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Secretarial Waiver Authority Under ESEA, Section 8401

Section 8401 of the Elementary and Secondary Education Act (ESEA) provides the Secretary of Education (hereinafter referred to as “the Secretary”) with broad waiver authority with respect to programs authorized under the act. While this waiver authority is limited in some respects, such as its applicability to fiscal accountability and the allocation of funds, upon the request of specified entities the Secretary may grant a waiver of various ESEA statutory and regulatory requirements, including those related to academic accountability. The decision to grant the waiver is left to the Secretary’s discretion. This In Focus provides a brief legislative history of this waiver authority and discussion of current secretarial waiver authority, how a waiver may be requested, reporting requirements, and the Secretary’s exercise of the waiver authority.

Brief Legislative History

Congress initially included the broad waiver authority in the ESEA through the Improving America’s Schools Act of 1994 (IASA; P.L. 103-382). The authority was retained through enactment of the No Child Left Behind Act of 2001 (NCLB; P.L. 107-110) and Every Student Succeeds Act (ESSA; P.L. 114-95) enacted in 2015. Prior to the IASA, the Secretary had only specific, program-based waiver authority.

Current Secretarial Waiver Authority

Under current law, the Secretary is permitted to waive most statutory and regulatory provisions that apply to the ESEA. This can include, for example, waivers related to the standards, assessments, and accountability requirements in Title I-A. There are, however, several restrictions on the Secretary’s waiver authority.

Secretarial Waiver Authority Restrictions

The Secretary is prohibited from waiving any statutory or regulatory requirement related to the following:

- allocation of funds to states, local educational agencies (LEAs), Indian tribes, or other recipients of funds;
- maintenance of effort requirements for LEAs or state educational agencies (SEAs) to maintain their level of spending for specified educational services;
- comparability of services (state and local funds must be used to provide services in schools served under Title I-A that are at least comparable to the services provided in non-Title I-A schools);

- the use of federal aid only to supplement, and not supplant, non-federal funds;
- equitable participation of private school students and teachers;
- parental participation and involvement;
- applicable civil rights requirements;
- the requirement for a charter school under the Public Charter Schools program (Title IV-C);
- prohibitions included in Title VIII-F-2 (e.g., prohibition regarding state aid);
- prohibitions against use of funds for religious worship or instruction (§8505);
- prohibitions against using funds for certain activities included in Section 8526 (e.g., using funds for construction, renovation, or repair); and
- certain ESEA Title I-A school selection requirements in Section 1113.

Waiver Application

An SEA or Indian tribe that receives funds under a program authorized by the ESEA may request a waiver of any statutory or regulatory requirement of the ESEA. An LEA that receives funds under an ESEA program and wants a waiver of any statutory or requirement that applies to the ESEA may submit a request to its SEA. The SEA may then submit the request to the Secretary if the SEA determines the waiver to be appropriate. Similarly, if an elementary or secondary school wants a waiver of any ESEA statutory or regulatory provisions, the school must submit a request to its LEA. If the LEA determines the waiver to be appropriate, the LEA may submit the request to the SEA for consideration.

An SEA submitting a waiver request of its own or on behalf of an LEA or an Indian tribe that wants to receive a waiver must submit a request to the Secretary that includes a plan that identifies the federal programs affected by the requested waiver; describes which federal statutory or regulatory requirements are to be waived; describes how waiving such requirements will advance student academic achievement; describes how the SEA, LEA, school, or Indian tribe will monitor and regularly evaluate the effectiveness of the plan implementation; includes only information directly related to the waiver request; and describes how schools will continue to provide assistance to the same populations served by programs for which waivers are requested. For waivers related to Section 1111(b), which addresses standards and assessments, or Section

1111(h), which addresses SEA, LEA, and school report cards, the plan must describe how the SEA, LEA, school, or Indian tribe will maintain or improve transparency in reporting to parents and the public on school and student performance, including the achievement of student subgroups (i.e., students by racial/ethnic groups, English learners, students with disabilities, and students from low-income families).

An LEA or school requesting a waiver must provide this information to its SEA or LEA, respectively. In addition, an SEA submitting a waiver request must meet additional requirements with respect to notice and comment and the review of requests submitted by LEAs.

Approval/Disapproval of a Waiver Request

The Secretary must issue a written determination regarding the initial approval or disapproval of a waiver request not more than 120 days after the request is submitted. The Secretary may disapprove a waiver request that does not meet the requirements of Section 8401, requests provisions to be waived that the Secretary is prohibited from waiving, provides insufficient information about how the waiver will advance student achievement, or does not provide for adequate evaluation to ensure review and continuous improvement of the plan. If the Secretary disapproves a waiver, the Secretary must immediately notify the waiver requester, provide in writing the reasons for the determination, and provide an opportunity for revision and resubmission.

As a condition of waiver approval, the Secretary cannot require an SEA, LEA, school, or Indian tribe to (1) include in or delete from such request specific academic standards, (2) use specific academic assessments, or (3) include in or delete from such request any specific elements of state academic standards, academic assessments, state accountability systems, or teacher and school leader evaluation systems. In addition, the Secretary is not permitted to disapprove a waiver based on conditions outside of the waiver request.

Duration of Waiver

A waiver granted under the authority of Section 8401 may not exceed four years. The Secretary may extend the waiver period beyond four years if the state demonstrates that the waiver has been effective in enabling the waiver recipient to carry out the activities for which the waiver was granted and the waiver has contributed to improved student achievement. In contrast, a waiver is to be terminated if the Secretary, after notice and an opportunity for a hearing, presents a rationale and supporting information that “clearly demonstrates” the waiver is not contributing to the progress of schools affected by the waiver or determines the waiver is no longer necessary to achieve its original purposes.

Reporting

Section 8401 includes reporting requirements for waiver recipients and the Secretary. In its annual reporting required under Section 1111(h), an SEA, LEA, school, or Indian

tribe receiving a waiver must describe the progress of schools affected by the waiver toward improving student academic achievement and how the use of the waiver has contributed to such progress.

The ESEA requires the Secretary to publish a notice of the decision to grant each waiver in the *Federal Register*. However, the publication of waivers in the *Federal Register* has not occurred consistently over time. For example, on October 6, 2017, ED published multiple notices of waivers granted in calendar years 2011 through 2016 in the *Federal Register* and acknowledged that it had failed to meet the requirement to publish waiver notices. The Secretary granted over 800 waivers during this time period. The most recent list of secretarial waivers granted under Section 8401 was published in the *Federal Register* on May 19, 2020. It does not appear that any comprehensive lists or individual waiver announcements have been published in response to the Section 8401 requirement since then.

The ESEA also requires the Secretary to provide for the dissemination of the *Federal Register* notice to SEAs, interested parties (e.g., educators, civil rights organizations), and the public. Prior to the enactment of the ESSA, the ESEA also required the Secretary to submit annual reports to Congress on the uses of waivers and whether they improved the quality of instruction or student achievement. This requirement was not retained when the ESEA was reauthorized by the ESSA.

The ESEA does not require the Secretary to publish waiver requests or information about waiver denials.

Use of Secretarial Waiver Authority

As previously discussed, the Secretary may waive most ESEA statutory and regulatory provisions. Waivers may be requested by SEAs or Indian tribes. In some cases, the Secretary may encourage eligible entities to apply for waivers or streamline the process for receiving specific waivers. For example, during the COVID-19 pandemic, the Secretary allowed SEAs to request waivers of various assessment and accountability provisions to SEAs using a streamlined application process. The authority was also used to grant waivers in response to the Gulf Coast hurricanes of 2005 and to address issues raised by the American Recovery and Reinvestment Act (ARRA; P.L. 111-5). During the Obama Administration, secretarial waiver authority was used to offer an ESEA flexibility package for states that included 11 waivers of ESEA requirements provided SEAs agreed to take other actions specified by the Administration. In July 2025, the Secretary highlighted the flexibility available to SEAs under the ESEA, including the ability of SEAs to request waivers of statutory and regulatory provisions.

Rebecca R. Skinner, Specialist in Education Policy

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