

---

## **ESEA Flexibility Request:** *Tips for Protecting Students with Disabilities*

On September 23, 2011, the U.S. Department of Education introduced an [ESEA Flexibility Program](#) which allows States to waive certain key accountability and funding allocation requirements of the Elementary and Secondary Education Act (ESEA-formerly referred to as NCLB, the No Child Left Behind Act). In exchange for these waivers, States must provide certain assurances that are supposed to improve academic achievement for all students. It is expected that most States will submit a Flexibility Request. Disability organizations are concerned that this flexibility program will not adequately protect the rights of students with disabilities.

Some key issues that advocates for the disability community should raise with respect to their State's ESEA Flexibility Request are below. It is still critically important that advocates for students with disabilities provide input during the development of the State Education Agency's (SEA's) ESEA Flexibility Request in order to ensure that your SEA does not alter or waive very important accountability provisions in ESEA. The ESEA Flexibility documents can be found at <http://www.ed.gov/esea/flexibility>. This document provides tips for each section of the ESEA Flexibility Request (starting on page 8).

### **CONSULTATION**

#### **Meaningful Engagement and Input from Diverse Communities**

The SEA must provide a description of how the SEA meaningfully engaged and solicited input on its request from diverse communities.

**Tip:** This description should include a list of all groups from which input was solicited and a description of the opportunities that were provided for consultation. *Contact your state's [special education advisory panel](#) and [department of education](#) for information on how to provide input on the flexibility request.*

### **EVALUATION**

#### **SEA Should Collaborate with the U.S. Department of Education on Evaluation**

The Department encourages an SEA that receives approval for ESEA flexibility to collaborate with the Department to evaluate at least one program, practice, or strategy the SEA or its Local Education Agencies (LEAs- commonly referred to as school districts) implement.

**Tip:** There is a box on the ESEA Flexibility Request that should be checked to indicate that the SEA is willing to collaborate with this evaluation.

## OVERVIEW OF SEA’S REQUEST FOR FLEXIBILITY

### Specifically Address Students with Disabilities

In the overview, SEAs must provide information on how the implementation of waivers and principles will enhance ability of SEAs and LEAs to increase the quality of instruction for students and improve student achievement.

**Tip:** The SEA should specifically address students with disabilities. Look up the [latest results for students with disabilities on the state assessments](#) in your state.

## PRINCIPLE 1: COLLEGE- AND CAREER-READY EXPECTATIONS FOR ALL STUDENTS

### 1A ADOPT COLLEGE-AND CAREER-READY STANDARDS

### 1.B TRANSITION TO COLLEGE-AND CAREER-READY STANDARDS

#### Universal Design for Learning

In the ESEA Flexibility Review Guidance the Department encourages an SEA to include in its plan activities related to a number of italicized questions. These activities are aimed at ensuring that all students, including English language learners, students with disabilities and low achieving students, access the college- and career-ready standards on the same schedule as all students. These activities include analyzing the standards to determine linguistic load and learning and accommodation factors; preparation courses and professional development for teachers and principals with respect to using the standards for diverse learners and development and dissemination of instructional materials aligned to the standards that support the learning of all students including diverse learners; increasing access to college-level courses or their prerequisites, dual enrollment courses, or accelerated learning opportunities and improving assessments.

**Tip:** *Universal Design for Learning ([www.udlcenter.org](http://www.udlcenter.org)) is an educational framework that was developed specifically to address all the goals in these activities; to ensure access and achievement for all learners through teacher preparation, professional development, the design of instructional materials and the development of assessments that are valid and accurate. SEAs should plan UDL activities to help them show that they have a high quality plan to transition to college and career ready standards that will improve achievement for all students.*

### 1.C DEVELOP AND ADMINISTER ANNUAL, STATEWIDE, ALIGNED, HIGH-QUALITY ASSESSMENTS THAT MEASURE STUDENT GROWTH

**Maintain 1% cap on alternate assessments on alternate academic achievement standards (AA-AAS) and 2% cap on alternate assessments on modified academic achievement standards (AA-MAS).**

These caps determine the number of advanced and proficient scores from these assessments that may be used for accountability purposes. They are based on 1% and 2%, respectively, of all students taking any assessments even though these particular assessments are only taken by students with disabilities. Therefore, the caps translate to approximately 10% and 20% of students with disabilities whose scores from these assessments can be used as proficient for accountability purposes.

While there is no limit on the number of students with disabilities who can actually take these two assessments, there is mounting evidence that districts are overusing alternate assessments. This results in very large percentages of students with disabilities not being permitted to take the regular assessment. The purpose of the caps is to discourage the placement of students in these assessments when they should be taking a more challenging assessment. This is still happening far too often, even with the caps in place. Therefore the caps should not be increased or eliminated as part of the ESEA Flexibility Request.

***Tip:** The [Flexibility FAQ](#) at B-8 makes it clear that the caps related to the AA-AAS and the AA-MAS still apply under this flexibility. Request information on the number and percent of students with disabilities being assessed via either an AA-AAS or AA-MAS. States with significant percentages of students with disabilities taking alternate assessments should include a plan to address the overuse in the Flexibility Request.*

*Additionally, states using an AA-MAS must phase out this assessment by 2013-2014. The Flexibility Request should include a plan for this phase-out.*

**Provide Evidence of High Quality Assessments for ALL Assessments**

When providing evidence that the SEA will develop and administer high quality assessments for all students, evidence should also be provided with respect to high quality alternate assessments on alternate academic achievement standards.

Option A under this section in the Flexibility Request allows an SEA to attach a Memorandum of Understanding, which demonstrates that the State is part of a consortium that is developing new assessments under the Race to the Top Assessment Grant Program. This document is supposed to be sufficient evidence that the SEA is developing high quality assessments. However, these consortia are not developing alternate assessments on alternate academic achievement standards. Two different consortia received funding from another grant, called a GSEG, to develop new alternate assessments on alternate academic achievement standards.

An SEA that provides a copy of its memorandum of understanding from one of the Race to the Top Assessment Consortia, should also should show evidence that it is developing a high quality alternate assessment on alternate academic achievement standards. This can be a copy of the letter of commitment to join a GSEG partnership or, if the SEA is

not in a GSEG partnership, other evidence of high quality alternate assessments on alternate academic achievement standards described in Options B and C of the Flexibility Request.

**Tip:** Request that the Flexibility Request include a statement regarding the state's plan to adopt the AA-AAS being developed by a GSEG partnership, [National Center and State Collaborative](#) or [Dynamic Learning Maps](#).

### **Address the Issues of Universally Designed and Accommodations Policies**

The SEA should show evidence that their assessments are universally designed to improve accuracy for all students and have fair, research-based accommodations policies in place for students with disabilities.

**Tip:** The [Race to the Top Assessment Grantees](#) are developing research-based accommodations policies. The state's Flexibility Request should include a commitment to adopt and implement the accommodations policy developed by the RTT consortia, [Partnership for Assessment of Readiness for College and Career](#) or [SMARTER Balanced Assessment Consortium](#) in addition to showing evidence of universally designed assessments.

### **SEAs Should Consider Providing an Alternate Assessment on Grade Level Achievement Standards (AA-GLAS) and an Alternate Assessment on Alternate Achievement Standards**

An alternate assessment on grade level achievement standards measures the same grade-level achievement as the regular assessment, though using a different assessment format; whereas an alternate assessment on alternate academic achievement standards measures achievement on the State content standards at a less complex level.

The use of the word “or” in assurance #3 and #6 of the ESEA Flexibility Request and in the definition of high quality assessments, could be interpreted to mean that the SEA is discouraged from having both an alternate assessment on alternate academic achievement standards and an alternate assessment on alternate academic achievement standards.

**Tip:** The [Flexibility FAQ](#) at C-15 makes it clear that states may develop BOTH an AA-GLAS and an AA-AAS and that the use of AA-MAS will no longer be allowed.

### **Student Growth Measured for ALL Students**

Student growth is referenced in a few places in the ESEA Flexibility Request, including this section. Although an increasing number of states are developing models to measure individual student growth, most do not have models that apply to students who take alternate assessments (especially those on alternate academic achievement standards). SEAs that apply for the ESEA Flexibility should commit to developing a valid model for measuring growth for all students, including those taking any alternate assessments.

**Tip:** Growth models should include all students and support accelerated growth for student groups that lag behind. Growth targets should require growth toward proficiency. Growth alone is not enough!

**PRINCIPLE 2: STATE-DEVELOPED DIFFERENTIATED RECOGNITION, ACCOUNTABILITY, AND SUPPORT**

**2.A DEVELOP AND IMPLEMENT A STATE-BASED SYSTEM OF DIFFERENTIATED RECOGNITION, ACCOUNTABILITY, AND SUPPORT**

**Ensure that Students with Disabilities Are Specifically Addressed in the State-Based System of Differentiated Recognition, Accountability, and Support**

In section 2.A.i. the SEA is asked to provide a description, plan or explanation of the SEA’s differentiated recognition, accountability, and support system that includes all the components listed in Principle 2, the SEA’s plan for implementation no later than the 2012–2013 school year, and an explanation of how the SEA’s differentiated recognition, accountability, and support system is designed to improve student achievement and school performance, close achievement gaps, and increase the quality of instruction for students. In its description, plan or explanation the SEA should specifically address how student achievement, school performance and the quality of instruction will be improved and the achievement gap closed for students with disabilities.

**Tip:** Plans to address quality of instruction and closing achievement gaps must include meaningful access to the general curriculum for students with disabilities. See the tip about Universal Design for Learning on page 2.

**Ensure that the SEA Decreases or At Least Maintains Minimum Subgroup Size**

Exhibit 27 Number and Percentage of Schools Required to Calculate AYP for Each Student Subgroup, 2005–06		
Student Subgroup	Schools Required to Calculate AYP for Subgroup	
	Number of Schools	Percentage of All Schools
African-American	25,807	30%
American Indian / Alaskan Native	7,503	9%
Asian/Pacific Islander	11,338	13%
Hispanic	25,602	30%
White	60,371	71%
Low-income students	55,646	65%
Students with disabilities	25,491	30%
LEP students	17,126	20%

Exhibit reads: Thirty percent of schools had a sufficient number of African-American students to require calculation of AYP for this subgroup.  
Source: SSI-NCLB, National AYP and Identification Database (based on data reported by 50 states and the District of Columbia for 85,435 schools in these states).

In the description, plan or explanation of the SEA’s differentiated recognition, accountability, and support system the SEA should decrease the current minimum subgroup size (N size), if it is undermining accountability for subgroups, or at least maintain the N size. The N size should not be higher for students with disabilities than for other subgroups.

The N size for accountability purposes is the minimum number of students who have to be in a subgroup in order for the subgroup scores to be calculated separately for accountability e.g. if the N size is 50, a school that has 49 or fewer students with disabilities taking assessments that year will only count their scores as part of the “all students” group without having to look at whether the disability subgroup scored well enough to meet the annual proficiency

targets set by the SEA (AYP-Adequate Yearly Progress). Research shows that [SEAs with subgroup N sizes that exceed 20 are excluding significant percentages of students with disabilities](#) from meaningful accountability, especially at the school level. According to information released by the U.S. Department of Education, only 30% of schools are held accountability for the students with disabilities subgroup due to ‘n’ size (see chart).

**Tip:** *Recommend that the Flexibility Request include the number and percent of schools in the state that are not required to achieve adequate yearly progress for the students with disabilities subgroup because of ‘n’ size. If excessive, the Request should include a plan to reduce ‘n’ size.*

### **Any Use of Multiple Measures of Achievement Must Be Meaningful for All Students**

The use of multiple measures for accountability must involve measures that are equally accessible by all students, including students with disabilities. Any measures used for subgroup accountability be weighted appropriately for the relevance to that subgroup.

For example, a past “multiple measures” proposal for ESEA was to allow passing scores from AP tests to be part of the proficiency calculation. However, few students with disabilities have access to AP courses. Even if a high percentage of the few students with disabilities who take the courses score a 3 or better, this does not equate to higher proficiency for the majority of the subgroup. Therefore a measure like this should not be used or should at least be weighted appropriately for relevance to the disability subgroup.

**Tip:** *Multiple measures must NOT include use of student Individualized Education Program (IEP) goals as a measure of achievement! Too many people believe that the IEP goals are the student’s curriculum. However, the IEP goals are the skills students need to make progress in the general education curriculum, the same curriculum that is used for all students, with modifications if necessary. Achievement must be measured against the content standards for the general education curriculum.*

## **2.B SET AMBITIOUS BUT ACHIEVABLE ANNUAL MEASURABLE OBJECTIVES**

### **Keep Same Annual Measurable Objectives (AMOS) for all students**

Annual Measurable objectives with respect to the ESEA Flexibility Request are the steps taken each year to ensure that students become proficient in at least math and reading/language arts. The ESEA Flexibility waiver leaves open the possibility that SEAs will set AMOs that differ by LEA (district), school, or subgroup with the caveat that the AMOs for LEAs, schools, or subgroups that are further behind must require greater rates of annual progress. However, the use of different AMOs for students with disabilities is worrisome because they could quickly drop off the track to proficiency. Therefore AMO targets should be used also include AMO targets that will result in all subgroups getting to proficiency by the end of 2019-2020 school year.

**Tip:** *It is important to look carefully at the options that the SEA is checking in the AMO section of the ESEA Flexibility Request. Option A allows SEAs to set AMOs in annual*

*equal increments toward a goal of reducing by half the percentage of students in the “all students” group and in each subgroup who are not proficient within six years from 2010-2011 school year. There are so many students with disabilities who are currently not proficient that cutting the number in half over 6 years leaves too many students behind. This option should be strongly discouraged.*

*Option B is preferable to Option A but it still give the SEA an extra 6 years to get all students proficient from the original 2012-2014 deadline in NCLB. That means states will have had from 2002 (the effective date of the NCLB deadline) until 2020 to get students to proficiency. To put this time frame in perspective, consider the fact that students who entered kindergarten in 2002 will be in 12<sup>th</sup> grade by 2014-2015; 5 years before 100% of students are expected to be proficient under Option B. Option C allows the SEA to come up with its own plan, so this is only a better option if the SEA is willing to commit to a more ambitious plan than Options A or B.*

## **2.C REWARD SCHOOLS**

### **Reward Schools Should Count the Disability Subgroup for Accountability.**

The definition of Reward School states that a school may not be classified as a “highest-performing school” or a “high process school” if there are significant achievement gaps across subgroups that are not closing in the school. Therefore, schools that do not count their disability subgroup for accountability purposes, because of a high N size (over 30), should not be Reward School. There is no way to tell if they are addressing the achievement gap or just obscuring the gap by hiding it behind a large N size.

***Tip:** Schools that use different (lower) AMOs for the students with disabilities subgroup and/or have too large an N size will likely show less significant gaps. This doesn't mean that students with disabilities are doing better!*

## **2.D PRIORITY SCHOOLS**

## **2.E FOCUS SCHOOLS**

### **Interventions for All Schools Where One or More Subgroups are Not Meeting Achievement Targets**

The ESEA Flexibility Request only requires interventions at 15% of the country's schools; the lowest performing 5% of schools (priority schools) and another 10% of schools with the greatest gaps between the highest achieving subgroups of students and the lowest achieving subgroups or that have subgroup(s) with low achievement or low graduation rates (focus schools).

Unfortunately, there are many other schools where students with disabilities have low achievement because their needs are not being met. These schools would also benefit from interventions, regardless of how well they may be doing with the rest of the students. The U.S. Department of Education requirement regarding interventions for 15% of schools is just the minimum an SEA can do. They can and should do more if they are truly invested in improved outcomes for all students.

**Tip:** SEAs that are submitting an ESEA Flexibility Waiver should be encouraged to provide appropriate interventions for any school that has a subgroup or subgroups with low achievement or low graduation rates.

### **Interventions Should Be Meaningful and Accessible to ALL Students**

Sometimes the interventions to improve achievement at schools take the form of initiatives which are not available to students with disabilities. One way this can happen is when “general education” initiatives are not used in special education classrooms.

**Tip:** When the SEA describes meaningful interventions for focus and priority schools, they should be interventions that will be used in all educational settings and be targeted at all subgroups that have low achievement and/or low graduation rates.

### **Graduation Rate Should Only Include Regular High School Diplomas**

There have been proposals in the past to include students who take alternate assessments on alternate academic achievement standards in the graduation rate as if they had graduated with a regular diploma, even if they received a certificate or other exit document that does not equate to a regular high school diploma.

**Tip:** The ESEA Flexibility Request should not use a definition of graduation rate that includes students who receive these other exit documents. Graduation rates should be calculated using the uniform rate currently required in ESEA regulations. Graduation targets for improvement should be disaggregated by subgroup and provide accelerated improvement for subgroups with poor graduation rates in order to close the graduation rate gap.

## **2.F PROVIDE INCENTIVES AND SUPPORT FOR OTHER TITLE I SCHOOLS**

### **Incentives and Supports for Other Title I Schools Should Be Targeted at Achievement for All Students**

The SEA is expected to provide an explanation of how those incentives and supports are likely to improve student achievement, close achievement gaps, and increase the quality of instruction for students.

**Tip:** This explanation should specifically address how the incentives and supports that are chosen will benefit students with disabilities.

## **2.G BUILD SEA, LEA, AND SCHOOL CAPACITY TO IMPROVE STUDENT LEARNING**

### **School-Wide Reforms**

The SEA is required to describe its process for building SEA, LEA, and school capacity to improve student learning in all schools and, in particular, in low-performing schools and schools with the largest achievement gaps.

**Tip:** The SEA should be encouraged to include school-wide reforms that benefit all students, including students with disabilities, in this process e.g. [Universal Design for Learning](#), [Response to Intervention](#) and [Positive Behavioral Intervention and Supports](#).

### **PRINCIPLE 3: SUPPORTING EFFECTIVE INSTRUCTION AND LEADERSHIP**

#### **3.A DEVELOP AND ADOPT GUIDELINES FOR LOCAL TEACHER AND PRINCIPAL EVALUATION AND SUPPORT SYSTEMS**

#### **3.B ENSURE LEAS IMPLEMENT TEACHER AND PRINCIPAL EVALUATION AND SUPPORT SYSTEMS**

##### **Guidelines for Teacher and Principal Evaluation and Support Should Address Capacity to Meet the Needs of Students with Disabilities**

SEAs must submit evidence that they have adopted guidelines or will be adopting guidelines that are likely to lead to the development of teacher and principal evaluation and support systems that improve student achievement and the quality of instruction for students.

**Tip:** It is important to ensure that these guidelines will address evaluation and support regarding the skills and strategies to address the needs of students with disabilities, including the implementation of school-wide initiatives that benefit all students e.g., [Universal Design for Learning](#), [Response to Intervention](#) and [Positive Behavioral Intervention and Supports](#). Evaluation systems should hold general education teachers accountable for the performance of students with disabilities.

For more information please contact:

Rick Sabia  
Associate Director  
National Down Syndrome Society Policy Center  
Email: [rsabia@ndss.org](mailto:rsabia@ndss.org)  
PH: 301-452-0811

This document was jointly developed by the  
[National Down Syndrome Society](#) and [The Advocacy Institute](#).