



**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 2018-2019 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)(1)(B)(ii): “Except as provided in subparagraph (E), the standards required by subparagraph (A) shall—with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.”
2. ESEA/ESSA Section 1111(b)(2)(B)(i)(I): “The assessments under subparagraph (A) shall—  
(i) except as provided in subparagraph (D), be—(I) the same academic assessments used to

measure the achievement of all public elementary school and secondary school students in the State.”

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

- For students with disabilities enrolled in Grades 4-8 whose lack of chronological grade-level proficiency can be determined by local Committees on Special Education (CSE):
  - Allow school districts to administer Grades 3-8 assessments in English Language Arts and mathematics at not more than two grade-levels below chronological grade-level and to use these student’s results on these examinations when making participation and accountability determinations at the elementary-middle levels;
    - Designate students who take these below grade-level assessments at a performance level of 1 when determining the Performance Indices at the elementary-middle levels for the relevant subjects;
    - Count these students’ participation in the below grade-level assessments when determining whether a school or district has met the 95 percent participation requirement in the relevant subjects at the elementary-middle level;
    - For all students enrolled in Grades 6-8, require school districts to advance the affected students’ assessment levels by at least one grade-level in each subsequent year.

### *Rationale for Waiver Request*

The New York State Education Department believes that states in very clearly defined and limited circumstances should be able to administer instructional level assessments to a small group of students with significant cognitive disabilities. This requested waiver of statutory or regulatory requirements is related to the assessment of elementary and middle school students with significant cognitive disabilities who are not eligible for the New York state alternate assessment and whose significant cognitive and intellectual disabilities preclude their meaningful participation in chronological grade-level instruction, even with accommodations, but who may be able to meet the state’s learning standards over time. This waiver will allow NYSED to more accurately measure these students’ achievement levels for the use of school districts in making future instructional decisions for these students and to provide more accurate measurements of proficiency and growth for these students’ districts and schools to apply towards the state’s annual accountability system.

The Department is currently in the process of transitioning its assessment system to computer adaptive assessments, a development that began in 2015 with the launch of computer-based field tests and continued this past year with the launch of computer-based operational tests for the New York Grades 3-8 English Language Arts and Mathematics Tests. However, NYSED currently lacks the ability to practicably meet the adaptive assessment requirements of ESEA/ESSA Section 1111(b)(2)(J)(i)(II) that “such assessment (aa) shall measure, at a minimum, each student’s academic proficiency based on the challenging State academic standards for the student’s grade level and growth toward such standards; and (bb) may [then] measure the student’s level of academic proficiency and growth using items above or below the student’s grade level, including for use as part of a State’s accountability system under subsection (c).” In order to apply this waiver to their students, school districts will be required to determine, prior to the test administration, that the affected students will not be able to achieve a proficiency result above performance level 1 on

the grade-level assessment. (This determination will be made using strict guidelines described in section c below). Therefore, the Department believes that the initial measurement of academic proficiency for the grade level standards required by the ESEA/ESSA subsection cited above will be provided for these students, and the Department views this request as comparable to the off-grade testing that will be allowable under ESEA/ESSA once the Department's transition to computer adaptive assessments is complete.

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:... (a). allowing students with disabilities who are not eligible for the New York state alternate assessment and whose cognitive and intellectual disabilities preclude their meaningful participation in chronological grade level instruction to be assessed based on instructional level rather than chronological age..."

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

Waiving the same levels of achievement and same assessments provisions of ESEA/ESSA Section 1111(b)(1)(B)(ii) and 1111(b)(2)(B)(i)(I) will allow NYSED to better support academic achievement for impacted students by providing the following:

***Increasing Relevance of Student Data***

When students with disabilities are required to participate in assessments that do not allow to students to demonstrate what they know and are able to do, the assessments do not provide actionable information on student performance to districts and schools. As a result, these assessments do not foster the most prudent instructional decisions. This request will benefit students by providing more relevant data that school districts can use towards advancement of the affected students' academic achievement as well as continuous improvement to the districts' special education programs. The Department also believes that this waiver will encourage districts and schools to provide instructional supports and services at a pace and level commensurate with students' needs, abilities, and individual rates of learning, as those institutions know that their year-end accountability will include assessments that are more likely to measure the advancements students made through this specialized instruction.

This waiver will support New York's efforts to achieve one of the goals of ESEA/ESSA, which is to empower state and local decision-makers to develop their own strong systems for school improvement based upon evidence. The more relevant proficiency results data that provided through this waiver will serve as more accurate evidence upon which the Department and school districts can base instructional and institutional decisions. By providing students with assessments that allow the students to demonstrate what they do not know and are able to do rather than what they do not know and cannot do, we expect to contribute to our efforts to reduce the numbers of students who are currently opting out of 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.***

Upon issuance of this waiver by the USDE, the Department will develop strict criteria and guidelines to be used by school districts in the selection of students to recommend for instructional

level, rather than chronological-grade level, assessment. Such guidelines may include assurances that the CSE's have determined that the recommended students:

1. Do not currently qualify for the New York State Alternate Assessment;
2. Took the New York State Alternate Assessment in the most recent previous year or in that same year performed at Level 1 on the chronological grade-level State assessment with raw scores that indicated correct responses to be below the chance level;
3. Are identified through individual evaluation to have significant intellectual delays and substantial difficulties in cognitive areas (such as memory, language comprehension, reasoning and problem-solving) that the CSE has identified to be the determinant reasons that the students are not able to reach grade level proficiency in their chronological grade-levels;
4. Would fail to achieve a proficiency result above performance level 1 on the grade-level assessment even with extensive modifications and accommodations to chronological grade-level curriculum, instruction, and assignments;
5. Over an at-least two-year period have received multiple, formal assessments of student progress during instruction (such as benchmark assessments, progress monitoring assessments, and/or standardized norm-referenced tests of achievement) that substantiated the students' instructional level of performance and that demonstrated that the students' lags in achievement are not due to lack of appropriate instruction in reading or mathematics.

The guidelines will not allow students to participate in this waiver if the CSE recommendations are based on any of the following exclusionary factors: the students' intelligence quotient (IQ); disability category; language differences; lack of appropriate instruction in reading and/or math; excessive or extended absences from instruction; cultural or environmental factors; factors related to sensory, motor or emotional disabilities; lack of access to appropriate instructional materials, including assistive technology devices or services; and/or the students' placement where their IEP's are being implemented.

Based on 2016-17 school year results, we estimate that the maximum percentage of students in grades 4-8 who could potentially participate in instructional level testing would be .3% in ELA and 1.4% in math because students meet conditions 1 and 2 listed above. The actual percentage of students who would receive instructional level assessments is likely to be lower as some students who meet the first two conditions will not meet conditions 3, 4, and/or 5.

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

This waiver received 20 comments during the public comment period from August 25, 2017 to September 8, 2017. Fourteen (14) of the 20 comments were written in general support of the waiver. Those comments were received from New York State School Boards Association, Freeport Public Schools, 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. Six comments were submitted in opposition to the waiver, from Advocates for

Children, the Advocacy Institute, Disability Rights New York, the National Center for Learning Disabilities, the National Center for Special Education in Charter Schools, and the New York City Department of Education. Reasons cited for opposition include: the waiver request undermines the purpose of ESSA, the waiver is discriminatory because it lowers educational standards for students with disabilities, and the waiver decreases accountability for schools that serve students with disabilities.

***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).***

In order to administer instructional level assessments to students with disabilities who meet the Department's criteria and guidelines, districts will be required to provide the Department assurance that all guidelines have been met and assurances that the modifications described in the guidelines do not lead to students being removed from their age-appropriate regular classrooms; that the students are provided instruction with their chronological grade-level peers by appropriately certified teachers; and that students' parents are informed of and provided the opportunity to respond to the recommendation and the reasons for the recommendation. Districts will be required to base these assurances upon evidence that they collect and maintain every year for each student, regardless of whether the student has taken an instructional-level assessment in previous years.

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 NYS 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,



Ira Schwartz

cc: MaryEllen Elia  
Jhone Ebert  
Angelica Infante