systemic, context-specific interventions that focus on the lowest-performing schools and those with the largest achievement gaps. These requirements expressly reference the CCSSO accountability principles. States must provide a description of their accountability system and plan for implementation by 2012-13, including which subjects will be included and how assessments will be weighted. Additionally, states must annually report college-going and college credit-accumulation rates for all students and subgroups in each LEA and high school by 2014-15.

(B) Set Ambitious but Achievable Annual Measurable Objectives

States have three options for setting new AMOs: They can choose to (1) set AMOs in equal annual increments towards a goal of reducing the achievement gap within 6 years; (2) set AMOs that increase in annual equal increments with a result of 100% proficiency by 2020; or (3) propose another method for ambitious but achievable AMOs. Though there is some ambiguity, these AMOs may be directly relevant to identifying focus and priority schools, as described below, but may be combined with other variables in various ways as part of each state's broader accountability system for all schools.

(C) Reward Schools

States must define how they will identify and recognize the highest-performing and high-progress schools.

(D) Priority Schools

States must define how they will identify the lowest performing, “priority” schools (at least 5% of the state's Title I schools), implement turnaround principles, and exit schools from priority status. States must implement these interventions beginning in 2012-13. This shift to turnaround principles affords states and districts with significant new flexibility to advance turnaround models that address key issues presented in the ESEA Flexibility guidance – moving beyond the current four turnaround models established in the School Improvement Grants Program.

(E) Focus Schools

States must define how they will identify “focus” schools with largest achievement gaps, lowest-performing subgroups, or low graduation rates (at least 10% of the state's Title I schools), provide meaningful interventions based on diagnostic review, and exit schools from focus status. States must implement these interventions beginning in 2012-13.

(F) Provide Incentives and Supports for Other Title I Schools

States must explain how the state accountability system will provide incentives and support to ensure continuous improvement at all Title I schools that are not making progress in improving student achievement and narrowing achievement gaps. States must also explain how they will build state, district, and school capacity to improve student learning.

(3) Supporting Effective Instruction and Leadership through Educator Evaluation

(A) Develop and Adopt Guidelines for Local Teacher and Principal Evaluation and Support Systems

States must develop teacher and leader evaluation and support systems that: (1) are used for continual improvement of instruction; (2) meaningfully differentiate performance using at least three performance levels; (3) use multiple valid measures, including a significant factor of student growth for all students and other measures of professional practice; (4) evaluate educators on a regular basis; (5) provide clear, timely, useful feedback to guide professional development; and (6) are used to inform personnel decisions. States must also provide growth data on current students and students taught the previous year to reading/language arts and math teachers in grades in which there is a state assessment. States must adopt guidelines for evaluation systems in 2011-12. Subsequently, LEAs must design evaluation systems consistent with these guidelines in 2012-13, pilot systems in 2013-14, and implement systems statewide in 2014-15. While somewhat ambiguous, it appears that “state guidelines” refer to the overall process and principles each state and its districts will follow in designing its educator evaluation system, with actual design to follow.

(B) Ensure LEAs Implement Teacher and Principal Evaluation and Support Systems

States must explain their process for ensuring that each LEA develops and implements teacher and leader evaluation systems consistent with state guidelines. While somewhat ambiguous, it appears that states may and will have different models of state versus local control in designing and implementing educator evaluation systems.

(4) Reducing Duplication and Unnecessary Burden

States must review and remove as necessary duplicative and burdensome reporting requirements for LEAs and schools.

States must engage stakeholders and communities in the development of their flexibility requests and provide evidence of this engagement in the flexibility request. Finally, states are encouraged to collaborate with the U.S. Department of Education to evaluate at least one program, practice, or strategy implemented in response to this flexibility package. The Department will fund and conduct the evaluation in partnership with the state. And states may want to act beyond this requirement to build policy evaluation, review, and continuous improvement directly into their college and career ready policies and waiver proposals.

ESEA Flexibility Process and Timeline

Though the new federal guidance is somewhat unclear, the U.S. Department of Education has seemingly outlined a rolling process for states to apply for waiver flexibility. For states to receive flexibility by the end of the 2011-12 school year, they must submit a flexibility request during one of the first two application windows:

First Application Deadline: November 14, 2011 with a December 2011 peer review

Second Application Deadline: mid-February 2012 with a spring 2012 peer review

There will be an additional opportunity to apply for approval that would take effect after the 2011-12 school year. Developing college and career ready policies, including new accountability systems and guidelines for educator evaluation, are complex tasks and important reform opportunities. This work will take time. States that have already done extensive work to develop state accountability systems and plan for educator evaluation systems could apply within these earlier deadlines, while those with a lesser degree of readiness may choose to implement a longer development process and wait for the subsequent application periods. If a state needs additional time to plan for implementation of flexibility, the Secretary has indicated in his letter to chief state school officers that states can request to hold its annual measurable objectives for 2011-12 at the same level as the previous year. In exchange for this temporary AMO flexibility, states must adopt college and career-ready standards; link teacher, principal, and student data and provide that data to educators; and identify persistent achievement gaps within the state.

States are also requested to notify the Department by October 12, 2011, of their intent to request ESEA Flexibility and the application period in which they intend to apply. The Department will host a series of Technical Assistance webinars in September and October 2011. Waivers will be granted through the end of the 2013-14 school year with the option to request an extension.

The Department will utilize a revised peer review process to review waiver requests, which will include both external peer reviewers and staff reviewers. These reviewers will evaluate the extent to which requests support a comprehensive and coherent improvement in standards, assessments, and accountability and teacher and principal effectiveness to lead to improved instruction and student achievement – as required under NCLB section 9401. States will have the opportunity to clarify plans and answer questions posed by the reviewers as needed. Reviewers will provide comments to the Department for the Secretary's consideration. The Secretary will make decisions regarding each state's request for flexibility. If a state's request is denied, it will receive feedback on what components of the request need additional development in order to be approved.

This summary analysis was prepared by EducationCounsel LLC. EducationCounsel provides education strategy, policy, advocacy, and legal support to state and national education leaders across the country. Our goal is to help transform education policies to help dramatically improve student achievement and close achievement gaps. This summary and analysis is provided for policy planning purposes, and does not constitute specific legal advice. If you have questions please contact **Scott Palmer**, Managing Partner, at scott.palmer@educationcounsel.com or (202) 545-2916; **Reg Leichty**, Partner, at reg.leichty@educationcounsel.com or (202) 545-2918; Steve Winnick, Senior Counsel, at steve.winnick@educationcounsel.com 545-2913, or **Sarah Rittling**, Senior Policy Advisory, at sarah.rittling@educationcounsel.com or (202) 545-2965. www.EducationCounsel.com