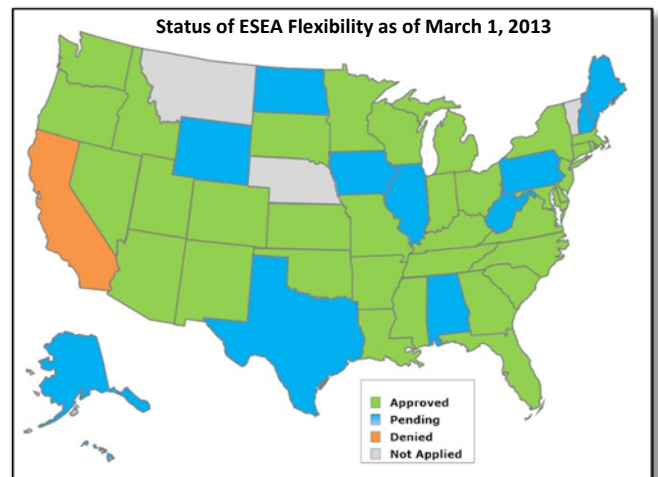


ESEA FLEXIBILITY: *Issues for Students with Disabilities*

BACKGROUND

In response to the failure of the U.S. Congress to reauthorize the Elementary and Secondary Education Act (ESEA), currently known as No Child Left Behind (NCLB), in September of 2011 the U.S. Department of Education (ED) invited State Educational Agencies to request “flexibility” regarding specific requirements of NCLB in exchange for “rigorous and comprehensive state-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction.” Frequently referred to as “waivers,” as of March 2013, 34 states and the District of Columbia have been approved for ESEA Flexibility. Twelve states, plus Puerto Rico and the Bureau of Indian Education, have requests pending. One state’s (CA) request has been denied.



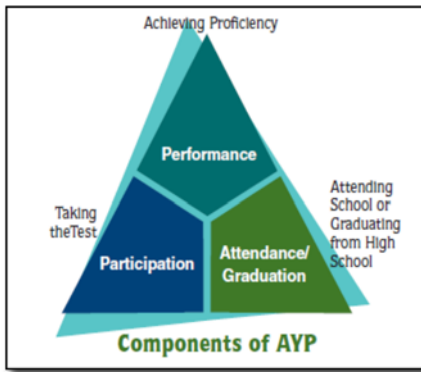
Additional information on ESEA Flexibility is available at <http://www2.ed.gov/policy/elsec/guid/esea-flexibility>.

This document identifies several issues that could negatively impact students with disabilities in states with approved ESEA Flexibility. It should be noted that not all issues pertain to all states that have won approval of their state-developed accountability plans. However, disability advocates are encouraged to use this as a roadmap to help identify issues specific to their state’s accountability plan, formulate questions regarding specific issues within their state’s plan, and pursue their concerns with district and state officials.

ISSUE 1

Loss of Subgroup Accountability for Test Participation

NCLB requires schools and districts to assess at least 95% of all students and **every student subgroup**, including students with disabilities, in tested grades in order to achieve Adequate Yearly Progress (AYP). This requirement has been especially helpful to students with disabilities, who, despite an IDEA requirement that they must be included in testing, have been routinely left out of testing and/or given tests designed for students in lower grades (a practice known as “out of level testing”). The National Center on Educational Outcomes (NCEO) has documented the significant increase in test participation that has occurred across states for students with disabilities since enactment of NCLB as a result of the 95% participation requirement.



While some states have maintained test participation requirements at the same level of rigor in their state accountability systems (i.e., keeping the 95% participation requirement as a minimum requirement for all schools), other states have departed from this level of rigor. For example, under Colorado’s plan, a school or district that does not meet the 95% participation rate **in more than one subgroup** is subject to a lower rating in the accountability system. This type of relaxation of the requirement in current law can lead to significant numbers of students with disabilities being excused from testing. It should be noted that some state applications are unclear regarding how test participation is treated within the accountability system, making it difficult to determine

whether the rigor of current law will be upheld.

ISSUE 2

Loss of Subgroup Accountability for Performance

Many states have created new consolidated subgroups as part of their accountability systems approved under the ESEA Flexibility program. These groups—frequently referred to as “super groups” or “gap groups”—combine the performance results of several subgroups required to be reported separately under NCLB. Most often, the groups being consolidated are low-income, English language learners, and students with disabilities, **with no student counting more than once even if the student belongs to two or more of the groups being combined**. While this approach may result in more schools being held accountable, particularly small schools that otherwise escape accountability for subgroups due to minimum “n” sizes, it can also result in masking the performance of the individual subgroups. It also suggests that a student with one challenge, say limited English, has the same needs as a student with multiple challenges, when in fact this is not the case.

An Alternative to Super Groups. Minimum “n” sizes vary greatly across states, resulting in equally high variability in the number of schools held accountable for the students with disabilities subgroup in accountability determinations. According to a 2012 study published by the Institute of Education Sciences, *The Inclusion of Students With Disabilities in School Accountability Systems*, across 40 states with relevant data for the 2008–09 school year, slightly more than a third (35 percent) of public schools were accountable for the performance of the students with disabilities subgroup, representing just over half (58) percent of tested students with disabilities in those states. In those 40 states, 62 percent of middle schools were accountable for the performance of students with disabilities, while 31 percent of elementary schools and 23 percent of high schools were accountable. These findings clearly indicate that the number of schools held accountable for subgroup performance could be increased simply by lowering the minimum “n” size. ED’s Flexibility guidance and application materials did not require an examination of the state’s current minimum “n” size, including how many schools were being held accountable. Despite this lack of attention to a very important aspect of accountability by ED, several states elected to reduce their minimum “n” size as part of its new accountability system. Others have maintained the minimum “n” size already in use.

What’s “n” size?

As part of their AYP definition, states were required to set the minimum number of students—or “n” size—that constitutes a subgroup (e.g., 30 or 50 students). The “n” size must be large enough to ensure statistically reliable information and prevent personal information from being revealed. Schools and districts are held accountable only for the student groups that meet the minimum subgroup number. If a state used an “n” of 35, for example, a school with only 20 students with disabilities in the tested grades would not be held accountable for this group of students. The test results for these students, however, would factor into the overall school’s AYP calculation and results.

Some states are creating new groups based on student performance instead of demographics. For example, students performing at the bottom 25% are combined and the performance of this “group” counts in the overall accountability. This approach is also problematic. As noted by the Education Trust in its recent report, *A Step Forward Or A Step Back? State Accountability in the Waiver Era*, “Conflating “closing the achievement gap” and “moving low-achieving students” can send the dangerous message that gap-closing is only about raising the floor.”

Another issue involves the use of consolidated or super groups to identify schools in need of improvement (Priority schools and Focus schools). Since the impact of ESEA’s traditional subgroups is diluted in a super group calculation, the impact any *one* subgroup can have on a school’s status is likely to lead to decreased focus on needy students, including students with disabilities.

The “super group” approach directly contradicts a core tenet of NCLB, which was to expose the performance of major racial/ethnic groups, students from low-income families, students with disabilities, and English language learners and to make the performance of these groups of students matter *significantly* in school accountability. Historically, the performance of these students had been masked by *overall* performance data. By requiring “disaggregation”—separate reporting of the performance and participation data for each student group—NCLB has shone a light on the poor performance of these student groups, requiring schools and districts to work to improve their performance. Masking the performance of these historically underperforming groups through the use of “super groups” creates a big risk for diminished attention to these students.

ISSUE 3

Differentiated Annual Measureable Objectives

NCLB requires schools and districts to meet an “Annual Measureable Objective” (AMO)—the percentage of students who must score proficient or above on state assessments in reading and math—each year in order to achieve Adequate Yearly Progress (AYP). NCLB required AMOs to be the **same for all schools, districts, and student subgroups**. The ESEA Flexibility relaxed this requirement and allowed states to set new AMOs using a variety of approaches and to differentiate AMOs for subgroups and schools. This raises three important issues for students with disabilities: expectations, transparency and incentives.

Expectations. While all of the flexibility approaches required a greater rate of improvement for those groups furthest behind, the resulting AMOs continue to limit the expectations and growth of students with disabilities, who are often the lowest performing group in the state. The differentiated AMOs in the example below (AMOs for the District of Columbia) indicate the negative impact on students with disabilities, with just over half of this subgroup expected to be proficient in reading by 2017.

Many states (AR, CT, DC, DE, FL, GA, IN, KS, KY, MA, MD, MN, NC, NJ, NY, RI, SD, UT, TN, WA, WI, and VA) elected to establish achievement targets (AMOs) that vary by student subgroups (race, ethnicity, low-income, English learners, students with disabilities). Some of these states also elected to set AMOs for every school in the state. This approach to setting *customized* AMOs results in all schools and districts being challenged to improve, both overall and for every subgroup, while states that have established subgroup AMOs that are the same for all schools will have large numbers of schools exceeding the targets and many schools for which the targets are completely out of reach. Either way, establishing different AMOs for student subgroups can lead to lowering expectations for students with disabilities.

Subgroup	Reading						
	2011 – Baseline	2012 Target	2013 Target	2014 Target	2015 Target	2016 Target	2017 Target
Asian/Pacific Islanders	71.51%	73.88%	76.26%	78.63%	81.01%	83.38%	85.76%
Black/Non-Hispanic	41.28%	46.17%	51.07%	55.96%	60.85%	65.75%	70.64%
Hispanic	47.08%	51.49%	55.90%	60.31%	64.72%	69.13%	73.54%
Amer. Indian/Alaskan Native	56.52%	60.14%	63.77%	67.39%	71.01%	74.64%	78.26%
White/Non-Hispanic	88.26%	89.24%	90.22%	91.20%	92.17%	93.15%	94.13%
Disabled	15.94%	22.95%	29.95%	36.96%	43.96%	50.97%	57.97%
LEP/NEP	24.77%	31.04%	37.31%	43.58%	49.85%	56.12%	62.39%
Econ. Disadvantaged	38.34%	43.48%	48.62%	53.76%	58.89%	64.03%	69.17%
All Students (State Total)	45.46%	50.01%	54.55%	59.10%	63.64%	68.19%	72.73%

Transparency. The differentiated AMO approach can also result in parents and other stakeholder being seriously misled about how students are actually doing. If the AMO for the “students with disabilities” subgroup is substantially lower than the “all students” group and other subgroups, unless the actual AMO is part of public reporting, the resulting information provides a false picture. Consider, for example, the report below (New Jersey). Suppose that the only information reported to the public is the “Met Target” column. Only by knowing the actual *pass rate* and the *target pass rate* is it apparent that the expectations for students with disabilities is lower than almost all other subgroups.

Performance Targets - Language Arts Literacy**			
This table presents the annual proficiency targets, as measured by the High School Proficiency Assessment (HSPA), established for this school under New Jersey's Elementary and Secondary Act Waiver.			
Subgroup	2010-2011 Pass Rate	2010-2011 Target	Met Target
Schoolwide	64.6%	65.0%	YES
White	78.0%	73.0%	YES
Black	81.0%	76.0%	YES
Hispanic	65.0%	74.2%	NO
American Indian	72.0%	78.0%	NO
Asian	93.0%	92.0%	YES
Native Hawaiian	N/A	N/A	N/A
Two or More Races	58.0%	74.0%	NO
With Disabilities	60.0%	68.0%	NO
Limited English Proficiency	70.0%	67.0%	YES
Economically Disadvantaged	69.0%	73.4%	NO

Incentives. The setting of lower AMOs for the students with disabilities subgroup could provide an incentive for schools to move low-performing students into special education in order to minimize the impact of their scores on the school’s accountability. While it’s important that students with disabilities who truly need special education and related services are referred, evaluated and served in a timely manner, creating an incentive to refer students who are low performers but do not have disabilities could overload the system and threaten the integrity of services to those students who are truly qualified.

ISSUE 4

Decreased Focus on Graduation Rates

While ED has clearly stated that ESEA Flexibility does not waive the requirements for graduation rates set forth in a 2008 ESEA federal regulation, states have received approval of state accountability plans that clearly do not uphold these requirements. The 2008 ESEA regulation on graduation was intended to address three critical problems. First, states were using a variety of ways to calculate graduation rates. Second, the graduation rates of student subgroups didn't matter in the overall school accountability. And third, high schools were permitted to have graduation rate goals as low as 50 percent and annual improvement goals as little as 0.1 percent.

The 2008 ESEA regulation requires all states to use a graduation calculation known as a "four-year adjusted cohort graduation rate" and requires reporting of this rate for all students and all student subgroups. The first four-year adjusted cohort graduation rate data was released in late 2012 (see <http://www2.ed.gov/documents/press-releases/state-2010-11-graduation-rate-data.pdf>). It showed graduation rates for students with disabilities range from a high of 84 percent (SD) to a low of 23 percent (MS and NV). Thirty states have graduation rates for students with disabilities at or below 66 percent. In addition, significant gaps between graduation rates for all students and students with disabilities exist *within* many states. Mississippi has the largest graduation gap at 52 points. In that state the graduation rate for all students is 75 percent compared to just 23 percent for students with disabilities. Seven states have graduation gaps of 35 percent or greater (MS, AL, LA, NV, GA, SC, and VA) and twenty-five states have graduation gaps of 20 percent or greater. The within-state graduation gap for every state with available data appears at right.

AK	28	IA	18	MT	13	RI	19
AL	42	IL	18	NC	21	SC	35
AR	6	IN	21	ND	19	SD	1
AZ	11	KS	10	NE	16	TN	19
CA	17	LA	42	NH	17	TX	9
CO	21	MA	17	NJ	10	UT	17
CT	23	MD	26	NM	16	VA	35
DC	20	ME	18	NV	39	VT	16
DE	22	MI	22	NY	29	WA	20
FL	27	MN	21	OH	27	WI	20
GA	37	MO	13	OR	26	WV	19
HI	21	MS	52	PA	12	WY	23

An extensive analysis of each state ESEA Flexibility application conducted by the Alliance for Excellent Education (AEE) indicates that many of the state accountability plans approved by ED are "inconsistent with the intended outcomes of the 2008 graduation rate regulations." Among the problems identified by AEE are: use of calculations consisting of other measures of high school completion such as GEDs and alternate diplomas, graduation rate counting too little within the state's accountability system, lack of accountability for student subgroups and inadequate expectations for improvement. All of these issues have a disproportionate impact on students with disabilities by marginalizing the importance of their graduation rates.

Through its analysis AEE identified:

- Eleven states that are permitted to use calculations consisting of other measures of high school completion not allowed by the 2008 regulation (AZ, CO, CT, DC, GA, LA, MA, MI, OK, and SD).
- Twelve states that have accountability systems allocating less than 25 percent of the index to the adjusted cohort graduation rate (AZ, CO, FL, KY, MA, MD, MI, NM, RI, SD, TN and WI).
- Eleven states that have either weak or no subgroup graduation rate accountability in their state accountability system. Most of these states have graduation rates for students with disabilities of less than 60 percent (MI, MN, NC, NM, NV, RI, and SC).
- Ten states that use extended-year cohort rates (frequently used for students with disabilities who may take longer to graduate) without setting more ambitious graduation rate targets for these cohorts (CO, KS, MA, MI, MN, MO, OR, RI, WA and VA).

Only by maintaining the requirements of the 2008 graduation regulation will we begin to see improvement in the numbers of students with disabilities who earn a regular diploma.

ISSUE 5

Limited Requirements for Interventions

ESEA Flexibility requires states to identify the lowest performing Title I schools in the state as in need of comprehensive interventions. Called “Priority” schools, the number of schools must equal at least 5 percent of all Title I schools in the state. Another group, called “Focus” schools, are those with the greatest gaps in achievement or graduation rates and in need of targeted interventions. The number of Focus schools must be equal to at least 10 percent of the Title I schools in the state. So, under ESEA Flexibility, states must require interventions in *no more than 15 percent of the Title I schools in the state*. This leaves many schools with large groups of failing students without any requirement to undertake improvement activities. This limited intervention approach could be particularly harmful to students with disabilities, since they are not likely to be highly concentrated in the lowest performing Title I schools in the state.

While all schools must continue to “report” on the performance of all students, and all student subgroups required by NCLB, there is no requirement for improvement activities in schools other than those designated as Priority or Focus—leaving a large number of underperforming schools with no incentive to improve. The Education Trust report found that “There’s a very real risk that, in some states, students in large swaths of schools won’t get the support and attention they need.”

ISSUE 6

Including Students with Significant Cognitive Disabilities

All states receiving ESEA Flexibility intend to incorporate a measure of student growth into their state accountability systems. However, many states have not indicated how students with the most significant cognitive disabilities who participate in state assessment systems via an Alternate Assessment on Alternate Achievement Standards would be included in growth calculations.

This exclusion of a portion of students with disabilities raises concerns regarding their rights under Section 504 as well as the IDEA. States should be required to include *all* students in *all* aspects of their state accountability systems.

Many states receiving ESEA Flexibility are not associated with either of the two consortia that are developing a high-quality Alternate Assessment based on Alternate Achievement Standards aligned to college and career-ready standards under grants from ED (see box). How those states (approved states of CO, KY, MA, MN and OH, pending states of AL, HI, IL, NH and TX) will ensure that they have an alternate assessment aligned to college and career-ready standards for students with the most significant cognitive disabilities is an area of concern.

National Center and State Collaborative consists of Alaska, Arizona, Connecticut, District of Columbia, Florida, Georgia, Indiana, Louisiana, Nevada, New York, North Dakota, Pacific Assessment Consortium (PAC-6), Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Wyoming are Partner States. Arkansas, California, Delaware, Idaho, Maine, Maryland, New Mexico, Oregon, and the US Virgin Islands are Tier II affiliated states.

Dynamic Learning Maps consists of Iowa, Kansas, Michigan, Mississippi, Missouri, New Jersey, North Carolina, Oklahoma, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Discontinuing the Alternate Assessment on Modified Academic Achievement Standards

All states that have been granted ESEA Flexibility are required to end the use of the Alternate Assessment on Modified Academic Achievement Standards (AA-MAS) currently allowed by ESEA Federal regulations (§ 200.1(e)). While this is viewed as a positive move—putting those students currently assessed using the AA-MAS on a course to better ensure access to the general curriculum and a regular high school diploma—it also poses a significant risk if not handled properly. States that are required to discontinue use of an AA-MAS as part of their approved ESEA Flexibility are: CT, GA, IN, KS, LA, MD, MI, MN, NC, OK, TN and VA. States with pending applications include ND, PA and TX. Some of these states have been assigning significant numbers of students with disabilities to this alternate assessment. For example, in the 2009-2010 school year, Oklahoma assessed 49 percent of students with disabilities on its AA-MAS for reading and 47 percent for math. Texas assessed 40 percent of its students on its AA-MAS for reading and 41 percent for math. This far exceeds the number of students with disabilities envisioned by ED as not able to participate in the general assessment when the regulation allowing this assessment was created.

The National Center on Educational Outcomes (NCEO), in its report, *States' Flexibility Plans for Phasing Out the Alternate Assessment Based on Modified Academic Achievement Standards*, found that states provided varying levels of detail about how they plan to phase out the AA-MAS and stated that “as states move toward phasing out the AA-MAS for accountability purposes, many will need to develop more detailed plans.” The report found that few states indicated any intent to update and review the Individualized Education Programs (IEPs) of students who participate in the AA-MAS, ensure that students have access to grade-level content, or provide information to parents about the transition process.

NCEO's analysis also found:

“In their waiver applications, only three states explicitly recognized the importance of ensuring that students who transition out of the AA-MAS will need to have access to grade level content. This is a concern since Federal regulations require that students who participated in the AA-MAS have access to grade level content. Previous studies found that some of these students may not have had the opportunity to learn content that would be on the test (Altman, 2012; Lazarus, Hodgson, Price & Thurlow 2011), and it is vital that as these students transition to the general assessment that they have access to grade level content.”

An additional concern involves the movement from the AA-MAS to the general assessment. The NCEO report concluded that:

“...based on the results of this analysis, it appears that a few states may have been unclear as to which assessment some students who currently take the AA-MAS would be shifting to. Almost all students who participated in the AA-MAS will transition to the general assessment, with or without accommodations. Very few students who take the AA-MAS have significant cognitive disabilities, so it would be very rare that a student would transition to an AA-AAS. States will need to use care when they revise their participation guidelines to ensure that students currently in the AA-MAS are shifted to the appropriate test (Lazarus & Rieke, in press).”

Ensuring that students assigned to the AA-MAS are appropriately transitioned to the general assessment and provided every opportunity to receive instruction in the general curriculum is critical to their success.

ESEA FLEXIBILITY REFERENCES AND RESOURCES

Alliance for Excellent Education: The Effect of ESEA Waiver Plans on High School Graduation Rate Accountability

<http://www.all4ed.org/files/ESEAWaivers.pdf>

Center on Education Policy: NCLB Waivers and Accountability

<http://cep-dc.org/displayDocument.cfm?DocumentID=411>

Collaboration to Promote Self-Determination: Press Release on occasion of Senate hearing Feb. 7, 2013

<http://thecpsd.org/wp-content/uploads/2013/02/CPSD-ESEA-Flexibility-Request-Press-Release-2-7-13-FINAL4.pdf>

Education Trust: A Step Forward or a Step Back? State Accountability in the Waiver Era

<http://www.edtrust.org/dc/press-room/press-release/new-ed-trust-report-shows-several-state-accountability-systems-created-t>

Jobs for the Future: NCLB Waivers and Accountability: The Graduation Rate Balancing Act

<http://www.jff.org/publications/education/nclb-waivers-and-accountability-graduati/1507>

National Center on Educational Outcomes: States' Flexibility Plans for Phasing Out the Alternate Assessment Based on Modified Academic Achievement Standards (AA-MAS) by 2014-15

<http://www.cehd.umn.edu/nceo/OnlinePubs/Synthesis89/default.htm>

National Center for the Improvement of Educational Assessments: Promoting Equity in State Education Accountability Systems, June 2013

http://www.nciea.org/publication_PDFs/Promoting%20Equity%20CSDMP110712.pdf

U.S. Department of Education: ESEA Flexibility Information

<http://www2.ed.gov/policy/elsec/guid/esea-flexibility>

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Available online at <http://www.advocacyinstitute.org/ESEA/AdvocacyInstitute-ESEA.Flexibility.Issues.for.SWDS.pdf>

A not-for-profit organization dedicated to services and projects that work to improve the lives of children, youth and adults with disabilities.

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