



November 29, 2017

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Dear Secretary DeVos,

On behalf of The Leadership Conference on Civil and Human Rights and the 16 organizations listed below, we urge you to ensure that children receive the support and attention they deserve through the implementation of the Every Student Succeeds Act (ESSA). As many of us wrote to you on April 26, “The department’s responsibility to students and taxpayers requires a thorough and robust review of submitted plans – not simply a rubber stamp of state submissions.”ⁱ **It is in that spirit that we write to urge you to reject New York’s requested waivers under ESSA.**

In its consolidated state plan submitted to the U.S. Department of Education on September 18, New York State Department of Education (NYSED) formally requested a waiver of two statutory requirements of Title I, Part A of ESSA which are critical to ensuring all students have equal access to a quality education. NYSED’s request asks the Department to grant waivers to:

- 1) allow school districts to administer grades 3-8 assessments in English Language Arts and mathematics to students below their chronological grade-level for students with disabilities, and use students’ results on these examinations when making participation and accountability determinations at the elementary and middle school levels,ⁱⁱ and
- 2) exclude English learners from the state’s assessment system for one year and accountability system for two years in English Language Arts after they have enrolled in schools in the United States.ⁱⁱⁱ

If granted, these waivers would undermine students’ access to the general curriculum and would be contrary to the spirit and intent of the ESSA. Thus, we urge you to reject New York’s requests.

It is worth noting that a similar request was made under NYSED’s ESEA Flexibility waiver and rejected by the department in June 2015. The reasons for that rejection remain unchanged. It remains critically important to “ensure that schools are held accountable for the academic achievement of all students, including ELs and students with disabilities...”^{iv} ESSA’s federal assessment regulations^v provide an even stronger basis for rejection. ESSA and its federal assessment regulations have not changed the requirement under the No Child Left Behind Act (NCLB) that all students are to be instructed and assessed on grade level academic standards. Under ESSA, there are only two possible state assessments for students with disabilities—the general assessment and the alternate assessment aligned with the challenging state academic standards. Although the alternate assessment is based on alternate academic

achievement standards, these achievement standards must be based on grade level academic content standards. In other words, although the expectations for achievement are different, the content is still from the grade in which the student is enrolled. Since below grade level assessments are not permitted for students who take an alternate assessment, there is no valid rationale for offering below grade level assessments to students with disabilities who take the general assessment.

The federal assessment regulations clearly express the importance of aligning assessment and instruction to the grade in which the student is enrolled, stating: “A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations,” and, “a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.”^{vi} This regulation was the product of a negotiated rulemaking process.^{vii} There was consensus among stakeholders that this language, which is consistent with the statutory language enacted by Congress, further clarifies that no assessment may be based on below grade level content and was important enough to be included in the regulation’s consensus-based text.

Further, New York’s proposal to selectively provide students with disabilities who are below grade level a different test from students without disabilities who are below grade level unjustly discriminates and violates these students’ rights under Section 504 of the Rehabilitation Act of 1973^{viii} since it deprives these students with disabilities equal educational opportunities and benefits as those available to non-disabled students. In addition, as was previously explained in a November 3 letter from the Consortium for Citizens with Disabilities, students with disabilities in New York experience a high degree of segregation compared to the rest of the nation, especially those students in disability categories most likely to be affected by the requested waiver.^{ix} Additionally, given the overrepresentation of Black students in the Intellectual disability category, it is likely that Black students would be overrepresented among students instructed and assessed outside of their grade level, raising additional concerns about the civil rights of students under this waiver request.

Regarding assessments for recently arrived English learners under ESSA, the new law provides states multiple options for including these students in the state assessment and accountability system. A state may choose to exclude recently arrived English learners from one administration of the English language arts assessment, and exclude their results from the math assessment in the accountability system for that same year. Or, a state may assess and report student performance on both assessments in the first year, include a measure of student growth on these assessments in the second year, and include students’ proficiency in the third year in the accountability system. Alternatively, a state may choose to apply the first option and the second option to different subgroups of recently arrived English learners depending on their characteristics.^x New York, however, seeks to further exclude English learners from the accountability system. Under the state’s proposal, no school would be accountable for the achievement of an English learner until their third year in the country. ESSA provides sufficient flexibility to balance both the importance of access to the general curriculum (as is the intent of ESSA and the requirement of civil rights law^{xi}) as well as the reality of the unique circumstances of late entrant English learners. Further extending the timeline under which schools are held accountable for these students’ learning does a disservice to the students and runs contrary to ESSA.

The Department of Education must ensure that all state plans and waiver requests advance educational equity and serve the interests of all children. Low-income children, children of color, children with disabilities, English learners, and Native children have been left behind for far too long and deserve no less than a robust and thorough state plan review to ensure an excellent and equitable education. We appreciate your attention to our concerns. Please do not hesitate to contact Liz King, director of education policy, at king@civilrights.org or (202)466-0087 with any questions.

Sincerely,

Alliance for Excellent Education
The Arc of the United States
Council of Parent Attorneys and Advocates
Democrats for Education Reform
The Education Trust
Judge David L. Bazelon Center for Mental Health Law
League of United Latin American Citizens
MALDEF (Mexican American Legal Defense & Educational Fund)
NAACP
National Center for Learning Disabilities
National Disability Rights Network
National Down Syndrome Congress
National Indian Education Association
National Urban League
TNTP
UnidosUS, formerly NCLR

ⁱ See: <https://civilrights.org/letter-secretary-devos-re-essa-state-plan-review/>

ⁱⁱ See: <http://www.p12.nysed.gov/accountability/essa/documents/DraftWaiverRequest-OffgradetestingforSWD.pdf>

ⁱⁱⁱ See: <http://www.p12.nysed.gov/accountability/essa/documents/DraftWaiverRequest-ELAtestingwaiverforsecondyearELLs-MLLs.pdf>

^{iv} See: <http://www.p12.nysed.gov/accountability/documents/NYWaiverrequestresponse6.5.2015.pdf>

^v See: <https://www.federalregister.gov/documents/2016/12/08/2016-29128/title-i-improving-the-academic-achievement-of-the-disadvantaged-academic-assessments>

^{vi} 34 CFR 200.6

^{vii} See: <https://www2.ed.gov/policy/elsec/leg/essa/essa-reg-neg-2016-sum-mtg3.docx>

^{viii} 29 U.S.C. § 794

^{ix} See: <https://c-c-d.org/fichiers/CCD-ltr-to-USED-re-NYSED-ESSA-waiver-w-signons.pdf>

^x See: <https://www.migrationpolicy.org/sites/default/files/publications/ESSA-Framework-FINAL.pdf>

^{xi} See: <https://www2.ed.gov/about/offices/list/ocr/ellresources.html>