

THE NEW ERA OF EXECUTIVE ACTION

GRANTING STATES WAIVERS FOR NO CHILD LEFT BEHIND

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Background

The No Child Left Behind (NCLB) Act of 2001, signed January 8, 2002, by President George W. Bush, requires all public schools to administer annual standardized tests in order to assess school performance and address achievement gaps. Under the act, schools that consistently fail to meet their state's Adequate Yearly Progress (AYP) standards face a range of consequences, from being required to develop a two-year improvement plan to mandatory "restructuring," which could involve closings and staff changes. The law set a goal that every student nationwide would be performing at grade level in reading and math by 2014.

Intended to improve public education by increasing accountability and enforcing higher standards, NCLB drew criticism from teachers and administrators for fostering a myopic focus on test taking. And while the law was initially praised for drawing attention to achievement gaps between racial and socioeconomic groups, evidence has been mixed on whether it has significantly helped to close those gaps.

As AYP targets rose over time under NCLB, more and more schools found themselves failing to meet state standards—facing onerous sanctions as a result. Pressure to improve test scores likely contributed to major cheating scandals in multiple states. Congress declined to reauthorize NCLB in 2007, but didn't get around to replacing it with anything, so it stayed on the books. In a 2009 speech, Education Secretary Arne Duncan described the proficiency goal set for 2014 as "utopian."

In March 2010, the Obama administration proposed sweeping changes to NCLB that would ease pressure on school districts by replacing the pass-fail accountability system with one that took into account individual student growth, graduation rates, and other measures besides test scores. The

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Department of Education’s proposal would also have realigned the ESEA with the president’s education reform goals, including rewarding high performing schools, districts, and states with extra federal funds—similar to the administration’s incentive-based program Race to the Top. Despite bipartisan support for some sort of reform, the president’s plan faced steep opposition from teachers’ unions and conservatives. Even as some states began to openly defy NCLB to avoid implementing sanctions, the president’s reform package languished in Congress.

For school year 2010–11, nearly half (48 percent) of the nation’s public schools failed to meet AYP, the largest portion since NCLB took effect in 2002. Administrators, school boards, and teachers unions all urged the Department of Education to offer regulatory relief in the absence of legislative reform.

Action

On August 8, 2011, Secretary Duncan announced that the federal government would allow states to apply for waivers to seek regulatory relief from NCLB’s more unpopular provisions, a move he had first mentioned in June. To qualify for waivers, states would have to adopt “college and career-ready” academic standards, outline plans to transform their lowest-performing schools, and establish new ways of measuring teacher and principal performance.

What It Does

On September 23, Secretary Duncan sent letters offering ESEA Flexibility to every state government. The waivers were made available pursuant to the secretary of education’s authority in Section 9401 of the ESEA to waive, with certain exceptions, any statutory or regulatory requirement of the ESEA for a state that receives ESEA funds. Under the waivers:

- States would be free to set their own “ambitious but achievable” annual achievement goals and ignore the 2014 deadline for 100 percent proficiency.
- Districts would no longer be required to pursue NCLB corrective measures against schools that fail to meet AYP.
- States would be permitted to allocate certain ESEA funds to particularly troubled schools (“priority schools”) and those with particularly severe achievement gaps (“focus schools”)—or to reward particularly high-achieving low-income schools with extra funds.
- States would be allowed to develop and implement “meaningful evaluation and support systems” for teachers and no longer face penalties for failing to staff only ‘highly qualified’ teachers—that is, fully certified teachers with bachelor’s degrees and expertise in their subject matter(s), as required under NCLB.

In order to receive flexibility through these waivers, states would have to comply with the following principles—and present a plan for how they would ensure compliance:

1. Adopt college and career readiness standards, which would continue to be assessed by yearly standardized tests.
2. Reward high-achieving and high-progressing Title 1 schools (those serving predominantly low-income students) and focusing.
3. Focus improvement efforts on the lowest performing Title 1 schools and those with the most severe achievement gaps.
4. Create guidelines for evaluating teachers and principals based in part on student performance.
5. Reduce redundant reporting requirements and unnecessary administrative burdens placed on districts and schools.

On February 9, 2012, the Obama administration announced the first ten waiver recipients: New Jersey, Massachusetts, Tennessee, Georgia, Florida, Kentucky, Indiana, Colorado, Minnesota, and Oklahoma.

Status

Forty-three States, the District of Columbia, and Puerto Rico have been approved for ESEA flexibility. Wyoming, Iowa, and the Bureau of Indian Education all currently have pending requests.

On November 13, 2014, the Department of Education announced that states would have the option of seeking waiver renewals in Spring 2015 that would extend to the end of the 2018–19 school year. The deadline for submitting renewal requests was March 31, 2015.

If Congress were to pass NCLB reform, the waivers could be rendered null. Earlier this year, the Republican-backed Student Success Act passed through the House education committee in February. President Obama, however, threatened to veto that bill, which would allow states to redistribute Title 1 funding, potentially harming low-income schools.

On April 7, Senators Lamar Alexander (R-TX) and Patty Murray (D-WA) announced a new bipartisan reform framework. It remains to be seen exactly what effect this reform package, if passed, would have on the state waivers.

Impact

Perhaps the biggest impact of the waiver system is that many schools identified as “failing” under NCLB provisions are no longer targets for intervention. A 2013 New America Foundation report found that, across sixteen states, 4,400 schools that were slated for improvement under NCLB “were no longer identified as priority or focus schools under waivers.”

This is primarily because the waivers allow states to assess a school's performance relative to that of other schools in the state, whereas the AYP standards under NCLB were pre-determined and absolute. Under NCLB, 90 percent of schools in a single state could be identified as “failing” and in need of corrective action—as was the case in Florida in 2011—even if many of those schools were high-performing relative to other schools in the state.

In providing relief from NCLB, the federal government sought to free up states and districts to focus their energy and resources on only the most in-need schools. Under the waiver system, states must only intervene in 15 percent of their Title 1 schools—by identifying them as either “priority” or “focus” schools. Whether or not a school will be slated for intervention depends on how other schools in the state perform.

Relief from NCLB regulations has granted a greater degree of freedom to state education officials to pursue policies that conform to the needs of their states, and they're hopeful that new strategies will pan out for students. Of the thirty-eight states that responded to a 2013 Center for Education Policy survey on NCLB waivers, thirty-five expected their own accountability systems to do a “better job than NCLB of identifying schools in need of improvement.”

Most states have adopted the Common Core State Standards—curricular standards developed by the National Governor's Association (NGA) and the Council of Chief State School Officers (CCSSO)—to fulfill the waiver guideline requirement for a statewide accountability system. However, the Department of Education does not require states to adopt Common Core in order to receive an NCLB waiver, so long as they institute some form of statewide “college-and-career-ready” standards.

Response

Teacher's unions, school administrators, school board officials, and think tanks have been particularly supportive of the waivers:

- National Education Association (NEA) president Dennis Van Roekel hailed the waivers for setting “more realistic goals for schools, while maintaining ESEA's original commitment to civil rights, high academic standards and success for every student.”
- American Federation of Teachers (AFT) president Randi Weingarten commended the administration, in a February 9, 2012 statement, for “responding to the calls for change from parents, teachers and administrators” and offering temporary relief—but nonetheless referred to waivers as an “imperfect solution.”
- American Association of School Administrators (AASA) welcomed regulatory relief but objected to conditional waivers.

- National Association of Elementary School Principals (NAESP) applauded the waivers for providing flexibility and protecting principals from automatic dismissal under NCLB improvement.
- National Association of Secondary School Principals (NASSP), echoed AASA's position: "While we are disappointed that NCLB relief is coming in the form of waivers rather than [unconditional] regulatory relief, the nation's principals are breathing a bit easier."
- National Association of State Boards of Education (NASBE) welcomed waivers but repeated its position that "what we need is a comprehensive new iteration of the Elementary and Secondary Education Act."
- National School Boards Association (NSBA) called waivers a "positive step" but objected to making relief conditional.
- National PTA applauded "the administration's efforts to provide much-needed flexibility and temporary relief to states" while continuing to call on Congress to "fix the law through the reauthorization process."
- The Center for American Progress issued a report on the waivers that stated "with little prospect for bipartisan cooperation in sight, the Obama administration is wise to take action now to ensure states, districts, and schools move forward with education reform while receiving the flexibility they need."

Some members of Congress, however, have voiced criticism of the waivers:

- Congressional Republicans have characterized the waivers as an executive power-grab. House education committee chair Representative John Kline (R-MN) said in September 2011, "In my judgment, he is exercising an authority and power he doesn't have. We all know the law is broken and needs to be changed. But this is part and parcel with the whole picture with this administration: they cannot get their agenda through Congress, so they're doing it with executive orders and rewriting rules. This is executive overreach."
- A 2011 Congressional Research Service (CRS) report commissioned by Representative Kline confirmed the secretary of education's authority to grant waivers under the ESEA, but questioned whether he had the legal authority to make them conditional on state's adopting the administration's preferred education policies.
- On February 12, 2014 Representative George Miller (D-CA), top Democrat on the House education committee, along with leaders of the Black, Asian Pacific American, and Hispanic •

Caucuses sent a letter to Secretary Duncan criticizing the administration for approving state policies under the waiver process that insufficiently address the needs of minority, disabled, and English learner students.

Even among supporters of the waivers, there has been some criticism of the metrics suggested to replace NCLB:

- American Federation of Teachers (AFT) president Randi Weingarten criticized the new waiver guidelines, issued November 13, 2014, for promoting an over-reliance on testing. “At best, it permits, and at worst, it rewards, states that habitually over-test—like Florida, whose kids now lose an average of seventy days of instruction due to testing. It lacks a concrete strategy to address the out-of-classroom factors that account for two-thirds of what affects student achievement. And sadly, even when focusing on teachers as a silver bullet, it lacks the answer to how we recruit, retain and support teachers at hard-to-staff schools.”