

---

---

## Article

# Advancing Student Achievement Through Elementary and Secondary Education Act Waivers

Justin Lam\*

### INTRODUCTION

To test, or not to test: that was the question that rankled Illinois school district leaders, advocates, and members of the State Board of Education during a November 2020 public meeting.<sup>1</sup> Seven months earlier, as COVID-19 led to widespread school closures in March, then-U.S. Secretary of Education Betsy DeVos waived federal requirements for students to take year-end assessments.<sup>2</sup> Yet the waivers were only for the 2019–20 school year.<sup>3</sup> The pandemic showed no signs of abating as the 2020–21 school year continued, and Illinois leaders wondered whether a new presidential administration would issue similar waivers.<sup>4</sup>

Such waivers come from the Elementary and Secondary

---

\* J.D. and Master of Public Policy 2021, University of California, Berkeley. I thank Professor Christopher Edley, Jr. and my classmates for their feedback and encouragement in developing this Essay. Copyright © 2021 by Justin Lam.

1. Samantha Smylie, *Illinois School Leaders and Advocates Split on Decision on Standardized Testing in a Pandemic*, CHALKBEAT CHICAGO (Nov. 20, 2020, 1:01 PM), <https://chicago.chalkbeat.org/2020/11/20/21583266/illinois-school-leaders-and-advocates-split-on-decision-on-standardized-testing-in-a-pandemic> [<https://perma.cc/X2PQ-TYPC>].

2. Matt Barnum & Kalyn Belsha, *All States Can Cancel Standardized Tests This Year, Trump and DeVos Say*, CHALKBEAT (Mar. 20, 2020, 12:23 PM), <https://www.chalkbeat.org/2020/3/20/21196085/all-states-can-cancel-standardized-tests-this-year-trump-and-devos-say> [<https://perma.cc/ZWX8-EZW5>]; see also REBECCA A. SKINNER, CONG. RSCH. SERV., IF11517, SECRETARIAL WAIVER AUTHORITY UNDER THE ESEA AND CARES ACT (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11517> [<https://perma.cc/72DZ-WLKB>] (explaining the streamlined waiver process granted to the Secretary of Education under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)).

3. SKINNER, *supra* note 2, at 2.

4. Smylie, *supra* note 1.

Education Act (ESEA), the main source of federal aid for education.<sup>5</sup> In Fiscal Year 2020, Congress appropriated \$25.9 billion for the Act's programs, which include Title I-A aid for disadvantaged students, Title II teacher professional development, Title III English Learner (EL) instruction, Title IV safe and healthy students and charter school expansion programs.<sup>6</sup> The Act conditions Title I-A aid on assessments and accountability: states must administer annual assessments in English/language arts and math in grades 3-8 and once in high school, as well as science tests in some grade levels and annual English language proficiency tests for English learners.<sup>7</sup> Each state must have an accountability system that "meaningfully differentiat[es]" between public schools and identifies the lowest-performing schools for comprehensive or targeted support and improvement.<sup>8</sup>

The Act also contains a rare congressional delegation of power: the power to waive Congress's rules.<sup>9</sup> When a state educational agency or tribal authority requests a waiver, section 8401 of the ESEA allows the Secretary of Education to "waive any statutory or regulatory requirement,"<sup>10</sup> although some exceptions apply.<sup>11</sup> The Act specifies four grounds upon which the Secretary may deny a waiver request—including when a request fails to demonstrate how it "will advance student academic achievement consistent with the purposes of this Act."<sup>12</sup>

Prior Secretaries of Education have typically granted waivers in response to changing conditions or state needs. As of publication, the U.S. Department of Education website has responded to 488 requests

---

5. REBECCA A. SKINNER, CONG. RSCH. SERV., R45977, THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA), AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT (ESSA): A PRIMER 1 (2020), <https://crsreports.congress.gov/product/pdf/R/R45977> [<https://perma.cc/DBX7-2BMB>].

6. *Id.*

7. *Id.* at 4–5.

8. *Id.* at 5–6.

9. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013) (defining "big waiver" as the "power to waive Congress's rules").

10. Elementary and Secondary Education Act § 8401, 20 U.S.C. § 6311. For simplicity, I use "state" herein to refer to state educational agencies or tribal authorities.

11. SKINNER, *supra* note 2, at 1. Under section 1118(b)(1) of the Elementary and Secondary Education Act, a state or local educational agency may use Title I-A funds "only to supplement" state and local funds, but not to supplant, or replace, such funds. U.S. DEP'T OF EDUC., SUPPLEMENT NOT SUPPLANT UNDER TITLE I, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT 9 (2019), <https://www2.ed.gov/policy/elsec/leg/essa/snsfinalguidance06192019.pdf> [<https://perma.cc/2KJ9-VQ8W>].

12. Elementary and Secondary Education Act § 8401(b)(4)(A)(iii).

received since 2009 for waivers of ESEA programs.<sup>13</sup> Most followed the Great Recession (90 requests in 2009–10) or the emergence of COVID-19 (154 in 2020), but states also submit waivers when natural disasters occur, or when states want to take advantage of flexibilities like trying new assessments.<sup>14</sup>

Waivers can also enact policy priorities in the face of legislative challenges. When Congress failed to reauthorize No Child Left Behind in 2007, states risked losing federal funding for failing to meet proficiency targets.<sup>15</sup> The Obama Administration then enacted a conditional waiver scheme.<sup>16</sup> Unfortunately, that waiver scheme led Congress to constrain the Secretary’s waiver authority when it passed the Every Student Succeeds Act of 2015.<sup>17</sup> But, within constraints, the Secretary still has relatively broad waiver authority. And that authority can provide a key education policy tool.

Pressures facing the Biden Administration—as well as the latest science on child development—should lead it to issue an interpretive rule that interprets Section 8401 through the lens of whole child equity. An interpretive rule tells the public how an agency will construe a statute it administers.<sup>18</sup> In the months and years ahead, the Administration will face pressures including whether to modify or waive annual testing requirements in future school years, how to advance the Secretary’s stated priorities to “reimagine education”<sup>19</sup> with a slim congressional majority and multiple legislative priorities, and how to heed calls for a greater racial justice agenda.<sup>20</sup> At the same time, whole

---

13. *State Requests for Waivers of ESEA Provisions for SSA-Administered Programs*, U.S. DEP’T OF EDUC. (last visited Sept. 2, 2021), <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers> [<https://perma.cc/43AX-FPYZ>].

14. *See, e.g.*, Letter from Frank T. Brogan to Sherri Ybarra & Debbie Critchfield (Sept. 25, 2020), <https://oese.ed.gov/files/2020/09/Idaho-2021-Science-Assessment-Waiver-letter-Extension.pdf> [<https://perma.cc/4JG9-CVfV>] (extending Idaho’s science assessment waiver); Letter from Frank T. Brogan to Tony Thurmond & Linda Darling-Hammond (Sept. 25, 2020) <https://oese.ed.gov/files/2020/03/California-7.pdf> [<https://perma.cc/6JP2-L6Z7>] (granting an assessment waiver to the Paradise, California school district following the 2018 Camp Fire).

15. *See infra* Part I.B.

16. *See id.*

17. *See infra* Part I.C.

18. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015).

19. Matt Barnum, *5 Big Questions Facing Miguel Cardona, Biden’s Pick For Education Secretary*, CHALKBEAT (Feb. 2, 2021, 4:39 PM), <https://www.chalkbeat.org/2020/12/23/22197906/5-big-questions-miguel-cardona-education-secretary> [<https://perma.cc/7FCC-D59N>].

20. *See* John B. King, Jr. & Marc. H. Morial, *KING/MORIAL: Advocate for a Racial*

child equity research shows that adverse childhood experiences—and schools' academic, social, and emotional supports for students in the wake of those experiences—affect “student achievement.”<sup>21</sup> The Secretary should interpret existing waiver authority to support a whole child equity approach, using this research to inform the granting and denial of waivers.<sup>22</sup>

Part I describes the legislative history of Congress narrowing the Secretary's waiver authority. Part II shows that current law, courts, and similar statutes support the Secretary's relatively broad discretion. Part III explains why this broad discretion effectuates congressional intent. Part IV proposes an interpretative rule to guide the waiver process, and analyzes how such a rule could advance the Biden Administration's priorities.

### I. A LEGISLATIVE HISTORY OF NARROWING AUTHORITY

The ESEA has progressed from not even including waivers, to including them as a response to a growth in federal programs, to restricting them. The arc of waiver authority follows a broader arc of the Act from a targeted, equity-focused statute to an outcome-focused statute—and, most recently, to an Act reflecting a call for a greater urge for education federalism. Yet the Act's waiver provision has remained relatively unchanged.

#### A. FROM FUNDING TO “FLEXIBILITY”

At its outset in 1965, the ESEA did not contain a waiver provision. The Act provided funds to promote equal educational opportunities and attached discrimination prohibitions to those funds,<sup>23</sup> but required states to do little in exchange.<sup>24</sup> States had to submit plans, but only to describe how they would spend funds for school library

---

*Justice Agenda at the U.S. Department of Education*, WASH. INFORMER (Dec. 15, 2020), <https://www.washingtoninformer.com/king-morial-advocate-for-a-racial-justice-agenda-at-the-u-s-department-of-education/> [<https://perma.cc/7XRW-HDCV>].

21. See Elementary and Secondary Education Act § 8401(b)(4)(A)(iii) (requiring that waiver applications demonstrate how a requested waiver will advance “student achievement”); *infra* Part IV.A (explaining whole child equity).

22. For a discussion of this approach, see *infra* Part IV.A.

23. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1317 (2017). Congress did not explicitly address desegregation in the Elementary and Secondary Education Act. But, because Title VI of the Civil Rights Act of 1965 prohibited discrimination in all federally funded programs, the new federal programs the Act funded enabled the federal government to effectuate Title VI protections. *Id.* at 1319.

24. *Id.* at 1318.

resources, textbooks, and other instructional materials.<sup>25</sup> By the late 1970s and early 1980s, however, disillusionment with desegregation efforts, disappointment with ESEA results, and a movement toward states' rights each grew.<sup>26</sup> Congress stopped increasing funding for the Act, and made funds resemble general aid and block grants rather than target them at resource equity.<sup>27</sup>

At the same time, a "flexibility" narrative had taken hold. Federal education programs had expanded to target specific groups of students, like the Individuals with Disabilities Education Act, or subject areas, such as the Carl D. Perkins Vocational-Technical Education Act.<sup>28</sup> These programs yielded concerns ranging from burdensome paperwork to, as then-Florida Commissioner of Education Frank Brogan put it, a "one size fits all command and control approach that we in the states are abandoning."<sup>29</sup>

As Congress increased funds for the highest-needs districts in the Improving America's Schools Act, the 1994 reauthorization of the ESEA,<sup>30</sup> it created a new ESEA waiver provision. The waiver provision "recognize[d] the need for greater local flexibility"<sup>31</sup> to support states' efforts to increase instructional quality or student academic performance.<sup>32</sup> The Act outlined a waiver request procedure, included exceptions to the Secretary's waiver authority, capped the length of waivers to three years, and required local educational agencies, states,

---

25. Elementary and Secondary Education Act of 1965, Pub. L. 89-10 § 203, 79 Stat. 37-38 (1965).

26. Black, *supra* note 23, at 1321-22.

27. *Id.*

28. See U.S. GOV'T ACCOUNTABILITY OFFICE, HEHS99-17, ED-FLEX STATES VARY IN IMPLEMENTATION OF WAIVER PROCESS 4 (1997), <https://www.gao.gov/assets/230/226596.pdf> [<https://perma.cc/E79C-HZMA>].

29. H.R. REP. NO. 106-43, at 9 (1999). Brogan became the Assistant Secretary of Elementary and Secondary Education during the Trump Administration.

30. Black, *supra* note 23, at 1322-23.

31. See S. REP. NO. 103-292, at 46-47 (1994). The Senate Committee on Labor and Human Resources "recognize[d] the need for greater local flexibility in the administration of Federal education programs," thus "support[ing] the use of waivers for the purpose of improving services and student performance." Democrats and Republicans alike continued calls for flexibility throughout the 1990s. President Bill Clinton, for example, bragged about how his administration had "granted 357 waivers," how the federal government had no "business telling you whom to hire, how to teach, [or] how to run schools," and how he had "vigorously supported more school-based management, and more flexibility" for states. H.R. REP. NO. 106-43, at 10 (1999).

32. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, 3899 (1994).

and tribal authorities to submit annual reports to the Secretary.<sup>33</sup> Many of these requirements exist today.

B. NO CHILD LEFT BEHIND INCREASES FLEXIBILITY IN EXCHANGE FOR ACCOUNTABILITY

The No Child Left Behind Act of 2001 doubled down on trading flexibility for accountability, but left waiver requirements largely the same as before. No Child Left Behind imposed far more accountability requirements than previous iterations of Title I<sup>34</sup>: in exchange for more federal funds than before, states had to adopt challenging academic standards for English, math, and science; assess student proficiency; achieve proficiency in those subjects by 2014; disaggregate school performance by subgroups; and apply consequences to schools that failed to meet adequate yearly progress toward proficiency.<sup>35</sup> But states could design their own standards and curricula<sup>36</sup> while receiving funds that still resembled block grants and general aid.<sup>37</sup> Meanwhile, the House Committee on Education and the Workforce largely “continued the scope”<sup>38</sup> of the Secretary’s waiver authority. The Committee left most of the Act’s waiver language untouched, including a requirement that a state, local educational agency, or tribe requesting a waiver describe how a waiver would “increase the quality of instruction for students” and “improve the academic achievement of students.”<sup>39</sup>

Ten years later, and following a failed reauthorization attempt by Congress in 2007, the ESEA was overdue for reauthorization.<sup>40</sup> Without reauthorization, if schools failed to meet the Act’s proficiency targets by 2014—the year all learners were supposed to be proficient—they would lose federal funds.<sup>41</sup> And, as Secretary of Education Arne Duncan announced, 80 percent of the nation’s schools would fail to

---

33. *Id.* at 3899–3901.

34. Black, *supra* note 23, at 1324 (“The NCLB imposed far more requirements and accountability than any prior version of Title I. In exchange for an influx of resources, it required states to meet several absolute benchmarks.”).

35. *Id.*

36. *Id.*

37. *See supra* Part I.A.

38. H.R. REP. NO. 107-334, at 368 (2001).

39. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9401(b)(1)(B)(i)–(ii), 115 Stat. 1425, 1972 (2002). A local educational agency usually refers to local school districts. *See* Elementary and Secondary Education Act § 8101(30) (defining “local educational agency”).

40. Black, *supra* note 23, at 1328–29.

41. *Id.* at 1329.

meet proficiency targets.<sup>42</sup> The Obama Administration then created ESEA Flexibility, through which Secretary Duncan would waive state and local violations of the No Child Left Behind Act if states adopted reforms like those of the earlier Race to the Top program.<sup>43</sup> These included adopting college- and career-ready standards; developing annual measurable goals and focusing turnaround efforts on the lowest-performing schools; implementing teacher and principal evaluation systems that differentiated performance based in part on student data; and removing reporting requirements that had little or no impact on student outcomes.<sup>44</sup> Forty-five states, the District of Columbia, Puerto Rico, and the Bureau of Indian Education submitted requests for flexibility.<sup>45</sup>

Through waiver conditions, the Obama Administration revamped much of No Child Left Behind. Whereas No Child Left Behind gave states autonomy to set curricular standards, the waiver conditions required states to adopt college- and career-ready standards—effectively, the Common Core State Standards or comparable ones.<sup>46</sup> No Child Left Behind made no mention of teacher evaluations, but the waiver application required states to adopt “high-quality” teacher and principal evaluation systems with multiple elements.<sup>47</sup> Waivers also did away with multiple No Child Left Behind proficiency requirements.<sup>48</sup> In doing so, the White House seized “an opportunity to fix what’s wrong with No Child Left Behind without waiting any longer for Congress to act.”<sup>49</sup>

But national political opposition arose in response to the waiver conditions. Aggravation with the Common Core standards, high-stakes testing, and the weight of testing in teacher evaluations fueled

---

42. *Id.*

43. *Id.* at 1329–30. Under Race to the Top, a competitive grant program established by the Department using funds from the American Recovery and Reinvestment Act, states had to adopt reforms in order to be eligible for grant funding.

44. *Id.*

45. *ESEA Flexibility*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<https://perma.cc/2EDM-BX3S>] (last visited Sept. 2, 2021).

46. Black, *supra* note 23, at 1330.

47. U.S. DEP’T OF EDUC., *ESEA FLEXIBILITY 3* (2012), <https://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc> [<https://perma.cc/C8BC-D8PL>].

48. Black, *supra* note 23, at 1330.

49. Megan Slack, *Everything You Need to Know: Waivers, Flexibility, and Reforming No Child Left Behind*, WHITE HOUSE (Feb. 9, 2012), <https://obamawhitehouse.archives.gov/blog/2012/02/09/everything-you-need-know-waivers-flexibility-and-reforming-no-child-left-behind> [<https://perma.cc/FS6S-B4RT>].

substantive objections.<sup>50</sup> Procedural objections stemmed from the Obama Administration acting through administrative law rather than going through Congress.<sup>51</sup>

#### C. THE EVERY STUDENT SUCCEEDS ACT SIGNALS A RETURN TO FEDERALISM

In 2015, Congress limited the Secretary's authority through the Every Student Succeeds Act, the 2015 reauthorization of the ESEA.<sup>52</sup> The Every Student Succeeds Act rendered "null and void" the waivers granted just three years earlier.<sup>53</sup> Yet it continued some of the substantive tenets of ESEA Flexibility: challenging, state-designed academic standards; annual testing; interventions for the lowest-performing schools; and certified (though not "highly qualified," as the waivers required) teachers.<sup>54</sup> Despite Congress nullifying its own waivers and waiver authority, the Obama Administration lauded the Every Student Succeeds Act's codification of "many of the key reforms the Administration ha[d] . . . encouraged states and districts to adopt in exchange for waivers."<sup>55</sup>

Further, the Every Student Succeeds Act kept the Act's waiver requirements mostly the same. Throughout iterations of the bill, Democrats and Republicans contested what the scope of the Secretary's waiver authority should be.<sup>56</sup> Yet the law kept the actual requirements for a waiver—including that an application "reasonably demonstrat[e] that the waiver will improve instruction for students and advance student academic achievement"—largely intact.<sup>57</sup>

#### D. COVID-19 LEADS TO WIDESPREAD ASSESSMENT WAIVERS—AND A CONTRAST FROM NO CHILD LEFT BEHIND WAIVERS

About five years after the passage of the Every Student Succeeds Act, the COVID-19 pandemic led to the largest push for waivers since No Child Left Behind. As schools closed in March 2020, states moved

---

50. Black, *supra* note 23, at 1331–32.

51. *Id.*

52. *See id.*

53. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 989–90 (2016).

54. Black, *supra* note 23, at 1332–37; Bulman-Pozen, *supra* note 53, at 990–91.

55. Bulman-Pozen, *supra* note 53, at 990–91 (quoting WHITE HOUSE OFF. OF THE PRESS SEC'Y, *Fact Sheet: Congress Acts to Fix No Child Left Behind* (Dec. 2, 2015)), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/03/fact-sheet-congress-acts-fix-no-child-left-behind> [<https://perma.cc/S6XG-WSTE>].

56. *See* H.R. REP. NO. 114-24, at 1104 (2015).

57. *See id.* at 135.

to scrap math, reading, and science tests required by the Act.<sup>58</sup> Many states applied for waivers from the U.S. Department of Education; two scrapped their tests without waiting.<sup>59</sup> Congress directed the Secretary of Education to create an “expedited application process”<sup>60</sup> for waiver requests. And it required states, tribes, and local school districts to describe how COVID-19 would prevent or restrict compliance with Act requirements, and to assure that the state, tribe, or school district would work to “mitigate any negative effects” that might result from the waiver.<sup>61</sup> The Department published a template waiver request form and promised a one-day turnaround.<sup>62</sup> Every state, the District of Columbia, the Commonwealth of Puerto Rico, and the Bureau of Indian Education requested and received a waiver for the 2019–20 school year.<sup>63</sup>

The next year, the Biden Administration declined to grant similar “blanket waivers.”<sup>64</sup> Rather, the U.S. Department of Education “emphasize[d] the importance of flexibility.”<sup>65</sup> It suggested states could

---

58. Matt Barnum, *Pressure Mounts for Feds to Drop State Testing Requirements Amid Widespread School Closures*, CHALKBEAT (Mar. 19, 2020, 9:20 AM), <https://www.chalkbeat.org/2020/3/18/21196059/pressure-mounts-for-feds-to-drop-state-testing-requirements-amid-widespread-school-closures> [https://perma.cc/CEC8-BCHV].

59. *Id.*

60. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 3511(b)(1), 134 Stat. 281, 400 (2020). Although outside the scope of this Essay, checkbox or form waivers warrant further study. In emergency situations like COVID-19, these forms can expedite applications and exemplify a federal intervention to help states. Of course, such forms might make it too easy for an executive to waive statutory safeguards.

61. *Id.* § 3511(c)(2).

62. *Template COVID Fiscal Waiver 19-2020*, U.S. DEP’T OF EDUC., <https://oese.ed.gov/files/2020/04/template-covid-fiscal-waiver-19-2020.pdf> [https://perma.cc/FLU4-XN67]. The template required states to assure that they would ensure compliance, mitigate “negative effects,” and provide notice-and-comment opportunities.

63. BETSY DEVOS, REPORT TO CONGRESS OF U.S. SECRETARY OF EDUCATION BETSY DEVOS: RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (“CARES ACT”) 10 (Apr. 27, 2020), <https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf> [https://perma.cc/RA4N-SCEA]. Thirty days after the CARES Act passed, Secretary of Education Betsy DeVos declined to request additional waiver authority from Congress for the Every Student Succeeds Act.

64. Letter from Ian Rosenblum, Acting Assistant Secretary of Elementary and Secondary Education, to Chief State School Officers 2 (Feb. 22, 2021), <https://www2.ed.gov/policy/elsec/guid/stateletters/dcl-assessments-and-acct-022221.pdf> [https://perma.cc/547K-JQ35].

65. *Id.*

administer shorter, remote, or later-than-usual versions of their statewide assessments.<sup>66</sup> The Department maintained all state and local report card requirements, including requirements to disaggregate data by subgroups. But the Department invited states to request waivers from accountability requirements to identify low-performing schools and require at least 95 percent of students to take year-end assessments,<sup>67</sup> and provided a checkbox template for doing so.<sup>68</sup>

States' assessment waiver requests varied, as did the Department's responses.<sup>69</sup> The Department granted the District of Columbia the only blanket waiver from assessments; denied a similar request from New York; denied Michigan's and Montana's requests to let school districts administer local (rather than statewide) assessments; approved Oregon's plan to test students in fewer grades; and told New Jersey and California that waivers were not needed to administer statewide assessments in the fall or in all districts except where "not viable," respectively.<sup>70</sup> But 41 states, the District of Columbia, Puerto Rico, and the Bureau of Indian Education received waivers for relief from the Act's accountability requirements.<sup>71</sup>

Unlike No Child Left Behind waivers, COVID-19 waivers occurred within a much different Overton window, or range of policies

---

66. *Id.* The Department did, however, "specifically encourage" states to extend testing windows for English language proficiency assessments. Given that these assessments provide a diagnostic for students' language needs, Paul Bruno and Dan Goldhaber suggest that these assessments enjoy more political support and less pushback than other assessments. PAUL BRUNO & DAN GOLDBABER, CALDER POLICY BRIEF NO. 26-0721, REFLECTIONS ON WHAT PANDEMIC-RELATED STATE TEST WAIVER REQUESTS SUGGEST ABOUT THE PRIORITIES FOR THE USE OF TESTS 5-6, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RSCH. (2021), <http://caldercouncil.org/wp-content/uploads/2021/07/CALDER%20Policy%20Brief%2026-0721.pdf> [<https://perma.cc/JSV3-YVYG>].

67. See Letter from Ian Rosenblum to Chief State School Officers, *supra* note 64; Evie Blad & Andrew Ujifusa, *Biden Education Department Approves One Request to Cancel State Tests But Rejects Others*, EDUC. WEEK (Apr. 7, 2021), <https://www.edweek.org/policy-politics/biden-education-department-approves-one-request-to-cancel-state-tests-but-rejects-others/2021/04> [<https://perma.cc/BCG6-ZBP6>].

68. U.S. DEP'T OF EDUC., OMB No. 1810-0752, 20-21 ACCOUNTABILITY WAIVER TEMPLATE (Mar. 8, 2021), <https://oese.ed.gov/files/2021/03/20-21-Accountability-Waiver-Template-Final.pdf> [<https://perma.cc/TZG9-98DE>].

69. See Blad & Ujifusa, *supra* note 67.

70. *Id.*

71. Andrew Ujifusa, *The Feds Offered Waivers on ESSA Accountability. Here's Where States Stand on Getting Them*, EDUC. WEEK (June 24, 2021), <https://www.edweek.org/policy-politics/the-feds-offered-waivers-on-essa-accountability-heres-where-states-stand-on-getting-them/2021/06> [<https://perma.cc/T58N-BJRE>].

politically acceptable to the mainstream.<sup>72</sup> No Child Left Behind waivers responded to a consensus on rigorous state standards and student assessment-informed teacher evaluations.<sup>73</sup> But COVID-19 waivers responded to a need to balance competing interests. Civil rights groups called for statewide assessments as a comparative tool, while education leaders differed in what, if any, purposes that testing would serve.<sup>74</sup> And, whereas schools risked losing federal funds without No Child Left Behind waivers, COVID-19 waivers were decided independent of school funding from the CARES Act or the American Rescue Plan, both of which Congress mostly distributed through the Title I formula of the ESEA.<sup>75</sup> The COVID-19 era of waivers might confirm the demise of policymaking through education waivers or reflect the difficulty in balancing competing visions of assessments and accountability when deciding waiver criteria. Or this era might be an outlier in the history of waivers, given the greater political attention on school reopenings or stimulus funding. Still, unlike the expressed waiver language in the CARES Act, Congress did not include language in the American Rescue Plan Act of 2021 encouraging or restricting the Secretary's waiver discretion.<sup>76</sup>

\* \* \*

Congress has narrowed the Secretary's waiver authority over time. But the implementing requirements have largely remained the same, informing the Secretary's current discretion.

---

72. See Anand Giridharadas, *How America's Elites Lost Their Grip*, TIME (Nov. 21, 2019, 6:39 AM), <https://time.com/5735384/capitalism-reckoning-elitism-in-america-2019/> [<https://perma.cc/M8E9-6HKB>] (describing the origins of the "Overton window" theory).

73. See *supra* Part I.B.

74. See Andrew Ujifusa, *Standardized Tests Could Be in Jeopardy in Wake of Biden Decisions, Experts Say*, EDUC. WEEK (July 21, 2021), <https://www.edweek.org/teaching-learning/standardized-tests-could-be-in-jeopardy-in-wake-of-biden-decisions-experts-say/2021/07> [<https://perma.cc/4VSU-TBCR>].

75. See Matt Barnum, *Some States Were Still Hoping to Cancel Testing. The Biden Administration Just Said No.*, CHALKBEAT (Mar. 29, 2021, 12:47 PM), <https://www.chalkbeat.org/2021/3/26/22353209/state-testing-cancellations-waivers-biden-department-education> [<https://perma.cc/VZ25-CXUX>]; see also American Rescue Plan Act of 2021 § 2001(c); Matt Barnum & Kalyn Belsha, *Unprecedented Federal Funding Is on the Way. High-Poverty Schools Are Starting to Reckon With How To Spend It.*, CHALKBEAT (Mar. 25, 2021, 4:07 PM), <https://www.chalkbeat.org/2021/3/25/22350474/unprecedented-federal-funding-high-poverty-schools-how-spend> [<https://perma.cc/EU9P-RDZP>].

76. Compare CARES Act § 3511(b)(1), with American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. § 2001 (2021).

## II. THE SECRETARY HAS BROAD WAIVER DISCRETION

Today, the Secretary of Education enjoys relatively broad waiver discretion. First, the waiver statute gives the Secretary broad discretion. Second, few courts have challenged—much less ruled on—the waiver provision. Third, similarly broad provisions abound in federal statutes.

### A. THE STATUTE GIVES THE SECRETARY RELATIVELY BROAD WAIVER AUTHORITY

Section 8401 of the ESEA allows the Secretary of Education to “waive any statutory or regulatory requirement of this chapter for which a waiver request is submitted” by a state educational agency or tribal authority.<sup>77</sup> To request a waiver, a state educational agency or tribal authority must submit a plan that fulfills certain requirements, including describing “how the waiving of such requirements will advance student academic achievement,” how the state agency will monitor implementation, and how the agency will serve the same populations served by the programs to be waived.<sup>78</sup> The agency must also provide for notice and comment, and summarize the comments.<sup>79</sup> After a state submits a waiver request, the Secretary has 120 days to provide an initial determination. If the Secretary disapproves, the Secretary must offer the state a chance to revise its application and re-submit. If the resubmission still fails to meet the requirements, the Secretary must offer a hearing on the record.<sup>80</sup> If the Secretary approves, a state must provide an annual report on progress, and the Secretary may terminate the waiver if it is not “contribut[ing] to the progress of schools” or “no longer necessary to achieve its original purposes.”<sup>81</sup>

Under section 8401, the Secretary’s may disapprove a waiver request if the request:

- (i) fails to meet submission requirements listed in Section 8401 of the Act;<sup>82</sup>

---

77. Elementary and Secondary Education Act § 8401. A local educational agency may do so through its state educational agency.

78. *Id.* § 8401(b)(1).

79. *Id.* § 8401(b)(3)(A)–(B). To be clear, these differ from the notice and comment requirements of the Administrative Procedure Act, and a search did not reveal implementing regulations.

80. *Id.* § 8401(a)(3).

81. *Id.* § 8401(f)(A)–(B).

82. *Id.* § 8401(b)(4)(A)(i).

- (ii) concerns items the Secretary may not waive,<sup>83</sup> such as the distribution of funds; “supplement, not supplant” requirements; comparability of services requirements; “equitable participation” of private school students and teachers; parental participation and involvement; applicable civil rights requirements; requirements for charter schools under the Charter Schools Program; and maintenance of effort requirements<sup>84</sup>;
- (iii) provides “insufficient information to demonstrate” that a waiver “will advance student academic achievement consistent with the purposes of this Act,”<sup>85</sup> or
- (iv) does not provide for “adequate evaluation to ensure review and continuous improvement of the plan.”<sup>86</sup>

The Secretary may not deny a waiver request based on “conditions outside the scope”<sup>87</sup> of the waiver request. The Secretary could not, for instance, condition a waiver of annual grade 8 science assessments on whether a state implements a new professional development program for educators of English Learners. Relatedly, the Secretary may not promulgate rules or regulations that add statewide accountability system requirements, add or delete specific state standards, specify academic assessments or weights for evaluation systems, or specify school support or improvement strategies.<sup>88</sup> And the Secretary may neither issue guidance that “provides a strictly limited or exhaustive list to illustrate successful implementation of provisions under this section,” nor require data collection beyond existing federal, state, or local reporting requirements.<sup>89</sup>

Still, the Secretary has broad authority to grant or deny waivers. The Secretary may deny a waiver, for instance, if its implementation plan provides “insufficient information” to show that the requested waiver will “advance student achievement consistent with the purposes of this Act.”<sup>90</sup> The department, however, has rarely denied waivers. Out of 488 responses to waiver requests issued since 2009, the

---

83. *Id.* § 8401(b)(4)(A)(ii).

84. *Id.* § 8401(c); *see also* SKINNER, *supra* note 2, at 1 (summarizing these requirements). The Secretary may not waive maintenance of effort requirements under Section 8401, but may waive such requirements under other Act provisions.

85. Elementary and Secondary Education Act § 8401(b)(4)(A)(iii).

86. *Id.* § 8401(b)(4)(A)(iv).

87. *Id.* § 8401(b)(4)(D).

88. *Id.* § 1111(e)(1)(B).

89. *Id.* § 1111(e)(1)(C)-(D).

90. *Id.* § 8401(a)(4)(A).

Department has issued at least 40 denials—a little over 12 percent.<sup>91</sup> In 2018, for example, 27 states exceeded a statutory cap allowing no more than one percent of students with the most significant cognitive disabilities to participate in alternate assessments; 23 received a waiver.<sup>92</sup> The following year, 36 states exceeded the cap, and 22 received a waiver.<sup>93</sup> To be clear, more denials would not necessarily lead to better student outcomes. But the Secretary certainly has the flexibility to issue such denials.

#### B. COURTS HAVE SUPPORTED SECRETARIAL DISCRETION

Few states or school districts have challenged the Act's waiver arrangements. Neither the U.S. Supreme Court nor the federal circuit courts have ruled on waivers, but two district court cases have supported agency discretion.

##### 1. *Connecticut v. Spellings*

In *Connecticut v. Spellings*, a federal district court held that the Secretary enjoys discretion to grant or deny a waiver because the decision is one “committed to the agency.”<sup>94</sup> Four years after the passage of the No Child Left Behind Act, Connecticut sought a waiver and state plan amendments to modify requirements related to annual testing, testing of English Language Learners, and special education students.<sup>95</sup> After being denied waivers, Connecticut challenged Secretary of Education Margaret Spellings's waiver denials.<sup>96</sup> The court found that even when Congress has not precluded review, section 701(a)(2) of the Administrative Procedure Act precludes review if the governing

---

91. Author analysis of data from *State Requests for Waivers of ESEA Provisions for SSA-Administered Programs*, U.S. DEP'T OF EDUC. (last visited Sept. 2, 2021), <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-state-plans-assessment-waivers> [https://perma.cc/62GM-VYPG].

92. See Letter from Rep. Robert C. “Bobby” Scott to Secretary Betsy DeVos 2 (Mar. 13, 2020), <https://edlabor.house.gov/imo/media/doc/Chairman%20Scott%20Lett%20to%20ED%20re%20Title%20I%20Alternative%20Assessments.pdf> [https://perma.cc/42S5-XACB] (expressing concern about the Department of Education's waivers of requirements for assessments for students with the most significant cognitive disabilities).

93. *Id.*

94. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 495 (D. Conn. 2006) (quoting the Secretary of Education's reply brief).

95. See *id.* at 477.

96. *Id.* at 474. Connecticut challenged Secretary of Education Margaret Spellings' interpretation of a No Child Left Behind provision barring unfunded mandates as well.

statute provides a court “no meaningful standard”<sup>97</sup> against which to judge the agency’s exercise of its discretion. In this case, the waiver provision “[did] not provide any standard—let alone a meaningful one” for judicial review.<sup>98</sup> Because of the agency’s discretion concerning waiver denials, the Secretary’s denial of waiver requests was not reviewable under section 701(a)(2) of the Administrative Procedure Act.<sup>99</sup>

And the waiver provision offered no standards for reviewing the denial of a specific waiver.<sup>100</sup> Although waiver requests had to include specific information,<sup>101</sup> the No Child Left Behind Act “d[id] not require”<sup>102</sup> the Secretary to grant a waiver if a request contained this information. Plus, the court reasoned, Congress had other ways of cabining the Secretary’s discretion.<sup>103</sup> Congress prevented the Secretary from waiving a number of No Child Left Behind requirements; authorized only “effective” waiver extensions that “contributed to improved student achievement” and were in the “public interest”<sup>104</sup>; required an annual report to Congress on the use of waivers and whether they had increased instruction quality and academic achievement<sup>105</sup>; and set restrictions on terminating a waiver.<sup>106</sup> “It seems clear,” the court concluded, that Congress limited the Secretary of Education’s exercise of discretion to grant waivers but left “completely unfettered” the Secretary’s discretion to deny a waiver.<sup>107</sup>

## 2. *Jindal v. United States Department of Education*

Even when the Secretary used conditional waivers, a federal

---

97. *Id.* at 495 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

98. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 495 (D. Conn. 2006).

99. *Id.* at 499.

100. *Id.* at 496; *see also supra* Part II.A (quoting the statute).

101. *Spellings*, 453 F. Supp. at 496 (“Requests must describe ‘for each school year, specific, measurable educational goals . . . that would be affected by the waiver and the methods to be used to measure annually such progress for meeting such goals.’”).

102. *Id.* at 496 (quoting 20 U.S.C. § 7861).

103. *Id.*

104. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 496 (D. Conn. 2006).

105. *Id.*

106. *Id.* (“The Act allows the Secretary to terminate a waiver only if the ‘Secretary determines, after notice and an opportunity for a hearing, that the performance of the State . . . has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purpose.’”).

107. *Id.* at 498, *aff’d as modified sub nom.* *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010). The Second Circuit upheld the district court’s dismissal of the case on ripeness grounds.

district court found that the use of waivers did not violate the ESEA and that the use of waiver conditions was constitutional.<sup>108</sup> In 2015, Louisiana governor Bobby Jindal contended that the Obama Administration exceeded its constitutional authority when it enacted conditional waivers via ESEA Flexibility.<sup>109</sup> The court disagreed for two reasons.

First, the granting of waivers in exchange for adopting standards “common to a significant number of states” did not exceed the Secretary’s authority.<sup>110</sup> The ESEA prohibits the Secretary from conditioning a state plan’s approval on adding or deleting “specific elements” of its academic standards, using “specific assessment instruments,” or approving or certifying state standards themselves.<sup>111</sup> Jindal claimed that requiring states to adopt the Common Core State Standards and PARCC assessments amounted to requiring a state to add or delete elements from its standards and assessments.<sup>112</sup> But Jindal failed to show any evidence that the ESEA Flexibility scheme did so.<sup>113</sup>

Second, the court declined to find ESEA Flexibility’s conditions “coercive.”<sup>114</sup> Jindal alleged that refusing to agree to the waiver conditions could ultimately mean losing ESEA funds.<sup>115</sup> Even so, the conditional waiver program itself did “not award funds to States or threaten state funding.”<sup>116</sup> In *National Federation of Independent Businesses v. Sebelius*, Affordable Care Act conditions were “viewed as a means of pressuring the States to accept policy changes” to Medicaid.<sup>117</sup> But ESEA Flexibility conditions—such as encouraging states to adopt college and career ready standards and aligned assessments—“protect[ed], rather than threaten[ed]” funding.<sup>118</sup> And Jindal provided no evidence that states were unaware of the program’s conditions or the

---

108. *Jindal v. U.S. Dep’t of Educ.*, No. CV 14-534-SDD-RLB, 2015 WL 5474290, at \*10, 13 (M.D. La. Sept. 16, 2015).

109. *Id.* at \*2 (M.D. La. Sept. 16, 2015). For more information on ESEA Flexibility, see *supra* Part I.B.

110. *Jindal*, 2015 WL 5474290, at \*10.

111. *Id.* at \*9.

112. *Id.* PARCC was a consortium of states that developed a set of assessments aligned to the Common Core State Standards. *Id.* at \*2 n.18.

113. *Id.*

114. *Jindal v. U.S. Dep’t of Educ.*, No. CV 14-534-SDD-RLB, 2015 WL 5474290, at \*14 (M.D. La. Sept. 16, 2015).

115. *Id.*

116. *Id.*

117. *Id.* (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602, 2604 (2012)).

118. *Jindal*, 2015 WL 5474290, at \*14.

Secretary's broad waiver authority.<sup>119</sup> "States were free to apply or not,"<sup>120</sup> and so was he.<sup>121</sup>

Admittedly, Jindal's allegations were not outliers. After the Department launched ESEA Flexibility, other states challenged the Department's interpretation, one state sought an administrative hearing, and House and Senate committees questioned the Secretary's authority.<sup>122</sup> Still, the court found that the Secretary's actions did not go beyond the scope of waiver authority under the ESEA.

### C. SIMILAR PROVISIONS OFFER AGENCIES BROAD DISCRETION, WITH LIMITED OR NO JUDICIAL REVIEW

Multiple federal statutes grant agencies waiver discretion and do so with minimal or no judicial review. The *Connecticut v. Spellings* court pointed to statutes that, for instance, vested the decisionmaker with authority to make substantive and procedural rules for resolving claims under the September 11 Victim Compensation Fund,<sup>123</sup> or authorized payments to service providers "at such time or times as the Secretary believes appropriate (but not less often than monthly)."<sup>124</sup> Each of these commit waiver requests to agency discretion, exempting the requests from judicial review.<sup>125</sup>

Of course, courts may review when an agency fails to conduct sufficient review or make adequate findings on the merits of a waiver.<sup>126</sup> Under the Administrative Procedure Act, if an agency relies on factors that Congress did not intend for it to consider, fails to consider "an important aspect of the problem," offers a justification counter to the evidence or that is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," a court may find

---

119. *Id.*

120. *Id.*

121. Jindal himself had enthusiastically supported the Common Core State Standards when Louisiana applied for them five years prior. *Id.* at \*11 n.101.

122. Black, *supra* note 23, at 1331 (citing Rick Scott, Governor of Florida, Request to Designate Jurisdiction to the Office of Administrative Law Judges (Oct. 17, 2014)); Sean D. Reyes, Attorney General, State of Utah, Common Core Standards Legal Analysis (Oct. 7, 2014); EMILY BARBOUR, JODY FEDER & REBECCA SKINNER, CONG. RSCH. SERV., SECRETARY OF EDUCATION'S WAIVER AUTHORITY WITH RESPECT TO TITLE I-A PROVISIONS INCLUDED IN THE ELEMENTARY AND SECONDARY EDUCATION ACT 6-7 (2011)).

123. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 498 (D. Conn. 2006) (citing *Schneider v. Feinberg*, 345 F.3d 135, 149 (2d Cir. 2003)).

124. *Id.* (quoting *Greater N.Y. Hosp. Ass'n v. Mathews*, 536 F.2d 494, 497 (2d Cir. 1976)).

125. *Id.* at 497.

126. BARBOUR, FEDER & SKINNER, *supra* note 122, at 6.

a waiver decision arbitrary and capricious.<sup>127</sup> The Ninth Circuit, for instance, found that the Secretary of Health and Human Services granted California a waiver to cut a benefits program without conducting sufficient review or making adequate findings regarding the merits of the waiver.<sup>128</sup> But that case involved a record that contained “no evidence”<sup>129</sup> that the Secretary had considered the effects of cutting the program—and might suggest that only an “extraordinarily sparse”<sup>130</sup> record would trigger judicial review.

Courts, however, have not clarified the extent to which a waiver must promote the objectives of its statute.<sup>131</sup> Take section 1115 of the Social Security Act, under which states may receive a federal waiver to try approaches that differ from the requirements of Medicaid.<sup>132</sup> Congress required that a waiver request, “in the judgment of the Secretary, [be] likely to assist in promoting the objectives of [the Act].”<sup>133</sup> Medicaid aims to “furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services.”<sup>134</sup> But no formulaic approach exists for how a waiver might promote these objectives, or for how a court might evaluate when a waiver runs afoul of these objectives. A waiver might, for instance, expand eligibility for new beneficiaries but up costs for existing beneficiaries.<sup>135</sup> Medicaid waivers thus illustrate how complicated tradeoffs in fulfilling statutory objectives can leave an agency with plenty of discretion.

Even when discretion is subject to judicial review, courts have not conclusively answered how to review such discretion. In *Wood v. Betlach*, Arizona beneficiaries challenged a state waiver application approved by the Secretary of Health and Human Services that would impose higher copayments on them.<sup>136</sup> The court ignored the

---

127. See 5 U.S.C. § 706(2)(A).

128. *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994).

129. *Id.* at 1075.

130. *Id.* at 1076.

131. See Edward H. Stiglitz, *Forces of Federalism, Safety Nets, and Waivers*, 18 THEORETICAL INQUIRIES L. 125, 148–49 (2017).

132. Tracy Douglas, *Medicaid Waivers and Consumer Protection: Evidence from the States*, 28 ANNALS HEALTH L. & LIFE SCI. 101, 104–05 (2019).

133. Stiglitz, *supra* note 131, at 147.

134. 42 U.S.C. § 1396-1.

135. Stiglitz, *supra* note 131, at 147–48.

136. *Wood v. Betlach*, 922 F. Supp. 2d 836 (D. Ariz. 2013); Stiglitz, *supra* note 131, at 146–47.

question of whether the waiver as a whole had to satisfy the Social Security Act's objectives, or whether every component of a waiver had to do so.<sup>137</sup> Rather, the court determined that copayments challenged as part of a larger section 1115 waiver did not merit independent approval.<sup>138</sup> All in all, even when judicial review applies, courts may struggle to check policy and political judgments—including those that an education secretary may exercise.

### III. THE SECRETARY SHOULD HAVE BROAD DISCRETION BECAUSE BROAD DISCRETION EFFECTUATES CONGRESSIONAL INTENT

Even if the ESEA statute's text, prior court decisions, and similar statutes did not suggest broad discretion for the Secretary of Education, the Secretary should enjoy broad waiver discretion. When Congress delegates the power to waive provisions of law that Congress itself has made, it advances its own statutory objectives by creating regulatory flexibility.<sup>139</sup> In the ESEA, waivers give the Secretary flexibility to respond to changing conditions in the pursuit of the statute's objectives. That flexibility advances Congress's intent even in the case of conditional aid—contrary to what critics of No Child Left Behind waivers asserted.

#### A. "BIG WAIVER" SCHEMES LIKE ESEA ADVANCE CONGRESSIONAL INTENT

The Secretary of Education should have the power to waive the Act's statutory requirements because Congress included a "big waiver" in order to effectuate its objectives under changing conditions. A look at the nature of such waiver schemes, as well as the instant case of the Act, reflects Congress's intent.

Agencies have had the power to apply enforcement discretion or waive limited statutory requirements throughout U.S. history.<sup>140</sup> But "big waiver" schemes, which might include the authority to waive almost any part of a statute or condition a waiver, are relatively new.<sup>141</sup> Unlike enforcement discretion, or the executive branch's decision not to enforce a statutory requirement, a "big waiver" scheme enjoys expressed statutory support.<sup>142</sup> Unlike a limited waiver, or a provision that delegates a limited power to waive or modify requirements in

---

137. Stiglitz, *supra* note 131, at 148.

138. *Id.*

139. See Barron & Rakoff, *supra* note 9, at 267, 270.

140. *Id.* at 271–77.

141. *Id.* at 267–68.

142. See *id.* at 273–76.

exceptional cases,<sup>143</sup> a “big waiver” might allow an agency to waive conditions with broad authority or without predicate conditions.<sup>144</sup> Such a scheme could obscure accountability or allow for the gutting of social safety net programs under the guise of “flexibility.”<sup>145</sup> But such a scheme can preserve Congress’s attempts to confer positive rights through spending programs.<sup>146</sup> This provides a “safety valve” that can release pressure when statutory objectives may not be attainable due to changed circumstances.<sup>147</sup>

The ESEA reflects such an attempt. In the 1990s, as a consensus emerged that federal education funding schemes had become too rigid, Congress did not remove the original statutory constraints. Instead, it delegated authority for removing statutory constraints to the Secretary via waivers.<sup>148</sup> In education, states use the safety valve frequently.<sup>149</sup> A world without federal education waivers would be impractical: consider the flexibility needed to respond to emergencies, like when Puerto Rico received a 2018 waiver following Hurricanes Maria and Irma.<sup>150</sup> Or think about the benefits of piloting new assessments, as in the case of Hawaii’s 2017 waiver to pilot the Hawaiian State Language Assessments.<sup>151</sup> Waivers allow the Secretary to respond to changing conditions in the pursuit of a “fair, equitable, and high-quality education” for “all children.”<sup>152</sup>

Of course, waivers in federal statutes can frustrate congressional intent if not implemented judiciously. Take a recent analysis that finds that waivers meant to improve Medicaid led to Michigan increasing

---

143. *Id.* at 277.

144. *See id.* at 278.

145. *See id.* at 269, 297.

146. *See id.* at 295.

147. Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 266 (2016).

148. *Id.* at 297–98.

149. *See supra* Introduction.

150. Letter from Frank T. Brogan, Assistant Secretary for Elementary and Secondary Education, U.S. Department of Education, to Julia Keleher, Secretary of Education, Puerto Rico Department of Education (Oct. 10, 2018), <https://www2.ed.gov/admins/lead/account/stateplan17/waivers/prschoolidentificationwaiverrequest.pdf> [<https://perma.cc/24H8-DWAP>].

151. Letter from Jason Botel, Principal Deputy Assistant Secretary, U.S. Department of Education, to Christina Kishimoto, Superintendent, Hawaii State Department of Education (Dec. 1, 2017), <https://www2.ed.gov/admins/lead/account/stateplan17/waivers/hitestesting2017.pdf> [<https://perma.cc/LQ4C-H263>].

152. *See* Elementary and Secondary Education Act § 1001 (describing the purpose of Title I-A aid).

insurance premiums, Iowa disenrolling more than 14,000 beneficiaries from Medicaid, and Arkansas imposing work requirements on adults enrolled in its Medicaid expansion.<sup>153</sup> Under the ESEA, recall the Department of Education's failure to properly monitor state assessments for students with significant cognitive disabilities.<sup>154</sup> Or recall the balancing act of flexibility and utility for assessments during the pandemic—waiving, for instance, the requirement that 95 percent of students take statewide assessments or allowing California districts to essentially decide whether to give exams.<sup>155</sup> By allowing varying, state-by-state testing waivers, some might argue that the U.S. Department of Education made assessments less useful. In short, without guardrails, a “big waiver” can sometimes allow an agency to take Congress's statutory objectives off track.

But two fixes can guard against the derailment of “big waiver” schemes. First, Congress can limit waivers to those that achieve expressed statutory purposes.<sup>156</sup> Recall the expressed limitations on the Secretary's authority that persist under the ESEA.<sup>157</sup> And No Child Left Behind required waiver applicants to show how a requested waiver would “increase” instructional quality and “improve” student achievement, meaning that a proposed waiver should have shown that it would produce results better than the statute's baseline requirements.<sup>158</sup> The Every Student Succeeds Act requires applicants to show how a waiver would “advance” student achievement.<sup>159</sup> Given the similarity of “advance” to “improve,” the presumed meaning—and legislative guidance—is likely the same.<sup>160</sup> Second, as discussed below, agencies themselves can pair a waiver scheme with an interpretive rule or policy guidance that furthers congressional intent.

#### B. CONDITIONAL WAIVERS ALSO ADVANCE CONGRESSIONAL INTENT

Waivers still effectuate congressional intent when granted with

---

153. Douglas, *supra* note 132, at 120–23, 126.

154. See Scott, *supra* note 92.

155. See Ujifusa, *supra* note 74.

156. See Barron & Rakoff, *supra* note 9, at 335.

157. See *supra* Part II.A.

158. Barron & Rakoff, *supra* note 9, at 336.

159. See *supra* Part II.A.

160. See Barron & Rakoff, *supra* note 9, at 336 (No Child Left Behind “add[ed] a level of legislative guidance to the exercise of administrative discretion, and force to the statutory scheme overall, that a bland delegation of the power to establish regulations to promote educational improvement would not.”).

conditions,<sup>161</sup> contrary to what the opponents of ESEA Flexibility might have argued.<sup>162</sup> Congress, of course, must make conditions clear and limit agency discretion. Even though the backlash to ESEA Flexibility led to Congress doing the latter, conditional waivers themselves are still constitutional.

Congress may allow—or decline to prohibit—an agency from imposing conditions in exchange for a waiver.<sup>163</sup> This gives an agency flexibility to negotiate with a program participant and to induce the participant’s continued participation.<sup>164</sup> Conditions can also help local or state experiments achieve the objective’s statutes.<sup>165</sup> Opponents of conditional waivers may argue that such waivers unconstitutionally coerce a state into accepting requirements it would not have agreed to otherwise.<sup>166</sup> But *Sebelius* and its related cases support a more narrow view.<sup>167</sup> Waivers—particularly conditional waivers—function as a contract: in return for funds, states agree to comply with conditions.<sup>168</sup> Unconstitutional coercion only occurs when Congress takes an entrenched program and tells states they can only participate in that entrenched program if they also agree to participate in a separate, unrelated program.<sup>169</sup>

Essentially, the power to condition can be understood as the power to effectuate statutory objectives, with two limits.<sup>170</sup> One limit is that Congress must make conditions for states’ receipt of federal funds “unambiguou[s]” so that states may be “cognizant of the choices of their participation.”<sup>171</sup> The other is that the executive’s discretion may be unfettered, but only within the aims and bounds of the originating statute. Executive officials can presume the authority to impose conditions, but those conditions should reflect the aims and guardrails of the statute as closely as possible.<sup>172</sup>

ESEA Flexibility reflected a form of the second limit. Conditional waivers can enable the executive branch to shape policy, but are more

---

161. *See id.* at 235.

162. *See supra* Part I.A.

163. Price, *supra* note 147, at 266.

164. *Id.*

165. *Id.*

166. *Id.* at 270.

167. *Id.*

168. *Id.*

169. *See id.*

170. *Id.*

171. *Id.* at 270–71.

172. *Id.*

likely to be controversial: recall the backlash to the program,<sup>173</sup> and Congress adding a provision in the Every Student Succeeds Act forbidding the Secretary from imposing conditions outside the bounds of the waiver request.<sup>174</sup> Although Congress curtailed the Secretary's authority, that was not a referendum on the constitutionality of conditional waivers—or a limit on a future Congress removing that provision.

\* \* \*

Waivers cannot appropriate more money for education, undo the ESEA's restrictions on secretarial authority, or fix federalism's shortfalls when it comes to advancing equity. But, in the face of competing priorities and congressional obstructions, they offer a tool not to be overlooked.

#### IV. RECOMMENDATIONS FOR WAIVER AUTHORITY

The Secretary of Education should make an “interpretative” rule<sup>175</sup> interpreting section 8401 waiver authority to advance a whole-child approach to student achievement. Such a rule could advance priorities that will benefit students across the country, including in areas like testing, state plan amendments, and desegregation.

##### A. INTERPRETING WAIVER REQUESTS IN A “WHOLE CHILD” MANNER

An interpretive rule advises the public about how an agency will construe a statute it administers.<sup>176</sup> Under the ESEA, the Secretary can interpret the “advance student achievement” language of the Act to shape future waiver decisions. And such an interpretation would reflect the latest research—already embraced by Congress and the White House—on child development and add transparency, while providing a faster route than notice-and-comment rulemaking.

##### 1. Interpreting the Act's Waiver Provisions

Under the Administrative Procedure Act, Congress distinguished legislative rules from “interpretive rules” and “general statements of policy.”<sup>177</sup> Unlike legislative rules, which must go through notice-and-

---

173. *See id.*

174. *See* Elementary and Secondary Education Act § 8401(b)(4)(D).

175. *See* 5 U.S.C. § 553(b)(A) (2020) (defining interpretive rules).

176. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015).

177. *Id.*; *see also* DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, REFORMING “REGULATORY REFORM”: A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 13 (2018), <https://www.acslaw.org/wp-content/uploads/2018/10/>

comment rulemaking,<sup>178</sup> the U.S. Office of Management and Budget considers interpretive rules as a type of agency guidance.<sup>179</sup> Interpretive rules do not carry the force and effect of law and are not accorded such weight during judicial review,<sup>180</sup> largely because they do not impose “legally binding obligations or prohibitions.”<sup>181</sup> In turn, Congress did not subject interpretive rules to notice-and-comment requirements.<sup>182</sup> This makes the process of issuing them “comparatively easier for agencies than issuing legislative rules.”<sup>183</sup>

The Secretary should take advantage of this process. Under section 8401(b)(1) of the ESEA, states requesting a waiver must describe “how the waiving of such requirements will advance student academic achievement,” how the state agency will monitor implementation, and how the agency will serve the same populations served by the programs to be waived.<sup>184</sup> Further, a waiver recipient must report annually on the “progress” of schools covered under the waiver “toward improving student academic achievement,” and how the use of the waiver has contributed to such progress.”<sup>185</sup> To date, neither federal regulations nor departmental guidance appear to have interpreted these provisions. The Secretary could interpret these aspects in a manner supporting whole child equity, which refers to a child-centered transformation of instructional, social, and emotional learning policy responses.<sup>186</sup>

Whole child equity acknowledges that adverse childhood experiences like trauma and chronic stress—often associated with poverty, race, ethnicity, and disability—affect how children develop and

---

Oct-2018-APA-Farber-Heinzerling-Shane-issue-brief.pdf [https://perma.cc/RQG9-3HFW].

178. See 5 U.S.C. § 553.

179. See 72 Fed. Reg. 3432, 3434 (2007) (defining agency guidance as an “agency statement of general applicability and future effect . . . that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”).

180. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015).

181. *Ass’n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015).

182. *Perez*, 575 U.S. at 96.

183. *Id.* at 97.

184. Elementary and Secondary Education Act § 8401(b)(1).

185. *Id.* § 8401(e).

186. *The Urgent Need for Whole Child Equity*, OPPORTUNITY INST., <https://theopportunityinstitute.org/whole-child-equity> [https://perma.cc/Q3Y5-E4XF] (last visited Sept. 2, 2021).

learn.<sup>187</sup> It realizes that children need environments that support their learning needs, and support mental health needs or basic needs like nutrition and shelter.<sup>188</sup> And it means that school systems should (1) focus accountability, guidance, and investments on developmental supports; (2) design schools to provide for healthy development; and (3) enable educators to better support students from a diverse range of contexts.<sup>189</sup>

To apply whole child equity via an interpretive rule, the Secretary might issue non-binding guidance that first explains the science behind whole child equity and how schools might apply the approach in school and systems design.<sup>190</sup> The guidance would state that, where applicable, a waiver request and its corresponding implementation plan “advance student achievement”<sup>191</sup> when it furthers a state’s attempts to support holistic child development. That guidance might offer examples of scenarios in which the Department might deny a waiver for failing to document how it would “advance student achievement.”<sup>192</sup> And the guidance could urge states to include in their annual reports<sup>193</sup> updates on schools’ progress toward advancing students’ socioemotional needs as part of their efforts to support student achievement.

In practice, the Secretary might evaluate a state’s compliance with waiver notice-and-comment requirements by assessing the degrees to which a state or local educational agency reached out to historically underrepresented populations—those with children most likely to suffer from adverse childhood experiences—when informing the public about the proposed waiver.<sup>194</sup> The Secretary might advise states that, pursuant to section 8401’s requirement that waivers include “adequate evaluation to ensure review and continuous

---

187. See OPPORTUNITY INST., *WHOLE CHILD EQUITY PROJECT 1*, [https://learningpolicyinstitute.org/sites/default/files/Opportunity\\_Institute\\_Whole\\_Child\\_Equity.pdf](https://learningpolicyinstitute.org/sites/default/files/Opportunity_Institute_Whole_Child_Equity.pdf) [<https://perma.cc/4FRG-5SFL>] (last visited Sept. 2, 2021); LINDA DARLING-HAMMOND & CHANNA M. COOK-HARVEY, *LEARNING POLICY INST., EDUCATING THE WHOLE CHILD: IMPROVING SCHOOL CLIMATE TO SUPPORT STUDENT SUCCESS* v-vi (2018), [https://learningpolicyinstitute.org/sites/default/files/product-files/Educating\\_Whole\\_Child\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Educating_Whole_Child_REPORT.pdf) [<https://perma.cc/8Y7A-PQAT>].

188. See OPPORTUNITY INST., *supra* note 187.

189. See DARLING-HAMMOND & COOK-HARVEY, *supra* note 187, at ix-x.

190. See *id.*

191. Elementary and Secondary Education Act § 8401(b)(4)(A)(iii).

192. *Id.* § 8401(b)(1).

193. See *id.* § 8401(e).

194. *Id.* § 8401(b)(3)(A)–(B).

improvement,”<sup>195</sup> an “adequate” evaluation might assess the degree to which plans support child development. The Secretary could decline to waive Act provisions that already support whole child equity, such as insisting that states continue to disaggregate school quality and support indicators by race and other student characteristics.<sup>196</sup> And the Secretary’s application of whole child equity might look different for waiver requests after, say, a natural disaster (when an adverse childhood experience already informs a state’s choice to seek a waiver) compared to piloting a new assessment (when that assessment is one piece of a broader accountability system that may or may not take a whole child equity approach).

## 2. Justifications

As challenges face the Biden Administration—like responding to COVID-19 or articulating an overarching school improvement approach<sup>197</sup>—three reasons justify such an interpretive rule.

First, research has embraced a multi-dimensional picture of academic achievement. So has Congress and the White House. The Every Student Succeeds Act already reflects this understanding,<sup>198</sup> as do multiple bills introduced in the most recent Congress.<sup>199</sup> What is more, the Biden Administration’s recent “Return to School Roadmap” tells schools to prioritize student health and safety in school reopening decisions—indeed, that meeting students’ social and emotional needs is “foundational” to helping students “overcome” the effects of adverse experiences.<sup>200</sup> Thus, interpreting waiver requests in this

---

195. *Id.* § 8401(b)(4)(A)(iv).

196. See DARLING-HAMMOND & COOK-HARVEY, *supra* note 187, at 42 (describing indicators of suspension and expulsion under the Elementary and Secondary Education Act).

197. See Barnum, *supra* note 19.

198. See, e.g., Elementary and Secondary Education Act § 1114(b)(7)(iii)(I) (requiring plans for schoolwide programs to address the needs of all children, which may include “counseling, school-based mental health programs, specialized instructional support services, mentoring services, and other strategies to improve students’ skills outside the academic subject areas”); Elementary and Secondary Education Act § 4108(B)(ii)(II) (providing grants for school-based mental health partnerships that provide “comprehensive” services and supports and staff development “based on trauma-informed practices”).

199. See, e.g., Strength in Diversity Act of 2020, H.R. 2639, 116th Cong. (2d Sess. 2020); Counseling Not Criminalization in Schools Act, S. 4360, 116th Cong. (2d Sess. 2020).

200. U.S. DEP’T OF EDUC., OFF. OF PLAN., EVALUATION AND POL’Y DEV., ED COVID-19 HANDBOOK, VOLUME 2: ROADMAP TO REOPENING SAFELY AND MEETING ALL STUDENTS’ NEEDS 8 (2021), <https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>

manner would fulfill and advance congressional intent.

Second, doing so would add transparency while preserving the Secretary's flexibility. An interpretive rule would advise state and local educational agencies and tribes about the Department's interpretations. Although a whole child equity approach could appear to muddy waiver decisions on "academic" topics like annual assessments, research shows that multiple factors can affect a child's academic achievement, such as certified and experienced teachers, social emotional learning supports, and access to health care.<sup>201</sup> To that end, an interpretive rule would confirm that advancing "achievement" cannot be just understood to consist of academic achievement, and that addressing nonacademic factors bears on students' academic achievement.

Such a rule would preserve flexibility by establishing a clear, transparent standard of review. An interpretive rule would preserve decision-making power with the Secretary while adding insight to how those decisions are made. Especially on the heels of an administration that did not always clarify how it came to waiver decisions,<sup>202</sup> an interpretive rule would show the Biden Administration's commitment to meeting the needs of all students.<sup>203</sup> It would also add transparency to what the administration would not waive: proposals that do not consider whole child needs when opportunities to do so exist, and existing protections within the Every Student Succeeds Act that provide key safeguards for advancing equity.

Additional procedures like a formal, on-the-record hearing for waivers or having state officials review each other's requests through a peer review process might offer similar transparency. But these procedures would add more than what section 8401, which vests waiver decisions with the Secretary and separates initial determinations

---

[<https://perma.cc/9C3G-2UJN>].

201. See HEATHER CLAPP PADGETTE, CANDACE WEBB & PHYLLIS JORDAN, HOW MEDICAID AND CHIP CAN SUPPORT STUDENT SUCCESS THROUGH SCHOOLS 3 (2019), <https://ccf.georgetown.edu/wp-content/uploads/2019/04/Student-Success-Report.pdf> [<https://perma.cc/V8UU-TTSW>].

202. See Scott, *supra* note 92 (expressing concern that the Department of Education's ongoing use of waivers for assessments for students with significant cognitive disabilities "delayed implementation of a core requirement in ESSA").

203. See *The Biden Plan for Educators, Students, and Our Future*, JOE BIDEN, <https://joebiden.com/education/> [<https://perma.cc/X4J5-PMWR>] (last visited Sept. 2, 2021); BIDEN-SANDERS UNITY TASK FORCE RECOMMENDATIONS 79 (July 8, 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> [<https://perma.cc/FLX2-8L88>].

from formal, on-the-record hearings,<sup>204</sup> requires. And such procedures could drain agency resources or delay waiver decisions,<sup>205</sup> or might open those decisions up to different interpretations of “advanc[ing] student achievement”<sup>206</sup> in ways that forego the clarity and consistency of an interpretive rule. Even if an interpretive rule for whole child equity did not lead to watershed changes in day-to-day waiver reviews or were not applicable in some instances, an interpretive rule would provide a procedural way to reflect civil rights leaders’ calls for a racial justice approach to the Department’s work.<sup>207</sup>

Third, such an interpretive rule could be done without notice and comment, expediting implementation and adding transparency without delay. Of course, the Department would probably solicit comments regarding a proposed interpretive rule.<sup>208</sup> But comments would not legally bind the Department in the same manner as they would for a legislative rule. And the Department could still use a comment process to engage researchers and civil rights organizations that have already documented the links between whole child approaches and improved student outcomes, and to reflect such links on the record.

#### B. APPLYING AN INTERPRETIVE RULE FOR WAIVER AUTHORITY

While not exhaustive, the following examples show how an interpretive rule that defines “advancing student achievement” and any other waiver requirements could advance federal education priorities.

##### 1. Testing and Accountability

An interpretive rule could provide clarity on how the Secretary plans to evaluate requests to waive annual testing. Even as the Biden Administration urges schools to return to in-person instruction, it is still likely to face waiver requests as schools continue to grapple with

---

204. See Elementary and Secondary Education Act § 8401(b)(4)(A), (B)–(C).

205. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 363 (2019) (“In short, proceduralism drains agency resources, introduces delay, and thwarts agency action.”).

206. See Elementary and Secondary Education Act § 8401(b)(4)(A)(iii).

207. See King & Morial, *supra* note 20.

208. See, e.g., U.S. Dep’t of Educ., Proposed Priorities-American History and Civics Education, 86 Fed. Reg. 20348 (Apr. 19, 2021), <https://www.federalregister.gov/documents/2021/04/19/2021-08068/proposed-priorities-american-history-and-civics-education> [<https://perma.cc/2Q2D-WND5>] (soliciting comments for priorities for a civics grant program).

the pandemic.<sup>209</sup> And such requests may intensify as the Delta variant puts some school reopening plans into question.<sup>210</sup> Like last year, states might ask to waive assessment requirements completely; ask for targeted waivers that allow them to require only a sample of students to take an exam; test only certain grades; omit required “diagnostic reports” in areas of a subject like geometry, fractions, and so on; or skip alignments between tests and state standards.<sup>211</sup>

Here, an interpretive rule prioritizing whole child equity would offer the administration a consistent framework for granting or denying waivers. For instance, an interpretive rule could prompt states to show in their waiver applications how schools will focus on efforts like parent outreach and students’ social-emotional health. If the administration wants to urge states to implement assessments without formal accountability (as Secretary Cardona had supported and some civil rights groups had urged), an interpretive rule could enable the Administration to do so in order to document disparities caused by the pandemic.<sup>212</sup> If the administration wants to support targeted waivers, an interpretive rule could justify more labor-intensive approaches.

In the long term, an interpretive rule could address President Biden’s concerns about testing. For instance, the Secretary could devise waivers and guidance that let states adjust how they use assessment results, or that show states how to incorporate performance

---

209. See Ujifusa, *supra* note 71.

210. See Katie Reilly, *Schools Expected to Leave Virtual Learning Behind in the Fall, but the Delta Variant Is Forcing a Change in Plans*, TIME (Aug. 5, 2021, 2:43 PM), <https://time.com/6087815/covid-delta-schools-reopening> [<https://perma.cc/6GBH-N9JY>].

211. See Stephen Sawchuk, *Could Biden Find a Middle Path on Student Testing During the Pandemic?*, EDUC. WEEK (Dec. 1, 2020), <https://www.edweek.org/policy-politics/could-biden-find-a-middle-path-on-student-testing-during-the-pandemic/2020/12> [<https://perma.cc/5YX4-LSHR>].

212. See Barnum, *supra* note 19 (citing Letter from Ajit Gopalakrishnan to Connecticut superintendents (Oct. 15, 2020), [https://cdn.vox-cdn.com/uploads/chorus\\_asset/file/22194128/Connecticut\\_Student\\_Assessment\\_Guidance\\_for\\_2021.pdf](https://cdn.vox-cdn.com/uploads/chorus_asset/file/22194128/Connecticut_Student_Assessment_Guidance_for_2021.pdf) [<https://perma.cc/2GGD-DMJR>]); Kalya Belsha, *Teachers Unions Will Have Newfound Influence In a Biden Administration. Here’s How They Might Use It*, CHALKBEAT (Nov. 17, 2020, 10:50 AM), <https://www.chalkbeat.org/2020/11/17/21571346/teachers-unions-influence-biden-administration> [<https://perma.cc/8ZLZ-GMHW>].

assessments<sup>213</sup> or other alternative approaches.<sup>214</sup> An interpretive rule would underscore the value that fewer, better tests may have for building a complete picture of a child's academic achievement, and that revised approaches to testing may balance accountability. And an interpretive rule might even provide a rationale for granting a waiver on the condition that a school show how it is redirecting its resources toward student support and enrichment activities.

## 2. State Plan Amendments

Although an interpretive rule for waivers would not affect state education plans, a rule would signal what states should consider for future plan amendments. Under the Every Student Succeeds Act, every state must submit a plan to the U.S. Department of Education showing how the state will implement the Act's programs.<sup>215</sup> States began implementing their plans in the 2017–18 school year.<sup>216</sup> A state seeking to make significant changes to its Every Student Succeeds Act plan—including to its academic standards, academic assessments, or accountability system—must submit a state plan amendment.<sup>217</sup> These amendments are not subject to the waiver process. But an interpretive rule focused on ensuring whole child equity would serve as a signal. The Biden Administration could point to such a rule to show that, regardless of whether a state chooses to seek a waiver or submit a state plan amendment, states need to prioritize whole child equity in their use of ESEA funds.

With reauthorization of the Every Student Succeeds Act unlikely to happen soon, the Biden Administration might rally states to submit

---

213. ANNA MAIER ET AL., LEARNING POL'Y INST., USING PERFORMANCE ASSESSMENTS TO SUPPORT STUDENT LEARNING (2020), <https://learningpolicyinstitute.org/product/cpac-performance-assessments-support-student-learning-report> [https://perma.cc/MK4V-E48A].

214. David A. DeSchryver, *Biden's Regulatory Agenda on Education*, EDUC. NEXT (Oct. 30, 2020), <https://www.educationnext.org/bidens-regulatory-agenda-on-education> [https://perma.cc/6AGZ-JG92].

215. Elementary and Secondary Education Act § 8302(a)(1); see also *ESEA Consolidated State Plans*, U.S. DEP'T OF EDUC., <https://oese.ed.gov/offices/office-of-formula-grants/school-support-and-accountability/essa-consolidated-state-plans/> [https://perma.cc/5YT9-75P5] (last visited Sept. 2, 2021) ("The purpose of the consolidated State plan is to provide parents with quality, transparent information about how the ESEA, as amended by the ESSA, will be implemented in their State.").

216. BELLWETHER EDUCATION PARTNERS, AN INDEPENDENT REVIEW OF ESSA STATE PLANS: EXECUTIVE SUMMARY 1 (2017), [https://bellwethereducation.org/sites/default/files/Bellwether\\_ESSAReview\\_ExecSumm\\_1217\\_Final.pdf](https://bellwethereducation.org/sites/default/files/Bellwether_ESSAReview_ExecSumm_1217_Final.pdf) [https://perma.cc/V7RT-95Q4].

217. Elementary and Secondary Education Act § 1111(a)(6).

amendments to their Every Student Succeeds Act plans. Indeed, as the pandemic continues, states might seek state plan amendments that scale back federally required accountability efforts.<sup>218</sup> What the Secretary will or will not waive, therefore, provides an important consideration for a state considering a plan amendment—and might even steer states toward applying research-based recommendations for supporting student health and wellness.<sup>219</sup>

### 3. Additional Priorities

With the added transparency of an interpretive rule, the Biden Administration could come to members of Congress and ask for appropriations or statutory fixes by showing how it will evaluate requests for waivers in those programs. For instance, the administration could seek increased flexibility in the following areas:

- **Charter schools:** Offer to waive—or to refrain from waiving—certain requirements of the federal Charter Schools Program in exchange for a ban on for-profit charter schools.<sup>220</sup>
- **Student Support and Academic Enrichment Grants:** Seek the authority to waive or adjust the restrictions on technology purchasing, allowing for more money to be spent on providing devices to students and educators; identify provisions that could be reinterpreted or waived to promote access to Positive Behavioral Interventions and Supports, restorative justice, or other social and emotional learning initiatives.<sup>221</sup>
- **Flexibility for equitable per pupil funding:** Section 1501 of the ESEA offers local educational agencies the flexibility to consolidate federal, state, and local funds based on weights that allocate more funding to English learners, economically disadvantaged students, or other student groups a local educational agency chooses.<sup>222</sup> In districts with large intradistrict funding disparities, the Secretary could explore how to offer waivers in ways that would encourage them to participate—and, ideally, to direct

---

218. See Ujifusa, *supra* note 71.

219. See HEALTHY SCHOOLS CAMPAIGN & ALLIANCE FOR A HEALTHIER GENERATION, STATE ESSA PLANS TO SUPPORT STUDENT HEALTH AND WELLNESS: A FRAMEWORK FOR ACTION (2017), <https://healthyschoolscampaign.org/wp-content/uploads/2017/03/ESSA-State-Framework.pdf> [<https://perma.cc/42M8-WFGF>].

220. For more information on the federal Charter Schools Program, see SKINNER, *supra* note 2, at 15.

221. For more information on Student Support and Academic Enrichment Grants, see SKINNER, *supra* note 2, at 14.

222. Elementary and Secondary Education Act § 1501.

additional funds toward their highest-needs students that provide whole-child supports.

- **Desegregation:** The Secretary could task the Department's general counsel to identify additional provisions of the Act where waivers could facilitate school integration activities or equitable school funding.

Admittedly, many changes the Biden Administration seeks would require congressional appropriations or statutory fixes. A waiver on accountability requirements may not, say, induce a state to spend more on school construction or teacher salaries. But an interpretive rule on waivers could move educational equity forward while the administration focuses public attention and political capital on its legislative efforts, or if the Administration faces a Republican-controlled Congress. And a rule could raise flexibilities to explore in the next reauthorization of the Act.

#### CONCLUSION

Waivers help an agency respond to changing conditions, increase agency flexibility, and advance executive policy priorities. The words of section 8401 have changed relatively little. Courts have continued to support discretion in education and elsewhere. And the doctrinal and practical arguments for discretion within limits will only continue to grow in the face of a more complex national education landscape. By pursuing an interpretive rule and applying it to pressing Biden Administration priorities, the Secretary of Education can take advantage of an often-overlooked tool to move education forward for our nation's students.