

## ED-FLEX GUIDANCE



### **Editor's Note**

This guidance was finalized in June 2000, and reflects the law as it existed at that time. Although many references in the document are outdated, this is the only written guidance on Ed-Flex. Readers should be aware that, although Ed-Flex was originally scheduled to expire in 2005, Congress passed a law (P. L. 109-211) in March 2006 that extended the life of Ed-Flex until the next reauthorization of the Elementary and Secondary Education Act, which is now expected to occur in 2007 or 2008. The Ed-Flex legislation is located in Tab F of the *Title I Handbook*.

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# ED-FLEX GUIDANCE

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## A. INTRODUCTION

### A-1. What is Ed-Flex?

Ed-Flex is a program that allows the Secretary of Education to delegate to states with strong accountability safeguards the authority to waive certain federal education requirements that may, in particular instances, impede local efforts to reform and improve education. It is designed to help districts and schools carry out educational reforms and raise the achievement levels of all children by providing increased flexibility in the implementation of federal education programs in exchange for enhanced accountability for the performance of students.

Ed-Flex was first enacted as a demonstration program in 1994 as part of the Goals 2000: Educate America Act. Initially, the Secretary was authorized to designate six states as Ed-Flex states. The 1996 amendments to the Goals 2000 legislation authorized the Secretary to delegate Ed-Flex waiver authority to six additional states. On April 29, 1999, President Clinton signed into law the Education Flexibility Partnership Act of 1999, which provides all states that have specific accountability safeguards with the opportunity to participate in the new Ed-Flex program.

## B. ELIGIBILITY REQUIREMENTS

### B-1. Who is eligible to participate in the Ed-Flex program?

State educational agencies (SEAs) in “eligible states,” including the District of Columbia, Puerto Rico, and the outlying areas (Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands), may participate in the Ed-Flex program. (The current 12 Ed-Flex states retain their waiver authority for the duration of the period for which it was initially granted. See Questions H-1 and H-2.)

### B-2. What are the basic conditions that must be met by a state to be eligible to participate in the Ed-Flex program?

To be eligible to participate in the Ed-Flex program, a state must —

(1) (a) have developed and implemented challenging state content standards, student performance standards, and aligned assessments as required under Title I

of the Elementary and Secondary Education Act (ESEA), against which districts in the state are producing the individual school performance profiles required by that legislation, *or*

(b) have developed and implemented challenging state content standards and interim assessments, and have made substantial progress toward developing and implementing the performance standards and aligned assessments required under Title I, and toward having local districts produce the individual school performance profiles;

(2) hold districts and schools accountable for meeting the educational goals described in their local waiver applications and for engaging in technical assistance and corrective actions consistent with Title I for districts and schools that do not make adequate yearly progress; and

(3) waive state statutory or regulatory requirements relating to education while holding districts and schools that are affected by the waivers accountable for the performance of students who are affected by the waivers.

### B-3. What are the Title I requirements regarding performance standards and aligned assessments?

As discussed in Question B-2, the substantial progress criterion in Ed-Flex is linked, in part, to the Title I requirements for performance standards and aligned assessments. These requirements include the following elements:

#### *Performance standards that —*

- Are aligned with the state’s content standards
- Address performance in at least reading/language arts and mathematics
- Describe three levels of proficiency (advanced, proficient, partially proficient).

#### *A yearly assessment system that —*

- Uses the same system to measure the performance of all students
- Measures performance in at least reading/language arts and mathematics

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- Is administered during three grade spans: 3-5, 6-9, and 10-12
- Is aligned with the state's content and student performance standards
- Is valid and reliable for the purposes for which the assessments are used and is consistent with professional and technical standards
- Involves multiple measures of student performance, including measures that assess higher order thinking skills and understanding
- Includes all students in the grades being assessed
- Provides for reasonable adaptations and accommodations for students with diverse learning needs
- Assesses limited English proficient students, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what those students know and can do in subjects other than English Provides individual student interpretive and descriptive reports that include scores and other information on the attainment of student performance standards.
- Provides results that can be disaggregated by gender, by each major racial and ethnic group, by English proficiency, by migrant status, by students with disabilities, and by poverty
- Provides individual student interpretive and descriptive reports that include scores and other information on the attainment of student performance standards.

### **B-4. What does it mean for a state to be making “substantial progress” toward developing and implementing the performance standards and aligned assessments required under Title I, and toward having local districts produce the individual school performance profiles?**

A state is making “substantial progress” if it is on track toward completing, no later than the beginning of the 2000-2001 school year, the challenging student performance standards and aligned assessments required under Title I, and if local districts will be producing the required individual school performance profiles for the 2000-2001 school year. These school performance profiles must be publicly available by September 2001.

Under the Title I legislation, each state was required to develop or adopt challenging content standards and student performance standards in at least mathematics and reading/language arts by the beginning of the 1997-98

school year. The performance standards must be aligned with the content standards and describe at least three levels of proficiency: advanced, proficient, and partially proficient. (A number of states are operating under a limited waiver of the standards deadline.) Title I further requires that states have in place, by the beginning of the 2000-2001 school year, assessments that are aligned with these standards. The assessments must meet the requirements in section 1111(b)(3) of the ESEA.

Local educational agencies receiving Title I funds must produce, publicize, and disseminate to teachers and other staff, parents, students, and the community, annual individual school performance profiles that include statistically sound disaggregated results as required by section 1111(b)(3)(I). The initial profiles must report on school performance for the 2000-2001 school year.

To be eligible to participate in the Ed-Flex program under the substantial progress criterion, a state must (1) have already implemented content standards and interim assessments required under Title I, (2) demonstrate convincingly that it is on track to be in full compliance, by the beginning of the 2000-2001 school year, with Title I requirements regarding performance standards and aligned assessments, and (3) demonstrate convincingly that districts in the state will produce the required individual school performance profiles for the 2000-2001 school year, and that these profiles will be publicly available by September 2001. The burden of proof is on each state that applies for Ed-Flex waiver authority to demonstrate that the various development and implementation steps necessary to meet these requirements have been thoughtfully and carefully planned, and that these steps are being effectively carried out in a timely fashion so that there will be full compliance with the requirements by the established deadlines.

### **B-5. How does a state demonstrate that it is making substantial progress in the development of performance standards, assessments, and individual school performance profiles under Title I?**

A state demonstrates that it meets the substantial progress criterion by submitting to the Department —

(1) evidence demonstrating the progress made to date with respect to *each* of the standards and assessment elements referenced in Question B-3;

*Examples of evidence that might be submitted with respect to particular elements:*

Description of specific strategies to ensure the inclusion of all students in the assessments, including students with limited English proficiency and students with disabilities.

Description of studies that have been completed or are in progress to examine whether the assessments used are valid and reliable for the purposes intended and are consistent with professional and technical standards.

Description of studies that analyze the alignment of the assessments to the state standards and that identify standards that are not adequately covered by the assessments.

Evidence that performance standards and aligned assessments have been field tested.

(2) a description of the remaining activities that will be conducted by the beginning of the school year 2000-2001 with respect to *each* of the elements referenced in Question B-3, and the projected dates for accomplishing these activities; and

(3) a description of the steps that the state has undertaken, or will undertake, to ensure that districts will be producing the individual school performance profiles required under Title I starting with the 2000-2001 school year, and that the profiles will be publicly available by September 2001.

**B-6. Is a state that is operating under a waiver of the performance standards deadline eligible to participate in Ed-Flex?**

A state that is operating under a waiver of the performance standards deadline is eligible to participate in Ed-Flex so long as it can convincingly demonstrate that it will meet the Title I requirements for standards, aligned assessments, and individual school performance profiles by the established deadline (see Question B-4), and that it meets the other Ed-Flex eligibility criteria referenced in Question B-2. In evaluating a state's eligibility for Ed-Flex, the Secretary will take into account whether a state operating under a waiver of the performance standards deadline has successfully undertaken the steps to which it committed when seeking the performance standards waiver.

For example, if a state has developed its performance standards and administered its assessments in the elementary and middle grade spans, but has a waiver of the performance standards deadline due to continuing work on its high school performance standards and assessments, it may meet the substantial progress criterion by demonstrating, among other things, that the high school activity will be completed by the 2000-01 deadline. Similarly, if a state has developed descriptions of student performance at the various proficiency levels and has field tested its assessments, but has a waiver of the performance standards deadline while it works out psychometric issues in deter-

mining the specific performance standards relative to its assessments, it may meet the substantial progress criterion by demonstrating that this activity, as well as the rest of the requirements for final assessments, will be completed by the beginning of the 2000-2001 school year.

Conversely, if a state has a waiver of the performance standards deadline, and is developing a request for proposals for its final assessments or has not yet selected its assessments, it will likely be unable to demonstrate that it meets the substantial progress criterion.

**B-7. What information must be included in the individual school performance profiles required under Title I?**

The individual school performance profiles must include the results of the local annual review of the progress of schools served under Title I, based on state assessments and any additional local measures that are used to determine whether a school is making adequate yearly progress. (Section 1116(a) of the ESEA) The profiles must include statistically sound data that is disaggregated 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 as compared to students who are not economically disadvantaged. The profiles may include other information that the districts consider appropriate, such as data on teacher qualification, class size, attendance, promotion rates and retention rates. The profiles must be publicized and disseminated to teachers and other staff, parents, students, and the community.

**B-8. How would a state demonstrate that it is making substantial progress toward having districts produce the required individual school performance profiles?**

The state must describe the steps it has taken to report publicly on how well schools are doing relative to the state's assessments. Furthermore, the state must describe the additional steps that will be taken to ensure that the school performance profiles will include the required disaggregated data for the 2000-2001 school year, and that the profiles will be publicly available by September 2001.

**B-9. What accountability measures must be in place for a state to be eligible for Ed-Flex?**

To be eligible for Ed-Flex, an SEA must have in place a process for holding districts and schools accountable for student performance. The burden is on each state seeking Ed-Flex waiver authority to demonstrate that it has implemented a serious accountability system that results in meaningful intervention in low-performing schools and districts. The accountability measures must include technical assistance and corrective actions consistent with

section 1116 of Title I for districts and schools that are not making adequate yearly progress. The SEA must demonstrate that for the 2000-2001 school year, schools in the state will produce individual school performance profiles that include statistically sound disaggregated data.

**B-10. To be eligible for Ed-Flex, must an SEA have the authority to waive both state statutory and state regulatory requirements relating to education?**

The Ed-Flex legislation recognizes that, in many states, the major state education requirements are promulgated in regulations; in other states, the requirements may be codified in state law. To be eligible for Ed-Flex, an SEA must have the authority to waive state education requirements that might interfere with a district's or school's ability to improve education and increase student achievement. If the major education requirements are primarily in state regulations, it is sufficient for Ed-Flex eligibility purposes if the SEA has the authority to waive state regulatory requirements. If the education requirements are mainly statutory, the SEA must have the authority to waive statutory requirements.

**B-11. May the Secretary waive the Ed-Flex eligibility criteria referenced in Question B-2?**

No. The Secretary may not waive the Ed-Flex eligibility criteria. Thus, only states that meet the eligibility criteria discussed above may apply for Ed-Flex. An SEA that does not have the authority to waive state education requirements, for example, or that will not implement the student performance standards and assessments required under Title I by the 2000-2001 school year, is not eligible to apply for Ed-Flex.

**C. THE SEA'S ED-FLEX APPLICATION**

**C-1. What information must an SEA submit to the Department to be considered for Ed-Flex waiver authority?**

To be considered for Ed-Flex, an SEA must submit to the Department —

- evidence that it meets the eligibility criteria in section 4(a)(2) of the legislation (see Questions B-2 through B-10) *and*
- an educational flexibility plan that includes —
  - (1) a description of the process that the SEA will use to evaluate applications from districts or schools requesting waivers;
  - (2) a detailed description of the state statutory or regulatory requirements relating to education that the SEA will waive;

- (3) a description of clear educational objectives that the state intends to meet under the educational flexibility plan;
- (4) a description of how the educational flexibility plan is consistent with and will assist in implementing the state comprehensive reform plan or, if the state does not have a comprehensive reform plan, a description of how the educational plan is coordinated with Title I standards and assessment activities described in section 1111(b) of the ESEA;
- (5) a description of how the SEA will evaluate the performance of students in the schools and districts affected by the waivers; and
- (6) a description of how the SEA will meet the statutory public notice and comment requirements in section 4(a)(8) of the Ed-Flex legislation.

**C-2. Is an SEA required to consult with others in the development of its Ed-Flex plan?**

Yes. The legislation requires an SEA seeking Ed-Flex waiver authority to provide the public with adequate and sufficient notice of its proposed waiver authority in a widely read or distributed medium. The notice must consist of a description of the SEA's proposed Ed-Flex application, and include a description of improved student performance that is expected to result from the waiver authority. Consistent with applicable state law specifying how comments may be received and how they may be reviewed by the public, the SEA must provide parents, educators, and the community an opportunity to comment on the proposed waiver authority. A copy of any comments received must be submitted with the agency's application to the Department.

**C-3. Does a state have to submit its comprehensive reform plan to the Department as part of its Ed-Flex application?**

No. In its Ed-Flex application, the state may summarize or reference relevant parts of its comprehensive reform plan, and describe how its Ed-Flex plan will assist in the implementation of the comprehensive reform plan. For those few states that do not have a comprehensive reform plan, the Ed-Flex application must include a summary of how the Ed-Flex plan is coordinated with Title I standards and assessment activities.

**C-4. Is there a specific Ed-Flex application form?**

No. An SEA must submit documentation addressing the Ed-Flex eligibility and application requirements, but does not have to follow a specific application format.

## D. SCOPE OF THE ED-FLEX WAIVER AUTHORITY

### D-1. To which programs does the Ed-Flex waiver authority apply?

The Ed-Flex waiver authority applies to —

- (1) Title I of the ESEA (other than sections 1116(a) and (c)), including Part A (Title I Basic Program), Part B (Even Start), Part C (Migrant Education), Part D (Neglected and Delinquent), and the Title I portion of the Comprehensive School Reform Demonstration Program;
- (2) Part B of Title II of the ESEA — the State and Local Activities portion of the Eisenhower Professional Development Program;
- (3) Subpart 2 of Part A of Title III of the ESEA (other than section 3136) — the Technology Literacy Challenge Fund Program;
- (4) Title IV of the ESEA — the Safe and Drug-Free Schools and Communities Program;
- (1) Title VI of the ESEA, including the Class-Size Reduction Program;
- (2) Part C of Title VII of the ESEA — the Emergency Immigrant Education Program; and
- (3) The Carl D. Perkins Vocational and Technical Education Program.

Program-specific guidance concerning the applicability of Ed-Flex is provided in Appendix A.

### D-2. Are there certain requirements that may not be waived?

Yes. A state may not grant any waiver that would undermine the underlying purposes of the statutory requirements of the program for which a waiver is sought.

In addition, a state may not waive any requirements relating to —

- (1) maintenance of effort;
- (2) comparability of services;
- (3) equitable participation of students and professional staff in private schools;
- (4) parental participation and involvement;
- (5) the distribution of funds to local educational agencies;

- (6) serving eligible school attendance areas in rank order under section 1113(a)(3) of
- (7) Title I;
- (8) the selection of a school attendance area or school under sections 1113(a) and (b) of Title I, except that an SEA may grant a waiver to allow a school attendance area or school to participate in Title I, Part A if the percentage of children from low-income families in the school attendance area or school is within 10 percentage points of the lowest Title I eligible school or attendance area;
- (9) the use of federal funds to supplement, not supplant, non-federal funds; and
- (10) applicable civil rights requirements.

Furthermore, requirements of the Individuals with Disabilities Education Act may not be waived under the Ed-Flex waiver authority.

### D-3. Are requirements of the General Education Provisions Act (GEPA) or the Education Department General Administrative Regulations (EDGAR) subject to the Ed-Flex waiver authority?

Yes. GEPA and EDGAR requirements may be waived under Ed-Flex, but only relative to the programs covered by the Ed-Flex waiver authority. An Ed-Flex state could not, for example, waive GEPA or EDGAR requirements relative to the Bilingual Education Program, because the Bilingual Education Program is not covered by Ed-Flex.

Requirements of the Family Educational Rights and Privacy Act (FERPA)(section 444 of GEPA) and the Protection of Pupil Rights Act (PPRA) may not be waived.

### D-4. Who is responsible for determining whether a particular requirement is “waivable”, or whether that requirement falls within one of the restrictions referenced above?

The SEA is responsible for determining whether a particular requirement may be waived, consistent with the Ed-Flex legislation and the waiver review process described in its Ed-Flex application. SEAs are encouraged to consult with officials of the U.S. Department of Education whenever questions arise about the legality or appropriateness of waiving a particular requirement. SEAs are also encouraged to use the Department’s general waiver guidance, which is available on the Department’s homepage at <http://www.ed.gov/flexibility/resources.html>. The Department has ultimate responsibility for ensuring compliance with Ed-Flex requirements and will work in close partnership with Ed-Flex states, issuing further guidance as warranted.

**D-5. What is meant by the “underlying purposes” of the statutory requirements of a program?**

The underlying purposes of the statutory requirements of a program relate to the fundamental reasons for which a program was established. The underlying purposes must be determined in the context of the overall authorizing legislation, taking into account any “statement of purpose” section that may be included in the legislation.

**Example**

Title II of the ESEA contains numerous safeguards to ensure that funds support sustained, high-quality professional development. The statutory purpose statement (section 2002) refers to improving teaching and learning by helping to ensure that teachers have access to sustained and intensive high-quality professional development in core academic subjects. The professional development must be aligned with challenging state standards, reflect recent research on teaching and learning, and incorporate effective strategies and techniques for meeting the educational needs of diverse student populations. It would be impermissible for an SEA to grant a waiver that would undermine these fundamental purposes. For example, an SEA may not grant a waiver that would allow Title II funds to be used generally for the purchase of classroom equipment.

**D-6. May an Ed-Flex state waive requirements relating to how funds are allocated or distributed to LEAs?**

No. The legislation expressly prohibits an Ed-Flex state from waiving requirements relating to the allocation or distribution of funds to LEAs. For example, the Technology Literacy Challenge Fund (TLCF) legislation (ESEA Title III) requires that program funds be awarded to LEAs on a competitive basis, with a specific focus on districts that have the highest percentage or number of children in poverty and the greatest technology needs. An Ed-Flex state may not waive this requirement.

**D-7. Does Ed-Flex permit a state educational agency to waive requirements that apply to the SEA itself?**

No. Under Ed-Flex, an SEA may waive requirements applicable to local educational agencies or schools. It may not waive requirements applicable to the SEA itself. For example, an Ed-Flex state does not have the authority to waive the deadline in Title I for the implementation of student performance standards, nor may it waive requirements governing the consolidation of state administrative funds. To obtain a waiver of requirements applicable to the SEA, the SEA must request a waiver from the U.S. Department of Education.

**D-8. Does the Ed-Flex waiver authority apply to competitive grants (i.e., direct grants) that are awarded by the U.S. Department of Education?**

No. The Ed-Flex waiver authority applies only to the state-administered programs authorized by the statutory provisions referenced in section 4(b) of the Ed-Flex legislation. For example, the Ed-Flex waiver authority applies to the Even Start state-administered program. It does not apply to the Even Start statewide family literacy initiative grants, which are awarded by the Department on a competitive basis.

**D-9. For how long will a state initially be granted Ed-Flex waiver authority?**

States that are eligible for Ed-Flex and that meet the application requirements described in Question C-1 will be granted Ed-Flex waiver authority for a period not to exceed five years. For a state that qualifies for Ed-Flex under the substantial progress criterion (see Questions B-4 and B-5), the exercise of Ed-Flex authority beyond June 30, 2001 will be conditioned on the state demonstrating that it is in full compliance with the Title I requirements concerning student performance standards, assessments, and individual school performance profiles. In other words, a state that qualifies for Ed-Flex under the substantial progress criterion and that meets the Title I requirements on time will retain its Ed-Flex authority for up to five years. A state that qualifies for Ed-Flex under the substantial progress criterion yet fails to meet the Title I requirements on time will not be permitted to exercise Ed-Flex authority beyond June 30, 2001 until it demonstrates that it has completed the development and implementation of the required standards and assessments, and that its districts are producing the required individual school performance profiles.

**D-10. For how long may a waiver granted by an Ed-Flex state remain effective?**

Waivers granted by an Ed-Flex state may remain in effect only through the period for which the state has the authority to grant waivers. Thus, in states that receive Ed-Flex waiver authority under the “substantial progress” standard, the waiver may not initially extend beyond June 30, 2001. Once the state demonstrates that the Title I requirements concerning standards, assessments, and individual school performance profiles have been met, it may extend the duration of a waiver granted to an LEA or school.

States that have already completed the development and implementation of the standards and assessments required under Title I and in which districts are producing the required individual school performance profiles will be able to grant waivers of longer duration. In their Ed-Flex plans, they should establish the maximum period

for which waivers will be granted. Some current Ed-Flex states grant waivers for a period not to exceed two years; other states grant waivers for up to three years. In all instances, the Ed-Flex plans must include mechanisms for ensuring accountability for the performance of schools and students affected by waivers.

## E. LOCAL APPLICATION REQUIREMENTS

### E-1. Who may apply to an SEA for waivers in an Ed-Flex state?

Local educational agencies (LEAs) and schools may apply to the SEA for waivers.

### E-2. What information must an LEA or school provide its SEA when requesting a waiver?

An LEA or school requesting a waiver must provide its SEA with an application that —

- (1) indicates each federal program that would be affected and each statutory or regulatory requirement that would be waived;
- (2) describes the purposes and overall expected results of waiving each requirement;
- (3) describes, for each school year, specific, measurable educational goals for each district or school affected by the proposed waiver, and for the students served by the district or school who are affected by the waiver;
- (4) explains why the waiver will assist the district or school in reaching these goals; and
- (5) describes how the notice and comment requirements in section 4(a)(8) of the Ed-Flex legislation have been met.

### E-3. What information does an SEA consider in reviewing requests for waivers?

In reviewing requests for waivers, an SEA must determine whether the applicant district or school has satisfactorily addressed the local application requirements. An SEA may grant waivers only to districts or schools that have developed local reform plans. An SEA may approve a waiver only after determining that the waiver will assist the district or school in reaching its educational goals, particularly goals with respect to school and student performance. These goals must be specific and measurable, and should be linked to state or local assessments.

Furthermore, before granting any waiver, an SEA must determine that the underlying purposes of the statutory re-

quirements of each program for which a waiver is sought will continue to be met.

### E-4. If an SEA determines that a particular waiver would be appropriate for districts or schools across the state, may it promote the waiver on a statewide basis?

Yes. There may be instances in which an SEA determines that a particular waiver would benefit districts or schools throughout the state. Consistent with its Ed-Flex plan, an SEA may promote the waiver on a statewide basis. After providing the public with an opportunity to comment on the proposed statewide waiver, the SEA may make these waivers available to districts or schools on an expedited basis. Any district or school that wishes to implement a waiver that an SEA is promoting on a statewide basis must first submit to the SEA an application that addresses the requirements in section 4 of the legislation.

## F. WAIVER OVERSIGHT AND REPORTING

### F-1. What are the responsibilities of Ed-Flex states relative to districts or schools that have been granted waivers?

Ed-Flex states are responsible for holding districts and schools that are operating under a waiver accountable for the performance of students affected by the waiver. Ed-Flex states must annually monitor the activities of these districts and schools and, in accordance with the evaluation strategies described in their Ed-Flex plan, measure their performance against the educational goals set forth in the local waiver applications. The goals should be linked to state or local assessment systems. Consistent with the provisions of Title I, an Ed-Flex state must engage in technical assistance and corrective actions for districts or schools that are not making adequate yearly progress.

### F-2. Are there circumstances in which an SEA should terminate waivers granted to a district or school?

Yes. An SEA must terminate a waiver granted to a district or school if it determines, after notice and an opportunity for a hearing, that the performance of a district or school with respect to the goals in its waiver application —

- (1) has been inadequate to justify continuation of the waiver, or
- (2) has decreased for two consecutive years, unless the SEA determines that the decrease was justified due to exceptional or uncontrollable circumstances.

**F-3. What are the reporting responsibilities of Ed-Flex states?**

An Ed-Flex state must submit to the Department an annual report that describes its waiver oversight activities and the impact of waivers on school and student performance. Not later than two years after a state has been designated an Ed-Flex state, its annual report must include data demonstrating the degree to which progress has been made toward meeting the state's educational objectives. The Department will provide supplemental guidance concerning the reporting requirements.

**F-4. Will the Department conduct performance reviews of Ed-Flex states?**

Yes. In accordance with section 4(a)(6)(B) of the Ed-Flex legislation, three years after a state is designated an Ed-Flex state, the Department will review the performance of the SEA in granting waivers of federal requirements. The Secretary will terminate the SEA's authority to grant waivers if the Secretary determines, after notice and an opportunity for a hearing, that the SEA's performance has been inadequate to justify a continuation of the waiver authority.

**G. PROCESS FOR REVIEW AND APPROVAL OF ED-FLEX APPLICATIONS**

**G-1. What factors will the Department consider in determining whether a particular SEA should be granted Ed-Flex waiver authority?**

The Department will examine (1) whether the state meets the Ed-Flex eligibility requirements, and (2) whether the state's Ed-Flex application demonstrates substantial promise of assisting the SEA and affected LEAs and schools in carrying out comprehensive educational reform.

In reviewing Ed-Flex applications, the Department will consider —

1. the comprehensiveness and quality of the state's Ed-Flex plan;
2. the ability of the plan to ensure accountability for the activities and goals described in the plan;
3. the degree to which the objectives described in the state's Ed-Flex plan are clear, have the ability to be assessed, and take into account the performance of LEAs or schools, and students, particularly those affected by waivers;

4. the significance of the state statutory or regulatory requirements relating to education that will be waived; and
5. the quality of the SEA's process for approving applications for waivers of federal statutory or regulatory requirements and for monitoring and evaluating the results of such waivers.

**G-2. What process will the Department use to review Ed-Flex applications?**

The Ed-Flex applications will be reviewed using a combination of Department personnel and external peer reviewers. Peer reviewers will examine the timelines and documentation that have been submitted to demonstrate that the state has met, or is making substantial progress toward meeting, the Title I requirements for the development and implementation of student performance standards and aligned assessments. Department personnel will review the Ed-Flex plan in conjunction with the recommendations of the peer reviewers.

**G-3. When will the Department begin to review Ed-Flex applications?**

The Department will review Ed-Flex applications on a rolling basis as soon as they are received.

**G-4. How long will it take the Department to complete the review of an Ed-Flex application?**

With the assistance of peer reviewers, the Department will review Ed-Flex applications as expeditiously as possible. The Department anticipates making a final decision on an Ed-Flex application within approximately 60 days of its receipt.

**H. STATUS OF CURRENT ED-FLEX DESIGNEES**

**H-1. Do the twelve states that have already been granted Ed-Flex waiver authority need to re-apply for Ed-Flex status at this time?**

No. The twelve states that have already been granted waiver authority under the Education Flexibility Partnership Demonstration Program (Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, New Mexico, Ohio, Oregon, Texas, and Vermont) retain that authority for the duration of the five-year period for which it was originally granted. These states may apply now for an extension of their Ed-Flex waiver authority, or request an extension closer to the date that their current waiver authority will expire. The requests for extensions must be made in accordance with the requirements of the new legislation.

## **H-2. What is the scope of the waiver authority of the original twelve Ed-Flex states?**

For the remainder of their initial five-year period of Ed-Flex status, the waiver authority of the original twelve Ed-Flex states is governed by the provisions of the Educational Flexibility Partnership Demonstration Program, as contained in section 311(e) of the Goals 2000: Educate America Act. In addition, these states are now authorized to waive requirements of the Technology Literacy Challenge Fund Program authorized by subpart 2 of Part A of Title III of the Elementary and Secondary Education Act.

The waiver restrictions applicable to the original twelve Ed-Flex states are those contained in section 311(e) of the Goals 2000 legislation. The new legislation places additional restrictions on Title I targeting waivers. These restrictions — relating to serving Title I eligible schools in rank order under section 1113(a)(3) of the ESEA and the selection of schools or school attendance areas under sections 1113(a) and (b) of the ESEA — do not apply to waivers granted by the original twelve Ed-Flex states during the remainder of their initial five-year Ed-Flex period. After an original Ed-Flex state receives an extension of its Ed-Flex status, it will be governed by the waiver provisions in the new legislation.

## **I. MISCELLANEOUS**

### **I-1. May districts and schools in states that have not yet been granted Ed-Flex waiver authority receive waivers of federal education requirements?**

Yes. Districts and schools in states that have not been granted Ed-Flex status may simply request waivers directly from the U.S. Department of Education. Guidance on applying for waivers from the Department is available on the Department's home page at [www.ed.gov/flexibility/resources.html](http://www.ed.gov/flexibility/resources.html).

### **I-2. Whom should a state contact regarding questions concerning Ed-Flex?**

Questions concerning Ed-Flex may be directed telephonically to Iyauta Moore at (202) 260-2509, or by e-mail to [iyauta.moore@ed.gov](mailto:iyauta.moore@ed.gov).

### **I-3. Where should a state submit its Ed-Flex application?**

Ed-Flex applications should be sent to:

U.S. Department of Education  
Office of the Assistant Secretary for  
Elementary and Secondary Education  
Attention: Ed-Flex  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202-6100

# APPENDIX A

## PROGRAM-SPECIFIC WAIVER GUIDANCE

### (1) ESEA TITLE I WAIVERS

#### **Are there restrictions on waivers of requirements relating to the distribution of Title I, Part A funds within a district?**

Yes. The Title I legislation focuses federal funds on schools with relatively high concentrations of poverty, in order to help the lowest-performing children meet challenging state content and student performance standards. Title I targeting requirements specify which schools within a district are eligible to receive Title I funds and how funds should be allocated among those schools. The Ed-Flex statute recognizes the importance of these requirements, and imposes specific restrictions on a state's authority to waive them. The following limitations on Title I targeting waivers are noteworthy:

- o Ed-Flex states may not waive requirements affecting the distribution or allocation of Title I funds *to* a district; only *within-district* targeting requirements are subject to waiver. (Section 4(c)(1)(E) of the Ed-Flex legislation)

- o An Ed-Flex state may not waive the requirement in section 1113(a)(3) that a district must first serve, in rank order of poverty, its school attendance areas above 75 percent poverty, including any middle schools or high schools, before serving any lower-ranked areas. (Section 4(c)(1)(F) of the Ed-Flex legislation)

- o In limited instances, a waiver may be granted to permit a district to serve a school that is otherwise ineligible for Title I services. Such a waiver may be granted *only if* the poverty rate for this school is within 10 percentage points of the lowest eligible Title I school. (Section 4(c)(1)(G) of the Ed-Flex legislation)

Consistent with the waiver criteria and the statutory restrictions referenced above, an Ed-Flex state may consider waivers of within-district targeting provisions if needed to meet the needs of low-achieving students in a school district.

#### **What factors should an SEA consider when reviewing requests for waivers of Title I targeting requirements?**

Requests for waivers of Title I targeting provisions, like other waiver requests, must include the information specified in section 4(a)(4) of the Ed-Flex legislation. Targeting waivers may result in resources being diverted from one school to another. Therefore, in reviewing such

requests, an SEA should consider not only the needs of students that would receive additional services as a result of the waiver, but also how the district is addressing the needs of students whose Title I services might be reduced as a result of the waiver. The waiver may only be granted if the district has developed a comprehensive local reform plan and the SEA determines that (1) the waiver will assist the affected LEA, schools, and students in reaching specific, measurable educational goals, and (2) the underlying purposes of the Title I, Part A program would continue to be met.

#### **May an Ed-Flex state waive the minimum poverty threshold necessary for implementation of a school-wide program?**

Yes. Title I of the ESEA permits schools in which at least 50 percent of the children are from low income families to use Title I funds, in combination with other education funds, to operate schoolwide programs. Schools with less than 50 percent of their students from low-income families must target Title I services to particular at-risk students. In some instances, schools with poverty levels below the 50 percent threshold may have undergone a comprehensive planning effort to upgrade the instructional program for all children and can demonstrate that the needs of the at-risk children would be effectively met through a schoolwide approach.

#### **What factors should an SEA consider when reviewing requests for waivers of the minimum poverty threshold required for implementation of a school-wide program?**

In considering whether to grant a waiver of the minimum schoolwide poverty threshold, an SEA should examine (1) the extent to which the school has developed — or will develop prior to implementing the waiver — a schoolwide program plan that addresses the components in section 1114(b) of Title I, including how the school conducted its comprehensive needs assessment and how the plan would address the needs identified through the needs assessment, and (2) whether the applicant has addressed the local application requirements in section 4(a)(4) of the Ed-Flex legislation.

While an SEA may, if warranted, lower the poverty threshold required for implementation of a schoolwide program, it may not waive the requirement that schoolwide programs include the eight components stated in section 1114(b) of Title I (e.g., the comprehensive needs

assessment; school reform strategies to address those needs, including strategies to ensure that the academic needs of the lowest achieving students are met).

### **May an Ed-Flex state promote a schoolwide waiver on a statewide basis?**

Yes. An SEA may determine that it is appropriate to lower the minimum poverty threshold required for implementation of schoolwide programs. After taking public comment on the proposed waiver, the SEA may announce that any school that meets a designated poverty threshold (for example, 40 percent) could implement a schoolwide program if it has undergone the comprehensive schoolwide planning required under Title I and submits a waiver request that meets the statutory application requirements. In essence, an SEA is making a pre-determination to grant the waiver, assuming certain conditions are met. A district or school would not be able to take advantage of the waiver unless it first submitted to its SEA the information required under section 4(A) of the Ed-Flex legislation. A critical part of this information is data on the specific, measurable goals that would be achieved with the waiver.

### **To what extent may Ed-Flex states grant waivers of provisions governing the Comprehensive School Reform Demonstration (CSRSD) program?**

The CSRSD program is funded under two separate authorities — section 1502 (Demonstration of Innovative Practices) of Title I of the ESEA and the Fund for the Improvement of Education (FIE) in Part A of Title X of the ESEA. Most CSRSD funds are appropriated under the Title I authority.

Consistent with the Ed-Flex legislation, an Ed-Flex state may grant waivers of the Title I portion of its CSRSD program. Because the Ed-Flex authority does not extend to Title X of the ESEA, however, an Ed-Flex state may not waive any requirement relative to the FIE portion of the CSRSD. Districts may seek waivers of requirements relative to the FIE portion of CSRSD from the U.S. Department of Education.

Ed-Flex states may not grant any waivers that would undermine the underlying purpose of the CSRSD program — to provide financial incentives for schools to implement comprehensive school reform programs based on reliable research and effective practices, so that all children can meet challenging state content and student performance standards.

In addition, the requirement that CSRSD-supported schools receive at least \$50,000 annually for three years may not be waived because there is no authority to waive requirements affecting the distribution of funds to LEAs.

### **Has the Department granted any waivers of CSRSD requirements?**

Yes. The Department has granted two CSRSD waivers, allowing CSRSD funds in two states to be targeted exclusively toward middle or secondary schools. Under the CSRSD program, schools at any grade level are eligible to compete for funding. Both states that received waivers submitted documentation demonstrating that there was a greater need for CSRSD assistance at the upper grade levels.

## **(2) ESEA TITLE II WAIVERS**

### **What factors should an Ed-Flex state consider in reviewing requests for waivers of the mathematics and science priority in the Title II Eisenhower Professional Development program?**

In determining whether to grant a waiver of the mathematics and science priority of the Eisenhower program, an Ed-Flex state should consider —

- the degree to which the needs of students in mathematics and science are being adequately addressed, as demonstrated by student achievement results;
- the degree to which there is a greater need for enhanced professional development in other core subject areas; and
- the degree to which the professional development activities proposed under the waiver are aligned with state standards and assessments.

### **Does the Ed-Flex waiver authority extend to Title II Eisenhower funds that are awarded to the state agency for higher education (SAHE)?**

No. The Ed-Flex waiver authority applies only to the SEA-administered portion of Title II, and not to that portion of the state's Title II allocation (16 percent) that is awarded to the state agency for higher education (SAHE). SAHE waiver requests may be submitted by the SEA to the U.S. Department of Education.

### **May an Ed-Flex state waive requirements of the Reading Excellence Act?**

No. The only portion of Title II that is subject to the Ed-Flex waiver authority is the SEA-administered portion of Part B — the Eisenhower Professional Development program. The Reading Excellence Act is in Part C of Title II; furthermore, it is a discretionary grant program. Therefore, the Ed-Flex waiver authority does not apply to the Reading Excellence Act.

### **(3) ESEA TITLE III WAIVERS**

#### **Has the Department granted any waivers of Title III requirements?**

Yes. The Department granted a waiver that permitted one state to use part of its Title III Technology Literacy Challenge Fund (TLCF) allocation to award grants to districts to develop strategic, long-range technology plans. Absent a waiver, TLCF funds could not be used for planning grants, but could only be used to support the implementation of technology plans that had already been developed. There is a specific focus in the TLCF legislation on assisting high-poverty districts with the greatest technology needs. The state had demonstrated that many of the high-poverty districts did not have the resources needed to develop technology plans, and would therefore be unable to benefit from TLCF funding unless a waiver were granted. The one-year planning grants awarded under the waiver will likely increase the number and quality of the technology plans being implemented in the state.

#### **May an Ed-Flex state waive the requirement that an LEA must afford students, teachers, and other educational personnel in private schools the opportunity to participate in the TLCF program on an equitable basis?**

No. The Ed-Flex legislation expressly prohibits Ed-Flex states from waiving equitable participation requirements.

#### **In reviewing requests for waivers of TLCF requirements, what factors should an SEA consider?**

In reviewing requests for TLCF waivers, an SEA must determine, among other things, that the waiver would not undermine the underlying purposes of the TLCF program — to assist districts, particularly districts that have the highest number or percentage of children in poverty and the greatest need for technical assistance, in implementing strategies designed to enable schools to integrate technology fully into the school curricula, so that all students become technologically literate.

### **(4) ESEA TITLE IV WAIVERS**

#### **Which portions of the Title IV Safe and Drug-Free Schools and Communities program are covered by the Ed-Flex waiver authority?**

Only the SEA-administered portion of Title IV is subject to Ed-Flex waivers. Ed-Flex does not apply to the Safe and Drug-Free Schools Governor's program, which is administered by a state's chief executive officer.

In some states, the SEA carries out the Governor's program for the chief executive officer. However, in these

instances the Governor retains ultimate responsibility for operation of the program. Therefore, even in these states, an SEA may not waive requirements relating to the Governor's portion of Title IV.

#### **If the SEA portion of Title IV is carried out by another agency in a state, may that state agency grant waivers on behalf of the SEA?**

No. Under Ed-Flex, only SEAs are delegated the authority to grant waivers. In instances where another agency is implementing the SEA portion of Title IV, the SEA retains ultimate authority for operation of the program and may grant waivers applicable to this portion of the program.

#### **Are the requirements of the Gun-Free Schools Act and the Pro-Children Act subject to the Ed-Flex waiver authority?**

No. The Gun-Free Schools Act and the Pro-Children Act are not part of Title IV. The Ed-Flex waiver authority is limited to Title IV and other specific SEA-administered programs listed in the Ed-Flex legislation.

#### **May Ed-Flex states waive the Safe and Drug-Free Schools Principles of Effectiveness?**

No. Ed-Flex states may not grant waivers that would undermine the underlying purposes of the Title IV program. The primary purpose of the Safe and Drug-Free Schools legislation is to prevent violence and the use of tobacco, alcohol, and other drugs. In order to effectively achieve this purpose, SEAs and LEAs must adhere to the Safe and Drug-Free Schools Principles of Effectiveness.

### **(5) ESEA TITLE VI WAIVERS**

#### **Do Ed-Flex states have the authority to waive requirements of the Class-Size Reduction legislation?**

Yes. Because the Class-Size Reduction program was authorized by Title VI of the ESEA, which is covered by the Ed-Flex waiver authority, Ed-Flex states may grant waivers of Class-Size Reduction requirements, consistent with the scope of their Ed-Flex authority.

#### **May Ed-Flex states waive the small-district consortia requirement in the Class Size Reduction legislation?**

Yes. It may be appropriate for an Ed-Flex state to waive the consortium provision (section 307(b)(2)) of the Class-Size Reduction legislation in some instances. This provision states that if an LEA's allocation under the Class-Size Reduction program is less than the starting salary for a new teacher in the LEA, the state may not award funds to the LEA unless the LEA agrees to form a

consortium with at least one other LEA for the purpose of reducing class size. Without a waiver, some LEAs would essentially be precluded from participating in the Class-Size Reduction program, due to traveling distances and administrative burdens.

**Are there instances in which an Ed-Flex state might waive the 15 percent limitation on the use of Class-Size Reduction funds for testing and professional development?**

Yes, a waiver of the 15 percent limitation (section 307(c)(2)(B)) may be warranted, for example, if a small LEA has made a supportable request for a waiver of the consortium requirement and has demonstrated an inability to use any of its allocation effectively to reduce class size in the early grades, assuming that there is no resulting violation of the non-supplanting prohibition in section 307(c)(3).

**In reviewing requests for waivers of requirements of the Class-Size Reduction legislation, what factors should an SEA consider?**

In reviewing these waiver requests, an SEA must determine that the intent and purposes of the legislation would still be met if a waiver were to be granted. The primary purpose of the Class-Size Reduction legislation is to support the hiring of additional qualified teachers to reduce class size in the early grades and thereby improve student achievement. Another important activity is professional development to enhance the quality of teacher services. Again, this should be linked to increased student achievement. The purposes may not be undermined by a waiver.

## **(6) TITLE VII, PART C WAIVERS**

**Which Title VII programs are covered by Ed-Flex?**

The SEA-administered Emergency Immigrant Education program in Part C of Title VII of the ESEA is covered by Ed-Flex. Other Title VII programs (i.e., the Bilingual Education program and the Foreign Language Assistance program) are not within the scope of the Ed-Flex authority.

To date, neither the Department nor any Ed-Flex state has received a request for a waiver of an Emergency Immigrant Education program requirement.

## **(7) PERKINS ACT WAIVERS**

**Do SEAs in Ed-Flex states have the authority to waive requirements of the Carl D. Perkins Vocational and Technical Education Act of 1998 (Perkins III)?**

Yes. SEAs in Ed-Flex states may waive requirements of the state-administered programs authorized by Titles I and II of Perkins III that are applicable to LEAs and schools and for which the SEA has administrative control under state law.

**May an SEA grant waivers of Perkins III requirements if the SEA plays no role in administering the Perkins program?**

No. If another state agency is designated as the “eligible agency” responsible under state law for administering Perkins programs and the SEA has neither direct nor delegated authority over these programs, the SEA may not waive Perkins III requirements.

If the SEA is not the recipient of Perkins III funds under state law, but nevertheless administers the secondary portion of Perkins on behalf of the “eligible agency,” the SEA will be authorized to grant waivers of Perkins III requirements only if its Ed-Flex application demonstrates that the “eligible agency” concurs with granting the SEA waiver authority with respect to these requirements. The Ed-Flex application should explain the role of the SEA and the “eligible agency” in considering requests for waivers of Perkins III requirements.

**May an Ed-Flex state waive the performance accountability requirements established by sections 113 and 123(a) of Perkins III?**

No. As statutory requirements that apply to states, these accountability provisions may not be waived by an Ed-Flex state.

**May an Ed-Flex state grant waivers of Perkins III requirements to institutions of higher education that receive funds under section 132 of Perkins III?**

No. An Ed-Flex state may grant waivers of Perkins III requirements only to LEAs (including educational service agencies) and schools that receive funds under section 131 of Perkins.

**How should an LEA establish the specific, measurable educational goals in its application for a waiver of Perkins III requirements?**

In describing educational goals in a local waiver application, an LEA is encouraged to use the core indicators of performance and the State adjusted levels of performance required under section 113 of Perkins III.

**How does the SEA evaluate the impact of local waivers of Perkins III requirements as required by section 4(a)(4)(D) of the Ed-Flex legislation?**

The Department recommends that the SEA use the Perkins III core indicators of performance to evaluate the

impact of waivers of Perkins III statutory requirements. This would enable the SEA to satisfy simultaneously the annual performance review requirements established by section 4(a)(4)(D) of Ed-Flex and the annual evaluation requirements established by section 123(b) of Perkins III.

**What are examples of Perkins III requirements that might be appropriate to waive in a given circumstance?**

Section 204(b) of Perkins III limits the duration of tech-prep education programs assisted under section 204 to four to six years. An LEA that is a member of a consortium that receives funds under section 204 may apply for a waiver of this requirement in order for the consortium to operate an eight-year tech-prep education program. An LEA or school may also wish to request a waiver of section 315 of Perkins III, which prohibits the use of Perkins funds to provide services to students prior to the seventh grade.

**What factors should an SEA consider when reviewing requests for waivers of Perkins III requirements?**

In determining whether the underlying purposes of statutory requirements of Perkins III would continue to be met if a Perkins III waiver were granted, the SEA should consider the impact of the proposed waiver on —

(1) efforts to improve the academic, vocational and technical skills of students;

(2) the development of services and activities that integrate academic, vocational, and technical instruction, and that link secondary and postsecondary education for vocational and technical education students; and

(3) the waiver applicant's ability to meet the state adjusted levels of performance established under section 113(b)(3)(A).

**Does Perkins III provide states with any additional waiver authority?**

Yes. The Perkins Act provides eligible agencies with limited authority to waive certain statutory requirements. Unlike the Ed-Flex waiver authority, for example, section 131(d)(2) of the Perkins Act authorizes the eligible agency to waive minimum allocation requirements for LEAs under certain circumstances. In addition, while Ed-Flex does not authorize waivers for postsecondary institutions, section 132(a)(4) of Perkins III permits the eligible agency to waive the postsecondary consortia requirements established by section 132(a)(3)(i) if an eligible institution is located in rural, sparsely populated area.

## **ED-FLEX STATES**

Following is a list of the states currently approved for Ed-Flex authority, followed by the date the authority was originally scheduled to expire. Originally, states were approved for a five-year period, after which renewal of the authority was dependent on state performance. However, P.L. 109-211, enacted in March 2006, has extended participation by all 10 states until the next authorization of the Elementary and Secondary Education Act, expected in 2007 or 2008. No additional states are being approved at present.

School districts in Ed-Flex should contact their state educational agency if they are interested in an Ed-Flex waiver.

Colorado (July 2006)

Delaware (December 2005)

Kansas (December 2005)

Maryland (January 2007)

Massachusetts (January 2006)

North Carolina (December 2005)

Oregon (January 2006)

Pennsylvania (October 2005)

Texas (March 2006)

Vermont (September 2006)

[The next page is Tab G, page 1.]