



**THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK**  
/ ALBANY, NY 12234  
Office of P-12 Education

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September 18, 2017

Mr. Jason Botel  
Acting Assistant Secretary and Principal Deputy Assistant  
Secretary for Elementary and Secondary Education and  
Office of Elementary and Secondary Education  
400 Maryland Ave., SW  
Washington, DC 20202

RE: Request for a Waiver of Statutory Requirements of the Elementary and Secondary Education Act (ESEA)

Dear Acting Assistant Secretary Botel:

Section 8401 of the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA) (hereafter referred to as ESEA/ESSA), provides authority to the Secretary of the United States Department of Education (USDE) to waive certain statutory and regulatory requirements at the request of a State Educational Agency. By way of this letter, the New York State Education Department (NYSED or “the Department”) is formally requesting a waiver of two statutory requirements of Title I, Part A of ESEA/ESSA. The Department is requesting a waiver of the identified sections for a period of four years, beginning with the 2017-2018 school year. Below is a detailed plan that addresses each requirement in Section 8401(b)(1) of ESEA/ESSA:

***A. Identify the Federal programs affected by the requested waiver.***

Title I, Part A of ESEA/ESSA.

***B. Describe which Federal statutory or regulatory requirements are to be waived.***

As directed by the New York State Board of Regents, the Department is seeking waivers for the following statutory requirements:

1. ESEA/ESSA Section 1111(b)(3)(A):

“With respect to recently arrived English learners who have been enrolled in a school in one of the 50 States in the United States or the District of Columbia for less than 12 months, a State may choose to—

(i) exclude— (I) such an English learner from one administration of the reading or language arts assessment required under paragraph (2); and (II) such an English learner’s results on any of the assessments required under paragraph (2)(B)(v)(I) or (2)(G) for the first year of the English learner’s enrollment in such a school for the purposes of the State-determined accountability system under subsection (c); or

(ii)(I) assess, and report the performance of, such an English learner on the reading or language arts and mathematics assessments required under paragraph (2)(B)(v)(I) in each year of the student’s enrollment in such a school; and (II) for the purposes of the State-determined accountability system—(aa) for the first year of the student’s enrollment in such a school, exclude the results on the assessments described in subclause (I); (bb) include a measure of student growth on the assessments described in subclause (I) in the second year of the student’s enrollment in such a school; and (cc) include proficiency on the assessments described in subclause (I) in the third year of the student’s enrollment in such a school, and each succeeding year of such enrollment.”

The purpose of these waivers will be to allow the Department to do the following:

- For recently arrived English Language Learners/Multilingual Learners (ELLs/MLLs)<sup>1</sup>:
  - In Year 1 of their enrollment exclude such students from participation in the New York State English Language Arts (ELA) assessment; and
  - In Year 2 of their enrollment assess such students in the New York State ELA assessment and exclude their results on the assessments from applying towards the achievement and growth indicators in the state’s annual accountability system; and
  - In Year 3 of their enrollment assess such students in the New York State ELA assessment and include their results on the results on the assessments applying towards the achievement indicator in the state’s annual accountability system and applying towards the growth indicator (as compared to their Year 2 assessment results) in the state’s annual accountability system;
  - Such students whose participation and/or application of their assessment results are excluded per this waiver shall be counted towards participation when determining whether a school or district has met the 95 percent participation requirement in ELA at the elementary-middle-high levels.

### *Rationale for Waiver Request*

This waiver will apply to New York State ELL/MLL students enrolled in Grades 3-8 who are within their first three years of enrollment in U.S. schools (Years 1-3). In order to support New

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<sup>1</sup> NYSED defines “English Language Learners/Multilingual Learners” as “students who, by reason of foreign birth or ancestry, speak or understand a language other than English and speak or understand little or no English, and require support in order to become proficient in English.” The terms “English Language Learner” and “Multilingual Learner” are synonymous in New York State. “English Language Learner/Multilingual Learner” is also synonymous with the term “English Learner,” as used by the United States Department of Education.

York's ability to accurately measure the knowledge and skills of its ELLs/MLLs, the state provides a number of accommodations to its math and science assessments, including printed translations in five languages other than English, oral translations of assessments for low incidence languages, and the ability to write responses in students' home/primary languages. Due to the nature of the knowledge being measured, however, ELLs/MLLs do not receive these accommodations when taking the ELA assessment.

NYSED's preliminary data analysis reveals that 73.6% of all ELLs/MLLs within their first three years of enrollment receive a proficiency score at Level 1 on the ELA assessment. This low achievement score is predictable, and as a result does not serve as a meaningful measurement of ELA achievement or progress for ELLs/MLLs in Years 1 or 2 of their enrollment.

NYSED has determined a positive moderate statistical correlation between student performance on the state's English language proficiency test, known as the New York State English as a Second Language Achievement Test (NYSESLAT; described in section D below) and on the state's English language arts test. We theorize that this correlation is partly due to the NYSESLAT being designed to measure Synthesized Linguistic Demands based on the New Language Arts Progressions, which are derived from the English Language Arts Common Core Learning Standards. While not significant enough to measure NYS' ELA standards fully, the Department believes this correlation may provide an additional predictor of a recently-arrived ELL/MLL student's potential to achieve proficiency on the state's ELA assessments.

This waiver is consistent with the provision of New York State Education Law 305(48) which specifies that, "[e]ffective upon and to the extent allowed by a federal waiver issued by" USDE, "[t]he commissioner shall issue regulations: ... (b). allowing English language learners to be assessed with a state-administered assessment that measures the English language development of such students rather than the English language arts exam for their first two years of enrollment..."

***C. Describe how the waiving of such requirements will advance student academic achievement.***

Waiving the requested requirements of the Exception for Recently Arrived English Learners provisions of ESEA/ESSA Section 1111(b)(3)(A) will allow NYSED to better support academic achievement for impacted students by providing the following:

***Increasing Relevance of Student Data and Reducing Student Testing Burden***

As described above, a large proportion of recently arrived ELL/MLL students demonstrate low proficiency on the state's ELA assessments. As a result, the information these assessments provide are not effective in helping school districts to foster the most prudent instructional decisions for these students. The Department believes that this waiver will allow students more time to demonstrate meaningful English language proficiency progress before utilizing their ELA score for accountability purposes.

These students are already required to take at least one English language proficiency assessment and some take additional local- and home-based assessments to continually measure their proficiency throughout school year. The New York State ELA test can serve as a source of extreme anxiety for students who are already carrying a high testing burden when compared with other students in New York State. NYSED believes that this waiver would advance the learning of recently arrived ELLs/MLLs by reducing their testing burden during

Year 1 of their enrollment, and providing these students' schools with more information from their NYSESLAT results to properly address their linguistic needs during Years 2 and 3 of their enrollment.

Without this waiver, schools are required to make these students take a test that will not provide enough information to fully address their linguistic needs. This will impose detrimental effects on these students. By allowing students to delay participation in the ELA assessments until they develop English language proficiency substantial enough to make the ELA assessment a meaningful measurement of their knowledge and skills, we expect to contribute to our efforts to support schools as they ensure that students demonstrate academic achievement on State assessments.

***D. Describe the methods the State educational agency, local educational agency, school, or Indian tribe will use to monitor and regularly evaluate the effectiveness of the implementation of the plan.***

The students involved in this waiver will be required to participate in the state's English language proficiency test, the NYSESLAT, regardless of whether or not they participate in the ELA assessment. New York State students are initially identified as ELLs/MLLs using the New York State Identification Test for English Language Learners (NYSITELL), which is administered on a one-time basis upon enrollment. Thereafter, all ELLs/MLLs take the NYSESLAT on an annual basis in the spring of each school year to assess their yearly progress at attaining English language proficiency. Both the NYSITELL and NYSESLAT assess students' English language abilities across four modalities: Speaking, Listening, Reading and Writing.

Over the last decade, there has been an increase in the number of ELLs/MLLs enrolled in New York State public schools, with a 2016 population of 85,405 Grades 3-8 students who speak over 200 languages. Of these students 11,950 recently arrived ELLs/MLLs in 2015 and 13,228 recently arrived ELLs/MLLs in 2016 did not take the state's ELA assessment. NYSED strives to ensure that all students' individual educational paths and socio-emotional needs are met in multiple languages leading them to college and career readiness. In order for these students to succeed, NYSED uses language proficiency data from the NYSESLAT to provide targeted instruction that will enable students to meet proficiency levels towards the rigorous New York State Next Generation Learning Standards.

***E. Include only information directly related to the waiver request.***

This waiver received 17 comments during the public comment period from August 25, 2017 to September 8, 2017. Sixteen (16) of the 17 comments were written in general support of the waiver. Those comments were received from Advocates for Children, the Chancellor's Advisory Council, New York State School Boards Association, the New York State Congress of Parents and Teachers, the Council of School Superintendents, Rocky Point Union Free School District, as well as several teachers and administrators. The New York City Department of Education wrote in general support, but shared concerns. NYCDOE indicated that it believed while this waiver proposes many benefits to schools around accountability, it does not reduce the test burden on students, and only possibly lessens anxiety around test performance for a second year ELL student, who would only be taking the ELA exam for baseline purposes.

***F. Describe how schools will continue to provide assistance to the same populations served by programs for which waivers are requested and, if the waiver relates to provisions of subsections (b) or (h) of section 1111, describe how the State educational agency, local educational agency, school, or Indian tribe will maintain or improve transparency in reporting to parents and the public on student achievement and school performance, including the achievement of the subgroups of students identified in section 1111(b)(2)(B)(xi).***

The Department will continue measured these students for English language proficiency through the NYSESLAT and will continue to take all other scheduled assessments. As described in our state plan, NYSED hopes to provide additional services to these students by seeking funding from the New York State legislature to develop Native Language Arts/Home Language Arts (NLA/HLA) exams for Grades 3-8 and for high school.

The NYSED Report Card reports enrollment and accountability data for ELLs/MLLs on a state-wide, district-wide, and school-wide basis.

Upon issuance of the waiver by the USDE, the Department will prepare for consideration by the Board of Regents such amendments to Commissioner's Regulations as may be necessary to implement the waiver. If New York State is granted the requested waiver, it will submit to the USDE in fall 2018 a copy of the amended Commissioner's Regulations.

Please feel free to contact me by phone at (718) 722-2796 or via e-mail at [Ira.Schwartz@nysed.gov](mailto:Ira.Schwartz@nysed.gov) if you have any questions regarding this waiver request. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Ira Schwartz". The signature is written in a cursive style and is positioned above a thin horizontal line.

Ira Schwartz

cc: MaryEllen Elia  
Jhone Ebert  
Angelica Infante