



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

OCT 03 2014

The Honorable Robert K. Hammond
Commissioner of Education
State Department of Education
201 E. Colfax Avenue, Suite 500
Denver, CO 80203-1799

Dear Commissioner Hammond:

This letter is in response to your August 19, 2014 letter to U.S. Department of Education (ED) Secretary Arne Duncan regarding various inquiries that have arisen in Colorado regarding the requirements for State assessments under the Elementary and Secondary Education Act of 1965 (ESEA) and, concomitantly, ESEA flexibility. Your letter was referred to me for response, and I am pleased to respond on behalf of Secretary Duncan.

Before I respond to your five specific questions, please let me emphasize the importance of the assessment requirements in the ESEA. A high-quality, annual statewide assessment system is essential to provide critical information regarding student achievement to parents, teachers, principals, and administrators at all levels. When that system is aligned with the academic content and achievement standards that a State expects all children to know and be able to do, it provides the road map for aligning instruction to the academic needs of students identified by the assessment system. A high-quality, annual system provides information on *all* students so that educators can improve educational outcomes, close achievement gaps among subgroups of historically underserved students, increase equity, and improve instruction.

Below, I have responded to each question, providing the statutory and regulatory citations, as applicable, and noting any differences between the statutory and regulatory requirements of the ESEA and ESEA flexibility.

1. What are the Federal requirements regarding the frequency, grade levels, and content areas of State assessments? Can ED provide an outline of the requirements in section 1111(b)(3) and any differences under ESEA flexibility?

ESEA section 1111(b)(3) (20 U.S.C. § 6311(b)(3)) requires a State educational agency (SEA) that receives funds under Title I, Part A of the ESEA to implement in each local educational agency (LEA) in the State a set of high-quality, yearly academic assessments that includes, at a minimum, assessments in mathematics, reading or language arts, and science. With respect to reading/language arts and mathematics, the assessments must be administered in each of grades 3 through 8 and not less than once

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in grades 10 through 12. With respect to science, the assessments must be administered not less than once during grades 3 through 5, grades 6 through 9, and grades 10 through 12.

Under ESEA section 1111(b)(3)(C) (20 U.S.C. § 6311(b)(3)(C)) and 34 C.F.R. § 200.2, the State assessments must —

- Be the same academic assessments used to measure the achievement of all children (§ 1111(b)(3)(C)(i); § 200.2(b)(1));
- Be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and English Learners (§ 200.2(b)(2));
- Be aligned with the State’s challenging academic content and achievement standards and provide coherent information about student attainment of the standards (§ 1111(b)(3)(C)(ii); § 200.2(b)(3));
- Be used for purposes for which they are valid and reliable and be consistent with relevant, nationally recognized professional and technical standards (§ 1111(b)(3)(C)(iii); § 200.2(b)(4));
- Be supported by evidence from the test publisher or other relevant sources that the assessment system is of adequate technical quality for each required purpose (§ 1111(b)(3)(C)(iv); § 200.2(b)(5));
- Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding, which may include single or multiple question formats that range in cognitive complexity within a single assessment and multiple assessments within a subject area (§ 1111(b)(3)(C)(vi); § 200.2(b)(7));
- Provide for the participation of all students in the tested grades, including students with disabilities, who must be provided reasonable accommodations, and English Learners, who must be assessed in a valid and reliable manner and provided reasonable accommodations including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what those students know and can do in academic content areas until they have achieved proficiency in English (§ 1111(b)(3)(C)(ix); §§ 200.2(b)(9), 200.6);
- Assess English Learners who have been in schools in the United States for three or more consecutive years in English on the reading/language arts assessments, except that, on a case-by-case basis, an LEA may assess those students in their native language for not more than two additional years (§ 1111(b)(3)(C)(x));
- Produce individual student interpretive, descriptive, and diagnostic reports that allow parents, teachers, and principals to understand and address the specific academic needs of students (§ 1111(b)(3)(C)(xii); § 200.2(b)(11));
- Enable results to be disaggregated within each State, LEA, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students compared to students who are not economically disadvantaged (§ 1111(b)(3)(C)(xiii); § 200.2(b)(10));
- Be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, but do not measure personal or family beliefs or attitudes (§ 1111(b)(3)(C)(xiv); § 200.2(b)(8)); and
- Enable the production of itemized score analyses (§ 1111(b)(3)(C)(xv); § 200.2(b)(12)).

For each grade and subject assessed, a State’s academic assessment system must —

- Address the depth and breadth of the State’s academic content standards;
- Be valid, reliable, and of high technical quality;
- Express student results in terms of the State’s academic achievement standards; and

- Be designed to provide a coherent system across grades and subjects. 34 C.F.R. § 200.3(a).

Under ESEA flexibility, these requirements have not been waived. They must, however, be interpreted in the context of a high-quality assessment as defined under ESEA flexibility. A “high-quality assessment” is an assessment or a system of assessments that is valid, reliable, and fair for its intended purposes; and measures student knowledge and skills against college- and career-ready standards in reading/language arts and mathematics in a way that —

- Covers the full range of those standards, including standards against which student achievement has traditionally been difficult to measure;
 - As appropriate, elicits complex student demonstrations or applications of knowledge and skills;
 - Provides an accurate measure of student achievement across the full performance continuum, including for high- and low-achieving students; provides an accurate measure of student growth over a full academic year or course;
 - Produces student achievement data and student growth data that can be used to determine whether individual students are college and career ready or on track to being college and career ready;
 - Assesses all students, including English Learners and students with disabilities; provides for alternate assessments based on grade-level academic achievement standards or alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities; and
 - Produces data, including student achievement data and student growth data, that can be used to inform determinations of school effectiveness for purposes of accountability under Title I; determinations of individual principal and teacher effectiveness for purposes of evaluation; determinations of principal and teacher professional development and support needs; and teaching, learning, and program improvement.
2. Do States have to administer the same general assessment to all students? If so, are there exceptions to this requirement? If there are exceptions, what thresholds must be met to be in compliance with Federal law and regulations (*e.g.*, to ensure comparability across multiple assessments)? Has any State been successful in meeting these thresholds? Can ED provide an outline of the requirements in section 1111(b)(5) and any differences under ESEA flexibility?

ESEA section 1111(b)(3)(C)(i) requires State assessments to “be the same academic assessments used to measure the achievement of *all* children (emphasis added).” So, with certain limited exceptions described below, the assessments an SEA develops must be the same for all students in the State. An SEA may not assess only a sample of students, even if that sample is representative of students in each LEA or the State as a whole.

One exception to the general requirement that a State’s assessment must be the same for all students is the authority in the Title I regulations for an SEA to adopt alternate academic achievement standards and alternate assessments aligned with those standards for students with the most significant cognitive disabilities. *See* 34 C.F.R. §§ 200.1(d), 200.6(a)(2)(ii)(B). These standards and assessments apply to a very small number of students with disabilities who, even with the very best instruction, are not likely to meet the grade-level academic achievement standards that apply to all students.

ESEA section 1111(b)(5) (20 U.S.C. § 6311(b)(5)) is another exception. It applies *only* in a State that provides evidence, satisfactory to the Secretary, that neither the SEA nor any other State government entity has sufficient authority under State law to adopt standards and assessments that would be

applicable to all students enrolled in public schools in the State. In this case, the SEA may meet the requirements of ESEA section 1111(b)(3) by adopting academic standards and assessments on a statewide basis, and limiting their applicability to students served under Title I, or adopting and implementing policies that ensure the each Title I LEA in the State adopts academic content and achievement standards and aligned assessments that meet all of the requirements in section 1111(b)(3) and corresponding regulations and apply to all students in the LEA. Only Iowa and Nebraska qualified for this exception. It is my understanding that Iowa met the requirements of section 1111(b)(3) because each of its LEAs administered the Iowa Test of Basic Skills and adopted the standards on which it was based, thereby effectively giving Iowa a statewide assessment system. Nebraska tried for a number of years to implement a system of standards and assessments developed by individual LEAs but was never able to demonstrate comparable technical quality and equivalence across LEAs; Nebraska's legislature now requires statewide assessments.

ESEA section 1111(b)(5) has no counterpart under ESEA flexibility; no SEA that has received ESEA flexibility is prohibited under State law from adopting a single statewide assessment system that applies to all students in the State. In other words, each SEA that has received ESEA flexibility has indicated it has authority under State law to adopt a single statewide assessment system that applies to all students in the State.

To my knowledge, ED has only approved one State — Utah — to administer multiple assessments. Specifically, Utah was approved to permit its LEAs to administer either Utah's statewide assessments or the Utah Local Adaptive Assessments (ULAAs). Through a rigorous peer review process spanning more than three years, Utah was able to demonstrate that the ULAAs met all ESEA requirements, including that the ULAAs measured the full depth and breadth of Utah's content standards, were aligned with those standards, were valid, reliable, and of high technical quality, and produced comparable results to Utah's statewide assessments. Significantly, by double testing students in select LEAs, Utah was able to provide evidence demonstrating that the ULAAs were comparable to its statewide assessments in their content coverage, difficulty, and quality. Using an equi-percentile methodology, Utah was also able to demonstrate through the peer review process that the achievement levels on the ULAAs sufficiently matched those on the statewide assessments. To my knowledge, Utah is no longer administering the ULAAs.

3. Can a combination of State and local measures be used within a State's assessment and/or accountability system? If so, under what conditions can that occur? Also, can local measures supplant State measures (*i.e.*, can a district use a local assessment to replace the State assessment in some or all Federally required grades and subjects)? Can ED provide an overview of 34 C.F.R. § 200.3(b) and any differences under ESEA flexibility?

To receive Title I, Part A funds, an SEA must develop and implement a set of high-quality, yearly academic assessments that include, at a minimum, assessments in reading/language arts, mathematics, and science that will be used as the primary means of determining the yearly performance of the State and each LEA and school in enabling all children to meet the State's academic achievement standards. *See* ESEA section 1111(b)(3)(A). As described below, the regulations that implement this requirement afford an SEA some flexibility in using a combination of State and local assessments in its statewide system. Importantly, it is the SEA that must articulate whether and how it will include such flexibility in its statewide system; an LEA may not adopt alternative assessments on its own without those assessments being authorized under the statewide system. ED will submit the SEA's system for peer review to ensure that it meets the regulatory requirements. *See* ESEA section 1111(e).

34 C.F.R. § 200.3(b) permits an SEA to include a combination of State and local assessments in its State assessment system. In doing so, the SEA must demonstrate that the system has a rational and coherent design that —

- Identifies the assessments to be used;
- Indicates the relative contribution of each assessment towards ensuring alignment with the State's academic content standards and determining the adequate yearly progress (AYP) of each school and LEA; and
- Provides information regarding the progress of students relative to the State's academic standards in order to inform instruction.

Under 34 C.F.R. § 200.3(c), an SEA that includes local assessments in its State system must —

- Establish technical criteria to ensure that each local assessment meets the requirements of 34 C.F.R. § 200.3(a)(1) and (c)(2);
- Demonstrate that all local assessments are (1) equivalent to one another and to the State assessments in their content coverage, difficulty, and quality; (2) have comparable validity and reliability with respect to student subgroups; and (3) provide unbiased, rational, and consistent determinations of the annual progress of schools and LEAs in the State;
- Review and approve each local assessment to ensure that it meets or exceeds the State's technical criteria; and
- Be able to aggregate, with confidence, data from local assessments to determine whether the State has made AYP.

In developing its statewide assessment system, an SEA may rely exclusively on local assessments only if the SEA meets the requirements of ESEA section 1111(b)(5) — *i.e.*, it does not have State authority to require all students to take the same statewide assessments. 34 C.F.R. § 200.3(d).

However an SEA designs its statewide assessment system, the assessments that comprise the system must include *all* students within the State or LEA, as applicable, including students with disabilities and English Learners. An SEA may not have one set of assessments for most students and a separate set, for example, for students with disabilities (with the exception of alternate assessments authorized under 34 C.F.R. § 200.6(a)(2)) or English Learners (with the exception of native language assessments aligned with the State's academic content and achievement standards).

4. What are the consequences if a State or district fails to adhere to the Federal assessment requirements? In addition to Title I funds, what additional funds are at risk (*e.g.*, Title III, IDEA, etc.)? Has any State ever had its Federal funds withheld in part or whole due to failure to adhere to the Federal requirements?

If an SEA fails to comply with the assessment requirements in either ESEA or ESEA flexibility, ED has a range of enforcement actions it can take. These include sending a letter to the SEA requesting that it come into compliance, increasing monitoring, placing a condition on the SEA's Title I, Part A grant award or its ESEA flexibility request, placing the SEA on high-risk status (34 C.F.R. § 80.12), issuing a cease and desist order (GEPA section 456 (20 U.S.C. § 1234e)), entering into a compliance agreement with the SEA to secure compliance (GEPA 457 (20 U.S.C. § 1234f)), withholding all or a portion of the SEA's Title I, Part A administrative funds (ESEA section 1111(g)(2) (20 U.S.C. § 6311(g)(2))), and suspending, and then withholding, all or a portion of the State's Title I, Part A programmatic funds (GEPA section 455 (20 U.S.C. § 1234d)). An SEA has similar enforcement actions available to it with

respect to noncompliance by an LEA, including withholding an LEA's Title I, Part A funds. *See, e.g.*, GEPA section 440 (20 U.S.C. § 1232c(b)).

The specific enforcement action ED would take would depend on the severity of non-compliance. For example, if an SEA has developed a statewide assessment system but that system is not approvable because it fails to meet all statutory and regulatory requirements, ED might condition the SEA's Title I, Part A grant award, place the SEA on high-risk status, enter into a compliance agreement, or withhold State administrative funds. ED has, in fact, withheld Title I, Part A administrative funds under ESEA section 1111(g) (20 U.S.C. § 6311(g)) from a number of States for failure to comply with the assessment requirements in ESEA section 1111(b)(3). On the other hand, if an SEA or LEA refuses to implement an assessment system that meets the statutory and regulatory requirements, ED might seek to withhold programmatic funds from the State and expect the SEA to withhold from the LEA. So, clearly, if an SEA or LEA fails to comply with the assessment requirements in either the ESEA or ESEA flexibility, it could place its Title I, Part A funds in jeopardy. In addition, the SEA or LEA could find itself out of compliance with a wide range of additional Federal programs that rely on statewide assessment results, putting additional funds at risk. These additional programs include those targeting students most at risk, including, but not limited to: the School Improvement Grants (SIG) program; ESEA Title III; Part B of the Individuals with Disabilities Education Act (IDEA); programs for rural schools under ESEA Title VI; migrant education under ESEA Title I, Part C; and programs focused on professional development and other supports for teachers, such as ESEA Title II.

Please note that an LEA may not avoid administering the State assessments required under ESEA section 1111(b)(3) by declining to accept Title I, Part A funds. As noted above, the assessment requirements are State-level requirements that apply to any SEA that accepts Title I, Part A funds. That SEA must then administer its assessments statewide — including to students in LEAs that do not participate in Title I.

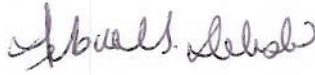
5. On page 7 of a document dealing with the Secretary's waiver authority with respect to provisions of Title I, Part A of the ESEA prepared by the Congressional Research Service (CRS) (June 28, 2011), CRS suggests that the Secretary has the authority to waive provisions of the assessment portion of the Title I statute under certain circumstances. Does ED agree with this interpretation? If so, please let us know under what conditions the Secretary would entertain a waiver of the state assessment provisions.

ESEA section 9401 (20 U.S.C. § 7861) authorizes the Secretary to waive most statutory and regulatory requirements of the ESEA, with certain exceptions listed in the statute. *See* ESEA section 9401(c). The exceptions do not include the standards and assessment requirements in ESEA section 1111.

Accordingly, the Secretary has authority to grant an SEA a waiver of one or more of those requirements. The Secretary may not grant such a waiver to an LEA, however, because the standards and assessment requirements are State-level requirements. In deciding whether to grant a waiver, the Secretary must determine that the waiver would increase the quality of instruction for students and improve their academic achievement. Because the standards and assessment requirements are so very central to accountability under Title I of the ESEA and ESEA flexibility, the Secretary would likely not lightly waive such core requirements absent compelling reasons that their waiver would benefit students.

Please do not hesitate to contact me if you need additional information or clarification. Thank you for your continued commitment to enhancing education for all of Colorado's students.

Sincerely,

A handwritten signature in dark ink, appearing to read "Deborah S. Delisle". The signature is fluid and cursive, with the first name being the most prominent.

Deborah S. Delisle
Assistant Secretary