

A State's Guide to the U.S. Department of Education's Educational Flexibility (Ed-Flex) Program



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ED-FLEX FREQUENTLY ASKED QUESTIONS

A. INTRODUCTION

A-1. What is Ed-Flex?

Ed-Flex is a program that allows the Secretary of the U.S. Department of Education (Department) to delegate to State educational agencies (SEAs) the authority to waive statutory or regulatory education requirements that may, in particular instances, impede local efforts to reform and improve education. It is designed to help local educational agencies (LEAs), educational service agencies (ESAs), 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. The Education Flexibility Partnership Act of 1999 (Ed-Flex Act) extended the previous authority and was most recently amended by the Every Student Succeeds Act (ESSA) in December 2015.

For additional information or technical assistance regarding Ed-Flex, interested entities should contact the Department at OESE.TitleI-a@ed.gov with the subject line “Ed-Flex.”

B. ELIGIBILITY REQUIREMENTS

B-1. Who is eligible to apply to the Ed-Flex program?

The Ed-Flex statute defines an eligible State, or “Ed-Flex Partnership State” as a State¹ that—

(A) Has—

- (1) Developed and implemented the challenging State academic standards, and aligned assessments, described in paragraphs (1) and (2) of section 1111(b) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the ESSA,² and is producing the report cards required by ESEA section 1111(h); or
- (2) Adopted new challenging State academic standards under ESEA section 1111(b)(1), made substantial progress (as determined by the Secretary) toward developing and implementing such standards and toward producing the report cards required under ESEA section 1111(h);

(B) Will hold LEAs, ESAs, and schools accountable for meeting the educational goals described in the local Ed-Flex applications and for engaging in technical assistance and, as applicable and appropriate, implementing comprehensive support and improvement activities and targeted support and improvement activities under ESEA section 1111(d); and

¹ States include each of the fifty States, the District of Columbia, Puerto Rico, and each of the outlying areas (Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands). (20 U.S.C. § 5891a(4)).

² Unless otherwise indicated, citations to the ESEA are to the ESEA, as amended by the ESSA.

(C) has waived or will waive State statutory or regulatory requirements relating to education while holding LEAs, ESAs, or schools within the State that are affected by such waivers accountable for the performance of the students who are affected by such waivers.

(20 U.S.C. § 5891b(a)(2))

B-2. For an application submitted in summer 2019, is an SEA that has an approved ESEA consolidated State plan considered to have made substantial progress?

Yes. An SEA that has an approved ESEA consolidated State plan will be considered to have made substantial progress (as determined by the Secretary).

B-3. To be eligible for Ed-Flex, must an SEA have the authority to waive *both* State statutory and State regulatory requirements relating to education?

No. To be eligible for Ed-Flex, an SEA can either have the authority to waive State statutory or State regulatory requirements.

B-4. May the Secretary waive the Ed-Flex eligibility criteria?

No. The Secretary may not waive the Ed-Flex eligibility criteria referenced in question B-1. 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 statutory or regulatory education requirements, for example, 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 a completed application template to the Department that includes the information identified in the statute. The application template includes—

- (A) Information demonstrating that the SEA meets the eligibility criteria in section 4(a)(2) of the Ed-Flex Act [20 U.S.C. § 5891b(a)(2)] *and*
- (B) An educational flexibility plan for the State that includes a—
 - (1) Description of the process that the SEA will use to evaluate applications from LEAs, ESAs, or schools requesting waivers of:
 - (A) Federal statutory or regulatory requirements; and
 - (B) State statutory or regulatory requirements relating to education;
 - (2) Detailed description of the State statutory or regulatory requirements relating to education that the SEA will waive;
 - (3) Description of clear educational objectives that the State intends to meet under the educational flexibility plan;
 - (4) Description of how the educational flexibility plan is consistent with activities described in subsections (b), (c), and (d) of ESEA section 1111;

- (5) Description of how the SEA will evaluate the performance of students in the schools, ESAs, and LEAs affected by the waivers; and
- (6) Description of how the SEA met the statutory public notice and comment requirements and a summary of the comments the SEA received (*see question C-2*).
(20 U.S.C. § 5891b(a)(3)(A)).

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

Yes. The statute requires an SEA seeking Ed-Flex waiver authority to provide the public with adequate and efficient notice of its proposed waiver authority (20 U.S.C. § 5891b(a)(7)). The SEA must:

1. Provide the public with adequate and efficient notice of the proposed waiver authority, consisting of a description of the agency’s application for the proposed waiver authority on each agency’s website, including a description of any improved student performance that is expected to result from the waiver authority or waiver;
2. Provide the opportunity for parents, educators, school administrators, and all other interested members of the community to comment regarding the proposed waiver authority. This must be done in accordance with any applicable State law specifying how the comments may be received and how the comments may be reviewed by any member of the public; and
3. Submit a summary of comments received with the application of the agency or school to the Secretary. (20 U.S.C. § 5891b(a)(7)).

C-3. Is there a specific Ed-Flex application template?

Yes. An SEA must submit a completed application template. The application template is available at: <https://oese.ed.gov/ed-flex/>.

D. PROCESS FOR REVIEW AND APPROVAL OF ED-FLEX APPLICATIONS

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

The statute specifies that the Department may approve an SEA’s application only if it determines that the application demonstrates substantial promise of assisting the SEA and affected LEAs, ESAs, and schools in carrying out comprehensive educational reform, after considering—

1. The eligibility of the State (*see Section B*);
2. The comprehensiveness and quality of the State’s educational flexibility plan;
3. The ability of the Ed-Flex plan to ensure accountability for the activities and goals described in the plan;
4. The degree to which the objectives described in the State’s Ed-Flex plan are clear, can be assessed, and take into account the performance of LEAs, ESAs, or schools, and students, particularly those affected by waivers;
5. The significance of the State statutory or regulatory requirements relating to education that will be waived; and
6. 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.
(20 U.S.C. § 5891b(a)(3)(B)(ii))

D-2. How long will it take the Department to complete the review of an Ed-Flex application?

The statute requires the Department to issue a written decision for each State application within 90 days of receiving the application. If disapproved, the Department will explain why an application was not approved and will describe the process for revising and resubmitting the application for reconsideration. (20 U.S.C. § 5891b(a)(3)(B)(i)).

D-3. What is the duration of the Ed-Flex authority?

States that are eligible for Ed-Flex and that meet the application requirements described in Section B will be granted Ed-Flex authority for a period not to exceed five years. (20 U.S.C. § 5891b(a)(6)(A)(i)).

D-4. After receiving Ed-Flex authority, may an SEA seek a renewal of Ed-Flex authority?

Yes. Each SEA seeking to renew its approved Ed-Flex authority must submit a request for renewal to the Secretary no later than the date of expiration of its existing authority. Details regarding expectations for requesting an extension will be provided to Ed-Flex States near the end of the State’s initial period of authorization. The Department will complete the review of the extension requests within 180 days. (20 U.S.C. § 5891b(a)(6)(B)(i)).

E. SCOPE OF THE ED-FLEX WAIVER AUTHORITY

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

The Ed-Flex waiver authority applies to the following sections of the ESEA—

1. Title I, Part A (Basic Programs Operated by LEAs, other than section 1111);
2. Title I, Part C (Education of Migratory Children)
3. Title I, Part D (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk)
4. Title II, Part A (Supporting Effective Instruction); and
5. Title IV, Part A (Student Support and Academic Enrichment Grants).

In addition, the Ed-Flex waiver authority applies to the Carl D. Perkins Career and Technical Education Act of 2006, as amended by the Strengthening Career and Technical Education for the 21st Century Act. (20 U.S.C. § 5891b(b)).

E-2. Are there certain requirements that cannot be waived?

Yes. A State cannot grant any waiver that would undermine the underlying purposes of the statutory requirements of the program for which a waiver is sought (*see question E-3*). (20 U.S.C. § 5891b(c)).

In addition, the Ed-Flex program does not authorize an SEA to waive any statutory or regulatory requirements relating to:

1. Standards, assessments, and accountability requirements under ESEA section 1111;
2. Maintenance of effort;
3. Comparability of services;
4. Equitable participation of students and professional staff in private schools;
5. Parental participation and involvement;
6. Distribution of funds to LEAs;
7. Serving eligible school attendance areas in rank order in accordance with ESEA section 1113(a)(3);
8. The selection of a school attendance area or school under subsections (a) and (b) of section 1113 of the ESEA, except that an SEA may grant a waiver to allow a school attendance area or school to participate in activities under Part A of Title I if the percentage of children from low-income families in the school attendance area of such school or who attend such school is not more than³ 10 percentage points below the lowest percentage of such children for any school attendance area or school of the local educational agency that meets the requirements of such subsections;
9. Use of Federal funds to supplement, not supplant, State and local funds;
10. Applicable civil rights requirements; and
11. Any requirements that apply to the SEA.

Furthermore, requirements of the Individuals with Disabilities Education Act cannot be waived under the Ed-Flex waiver authority. Only eligible requirements from ESEA programs referenced in E-1 may be waived.

E-3. What is meant by the “underlying purposes” of the statutory requirements of a program?

The underlying purposes of the statutory requirements of the Ed-Flex Program relate to the fundamental purposes 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. The following examples illustrate this requirement.

Title II, Part A: The purposes of the Building Systems of Support for Excellent Teaching and Learning are to increase student academic achievement; improve the quality and effectiveness of

³ 5891b(c)(1)(G) currently prohibits waivers of the selection of a school attendance area or school under subsections (a) and (b) of section 1113 of the ESEA, except that an SEA may grant a waiver to allow a school attendance area or school to participate in activities under Title I, Part A “if the percentage of children from low-income families in the school attendance area of such school or who attend such school **is not less than** 10 percentage points below the lowest percentage of such children for any school attendance area or school...” (emphasis added). We believe the emphasized language is an error and that this prohibition should mirror the language in ESEA section 8401(c)(10), which prohibits waivers of the selection of a school attendance area or school under sections (a) and (b) of section 1113 of the ESEA, except that the Secretary may grant a waiver to participate in activities under Title I, Part A “if the percentage of children from low-income families in the school attendance area or who attend the school **is not more than** 10 percentage points below the lowest percentage of those children for any school attendance area or school...” (emphasis added).

educators; increase the number of educators who are effective in improving student academic achievement; and provide low-income and minority students greater access to effective educators. An LEA that waives requirements of Title II, Part A meets the purposes of Title II, Part A if it implements activities and strategies to improve student academic achievement by increasing the effectiveness of educators generally and the number of effective educators in the LEA, especially by implementing strategies and activities that increase the availability of effective educators to poor and minority students in the LEA. These activities could include: developing and implementing initiatives to recruit and retain effective educators, providing high-quality, personalized professional development that is evidence-based, and developing and implementing educator induction and mentoring programs that are designed to improve classroom instruction and student achievement.

Title IV, Part A: The purposes of the Student Support and Academic Enrichment Grant program is to improve students' academic achievement by increasing capacity to: 1) provide all students with access to a well-rounded education; 2) improve school conditions for student learning; and 3) improve the use of technology in order to improve the academic achievement and digital literacy for all students. An LEA waives requirements of Title IV, Part A funds in its student-centered funding system meets the purposes of Title IV, Part A if it implements activities collectively in its schools that address each of these purposes. Such activities might include: programming in foreign languages, civics, arts history, STEM, and college and career counseling; increasing the availability of, and enrollment in, accelerated learning courses; drug violence and prevention activities; school-based mental health services; prevention of bullying and harassment activities; or building technological capacity and infrastructure and providing technical assistance to teachers on the use of technology.

E-4. 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 may not, for example, waive GEPA or EDGAR requirements relative to the 21st Century Communities Learning Centers program under ESEA Title IV, Part B because that 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.

E-5. Who is responsible for determining whether a particular requirement is eligible to be waived or whether that requirement falls within one of the restrictions referenced above?

The SEA has the initial responsibility for determining whether a particular requirement is eligible to be waived, consistent with the Ed-Flex legislation and the waiver review process described in its Ed-Flex application. SEAs are strongly encouraged to consult with officials of the Department whenever questions arise about the legality or appropriateness of waiving a particular requirement. The Department has ultimate responsibility for ensuring compliance with Ed-Flex

requirements and in making determinations regarding the permissibility of particular waivers and will work in partnership with Ed-Flex States.

E-6. May an Ed-Flex State waive requirements relating to the allocation or distribution of funds to LEAs?

No. The legislation expressly prohibits an Ed-Flex State from waiving requirements relating to the allocation or distribution of funds to LEAs. (20 U.S.C. § 5891b(c)(1)(E)).

However, a State may waive requirements under ESEA section 1113 regarding how districts allocate funds to schools provided the waiver does not violate the limitations in 20 U.S.C. § 5891b(c)(2)) and is consistent with the State’s approved Ed-Flex application. (*See question E.2*)

E-8. Does Ed-Flex permit an SEA to waive requirements that apply to the SEA itself?

No. Under Ed-Flex, an SEA may waive requirements applicable to LEAs, ESAs, or schools. It may not waive requirements applicable to the SEA itself. For example, an Ed-Flex State does not have the authority to grant itself a waiver that extends the obligation period of State-level ESEA funds (e.g., Title II, Part A funds that an SEA reserves for State activities). To obtain a waiver of requirements applicable to the SEA, an SEA would request a waiver from the Department under the authority of ESEA section 8401.

E-9. 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 in 20 U.S.C. § 5891b(b) (*see question E-1*).

E-10. How has Ed-Flex waiver authority been used in the past?

In the past, Ed-Flex waiver authority has been used most commonly to waive:

- 1) Carryover Authority Waivers: This waiver allows an LEA to carry over more than 15% of Federal funds across fiscal years
- 2) Schoolwide Minimum Poverty Threshold Waivers: This waiver allows an SEA to apply Title I funds to the entire school population even if less than 40 percent of the children in the school are from low- income families.

Note that under the ESEA, as amended by ESSA, States have the authority to waive the poverty threshold and no longer need Ed-Flex authority to do so.

F. LOCAL APPLICATION REQUIREMENTS

F-1. Who may apply to an SEA for waivers in an Ed-Flex State?

LEAs, ESAs, and schools may apply to the SEA for waivers.

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

An LEA, ESA, 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 LEA, ESA, or school affected by the proposed waiver, and for the students served by the LEA, ESA, or school who are affected by the waiver;
4. Explains why the waiver will assist the LEA, ESA, or school in reaching these goals; and
5. In the case of an application from an LEA or ESA, describes how the notice and comment requirements in 20 U.S.C. § 5891b(a)(7) have been met.

The application may also contain additional information that the SEA reasonably requires. (20 U.S.C. § 5891b(a)(4)(A)).

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

In reviewing requests for waivers, an SEA must determine whether the applicant LEA, ESA, or school has satisfactorily addressed the local application requirements. An SEA shall evaluate an application submitted by an LEA, ESA, or school in accordance with the SEA's Ed-Flex plan as described in 20 U.S.C. § 5891b(a)(4)(B). An SEA may not approve an application for a waiver unless—

1. The LEA, ESA, or school requesting such waiver has developed a local reform plan that
 - A. Is applicable to such agency or school, respectively; and
 - B. May include innovative methods to leverage resources to improve program efficiencies that benefit students;
2. The waiver of Federal statutory or regulatory requirements will assist the LEA, ESA, or school in reaching its educational goals, particularly goals with respect to school and student performance; and
3. The SEA is satisfied that the underlying purposes of the statutory requirements of each program for which a waiver is granted will continue to be met.

(20 U.S.C. § 5891b(a)(4)(C))

F-4. If an SEA determines that a particular waiver would be appropriate for LEAs, ESAs, 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 LEAs, ESAs, 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 LEAs, ESAs, or schools on an expedited basis. Any LEA, ESA, 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 20 U.S.C. § 5891b, and comply with State notice and comment requirements.

G. WAIVER OVERSIGHT AND REPORTING

G-1. What are the responsibilities of Ed-Flex States relative to LEAs, ESAs, or schools that have been granted waivers?

Ed-Flex States are responsible for holding LEAs, ESAs, 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 LEAs, ESAs, and schools, and, in accordance with the evaluation strategies described in the State's Ed-Flex plan, measure their performance against the educational goals set forth in the local waiver applications. (20 U.S.C. § 5891b(a)(4)(D)).

G-2. Are there circumstances in which an SEA should terminate waivers granted to an LEA, ESA, or school?

Yes. The statute requires that an SEA must terminate a waiver granted to an LEA, ESA, or school if it determines, after notice and an opportunity for a hearing, that—

1. There is compelling evidence of systemic waste, fraud, or abuse;
2. The performance of the LEA, ESA, or school with respect to meeting the accountability requirement and the educational goals has been inadequate to justify continuation of such waiver;
3. Student achievement in the LEA, ESA, or school has decreased; or
4. Substantial progress has not been made toward meeting the long-term goals and measurements of interim progress established by the State under ESEA section 1111(c)(4)(A)(i). (20 U.S.C. § 5891b(a)(4)).

G-3. What are the reporting responsibilities of Ed-Flex States?

The statute requires that 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, which the Department will make publicly available on its website. Not later than two years after a State has been designated an Ed-Flex State under the reauthorized authority, its annual report must include data demonstrating the degree to which progress has been made toward meeting the State's educational objectives. The data shall include, when applicable—

1. Information on the total number of waivers granted for Federal and State statutory and regulatory requirements under this section, including the number of waivers granted for each type of waiver;
2. Information describing the effect of the waivers on the implementation of State and local educational reforms pertaining to school and student performance;
3. Information describing the relationship of the waivers to the performance of schools and students affected by the waivers; and
4. An assurance from State program managers that the data reported under this section are reliable, complete, and accurate, as defined by the State, or a description of a plan for improving the reliability, completeness, and accuracy of such data as defined by the State. (20 U.S.C. § 5891b(a)(5)(B)(ii))

G-4. Will the Department conduct performance reviews of Ed-Flex States?

Yes. In accordance with the Ed-Flex Act, following the expiration of an approved Ed-Flex plan for an Ed-Flex State, the Secretary, within 180 days, shall complete a review of the performance of the SEA in granting waivers of Federal statutory or regulatory requirements. Specifically, the Secretary will determine if the SEA—

1. Has achieved, or is making substantial progress towards achieving, the objectives described in the application submitted and the specific long-term goals and measurements of interim program established under ESEA section 1111(c)(4)(A)(i); and
2. Demonstrates that LEAs, ESAs, or schools affected by the waiver authority or waivers have achieved, or are making progress toward achieving, the desired goals described in the application. (20 U.S.C. § 5891b(a)(6)(B)(i))

The statute requires that the Secretary terminate the SEA’s authority to grant waivers of Federal statutory or regulatory requirements 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 based on the SEA’s performance against the specific long-term goals and measurements of interim progress established under ESEA section 1111(c)(4)(A)(i).