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## Secretarial Waiver Authority Under the ESEA and CARES Act

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) was signed into law. The law includes new waiver authority for the Secretary of Education (the Secretary), in addition to the waiver authority the Secretary already has under the Elementary and Secondary Education Act (ESEA). Among other things, the new waiver authority permits the Secretary to waive educational accountability requirements using a streamlined process. After a brief discussion of the Secretary's waiver authority under the ESEA, this In Focus discusses the waiver authority provided to the Secretary in the CARES Act.

### ESEA Waiver Authority

Under Section 8401 of the ESEA, the Secretary is authorized to waive most statutory and regulatory requirements associated with any program authorized by the ESEA, provided that certain requirements are met, if specifically requested by a state educational agency (SEA) or Indian tribe. Local educational agencies (LEAs) may submit waiver requests through their SEA. The SEA may then submit the request to the Secretary if it approves the waiver. Schools must submit their waiver requests to their LEA, which in turn submits those requests to the SEA.

An entity requesting a waiver must submit a waiver request with a plan that, among other requirements, identifies the federal program affected by the requested waiver, describes which federal statutory and regulatory requirements are to be waived, and describes how the waiving of such requirements will advance student achievement. The Secretary must issue an initial approval or disapproval of a waiver request not more than 120 days after it is submitted. The Secretary may grant a waiver for up to four years and may extend it under certain circumstances.

The Secretary is prohibited from using authority available under Section 8401 to waive statutory or regulatory requirements related to, for example, the allocation or distribution of funds to states, LEAs, Indian tribes, and other recipients of funds; supplement, not supplant requirements; and applicable civil rights requirements. The Secretary is prohibited from waiving maintenance of effort (MOE) requirements under Section 8401, but has the authority to waive MOE requirements for LEAs under Sections 1118(a) and 8521(c) and for states under Section 1125A(e)(3).

### National Emergency Educational Waivers

The COVID-19 Pandemic Education Relief Act of 2020, included as Title III-B of the CARES Act, provides for waivers primarily related to the ESEA. Section 3511 of the CARES Act allows the Secretary, upon request from an

SEA, LEA, or Indian tribe, to grant waivers of various statutory or regulatory provisions if she determines that such a waiver is necessary and appropriate due to the coronavirus emergency determined to exist by the President under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (hereinafter referred to as the coronavirus emergency).

### Streamlined Waivers

The Secretary is required to create an expedited application process for SEAs (including the Bureau of Indian Education [BIE]) and Indian tribes to request a waiver of any statutory or regulatory requirement for an SEA related to educational assessments, accountability, and reporting requirements pertaining to assessments and accountability under Section 1111 of the ESEA or Section 421(b) of the General Education Provisions Act (GEPA) (which concerns the extension of the period available for the obligation and expenditure of appropriated funds for most programs administered by the U.S. Department of Education (ED) and is commonly referred to as the Tydings Amendment). The Secretary may grant such waivers using the streamlined application process if she determines that the waivers are necessary and appropriate due to the coronavirus emergency.

More specifically, the expedited waiver process may be applied to waiver requests related to the following provisions of Section 1111 of the ESEA:

- educational assessment requirements under (b)(2) and assessment requirements for recently arrived English learners under (b)(3);
- statewide educational accountability systems, including long-term goals, indicators, annual meaningful differentiation, and identification of schools under (c)(4);
- requirements related to additional targeted support and improvement under (d)(2)(C) and (D);
- reporting requirements for various data included in annual state report cards under (h)(1)(C), including a description of the state's accountability system (i), student performance on academic assessments (ii), student performance on the other academic indicator required for elementary schools and secondary schools that are not high schools (iii)(I), number and percentage of English learners achieving English language proficiency (iv), student performance on the state's indicator(s) of school quality or student success (v), student progress toward meeting the long-term and interim goals included in the state's accountability system (vi), the percentage of students assessed and not assessed (vii), and the number and percentage of

students with the most significant cognitive disabilities who take an alternate assessment (xi); and

- any provisions related to annual LEA report cards under (h)(1)(2)(C)(2) that were waived for state report cards, how student performance on assessments in the LEA compared to student performance on assessments in the overall state on assessments under (h)(1)(2)(C)(2)(i), and how student performance on assessments in each school compared to student performance on assessments in the overall LEA under (h)(1)(2)(C)(2)(ii).

Any school that is located in a state that receives a waiver of any of the aforementioned Section 1111 provisions and is identified for comprehensive support and improvement, targeted support and improvement, or additional targeted support and improvement for the 2019-2020 school year must maintain that identification status for the 2020-2021 school year and continue to receive supports and interventions that are consistent with the school's support and improvement plan in the 2020-2021 school year.

### Additional Waivers Available

For an SEA (including the BIE), LEA (including a BIE-funded school), or Indian tribe that receives funding under the ESEA and requests a waiver using a second waiver process described below, the Secretary may waive statutory and regulatory provisions of the ESEA related to

- the percentage of low-income students in a school required to operate a schoolwide program under Title I-A (§§1114(a) and 8521);
- maintenance of effort requirements that apply to LEAs (§§1118(a) and 8521);
- requirements related to the carry-over of Title I-A funds from one fiscal year to the next (§1127);
- the needs assessment required under Title IV-A for LEAs receiving \$30,000 or more under the Student Support and Academic Enrichment (SSAE) grant program (§4106(d));
- requirements to use funds for a well-rounded education, safe and healthy students, and technology under the SSAE program for LEAs receiving grants of \$30,000 or more (§4106(e)(2)(C), (D), and (E));
- the limit on the percentage of funds that may be used to purchase technology infrastructure under the SSAE program (§4109(b)); and
- the definition of professional development that applies to the ESEA (§8101(42)).

Any SEA, LEA, or Indian tribe requesting a waiver of any of the aforementioned statutory or regulatory provisions may submit a waiver request that (1) identifies the federal programs affected by the requested waiver; (2) describes the federal statutory or regulatory requirements that would be waived; (3) describes how the emergency related to the coronavirus restricts the ability of the state, SEA, LEA, Indian tribe, or school to comply with such statutory or regulatory requirements; and (4) provides an assurance that the SEA, LEA, or Indian tribe will work to mitigate any negative effects that may occur as a result of the waiver.

Any SEA, LEA, or Indian tribe requesting a waiver of the aforementioned statutory and regulatory provisions must provide the public and all LEAs in the state with notice of, and the opportunity to comment on, the waiver request by posting information about it and the process for commenting on the state website. (This requirement does not apply to the streamlined waivers.)

The Secretary is required to approve or disapprove a waiver request submitted under this second process within 30 days after the date of submission. The Secretary may only disapprove the waiver request if the waiver fails to meet the requirements of Section 3511, the waiver is not permitted under the aforementioned list of waivers, or the description of how the emergency related to the coronavirus restricts the ability to comply with such statutory or regulatory requirements is insufficient for the Secretary to determine that the waiver is necessary or appropriate.

### General Waiver Provisions

Any waivers issued by the Secretary based on the provisions of the CARES Act shall be implemented, as applicable, for all public schools, including public charter schools, located within the boundaries of the waiver recipient. With respect to public charter schools, the waivers must also be implemented in accordance with state charter school law, and such implementation must be overseen in accordance with state charter school law.

Any waiver approved by the Secretary under Section 3511 may be for a period not to exceed the 2019-2020 academic year, except to carry out the full implementation of any MOE waivers granted during the 2019-2020 academic year. The Secretary is prohibited from waiving any statutory or regulatory provision related to civil rights.

Not later than seven days after granting a waiver under Section 3511, the Secretary must notify Congress about it. Not later than 30 days after granting a waiver under Section 3511, the Secretary must publish a notice of her decision in the *Federal Register* and on ED's website.

In addition, not later than 30 days after the enactment of the CARES Act, the Secretary is required to prepare and submit a report to Congress on any additional waivers under the Individuals with Disabilities Education Act (IDEA), ESEA, and Carl D. Perkins Career and Technical Education Act of 2006 that she believes are necessary to be enacted into law to provide limited flexibility to SEAs and LEAs to meet the needs of students during the coronavirus emergency.

### Obtaining Waivers

ED has a webpage focused on the department's coronavirus response that includes applications to obtain waivers of various elementary and secondary federal education provisions. These are in addition to the provisions for obtaining a waiver included in Section 8401 of the ESEA.

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