

**DEPARTMENT OF EDUCATION****State Flexibility Program**

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice of proposed application requirements, selection criteria, and competition schedule.

**SUMMARY:** We propose application requirements, selection criteria, and a competition schedule for granting State educational agencies (SEAs) State flexibility (State-Flex) authority under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (Pub. L. 107-110). We are taking this action to implement the State-Flex competitions, under which the Secretary will grant State-Flex authority to up to seven SEAs. The authority will assist these SEAs, and the local educational agencies (LEAs) with which they enter into performance agreements, in making adequate yearly progress and narrowing achievement gaps.

**DATES:** We must receive your comments and recommendations on the application requirements, selection criteria, and competition schedule proposed in this notice on or before May 22, 2002.

**ADDRESSES:** Address all comments about the application requirements, selection criteria, and competition schedule proposed in this notice to Mr. Charles Lovett, Group Leader, Office of School Support and Technology Programs, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E241, Washington, DC 20202. If you prefer to send your comments by facsimile transmission, use the following number: (202) 205-5870. If you prefer to send your comments through the Internet, use the following address: [charles.lovett@ed.gov](mailto:charles.lovett@ed.gov).

If you want to comment on the information collection requirements, you must send your comments to the Department representative named in this section.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles Lovett, Group Leader. Telephone: (202) 401-0039 or via Internet: [charles.lovett@ed.gov](mailto:charles.lovett@ed.gov).

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339. Individuals with disabilities may obtain this notice in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed above.

**SUPPLEMENTARY INFORMATION:****Invitation to Comment**

We invite you to submit comments regarding the proposed application requirements and selection criteria. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 3E241, 400 Maryland Avenue, SW., Washington, DC between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**General**

The ESEA, as amended, authorizes the Secretary of Education to grant State flexibility (State-Flex) authority to up to seven State educational agencies (SEAs). (20 U.S.C. 7311 *et seq.*) With this authority, SEAs may (1) consolidate certain Federal education funds that are provided for State-level activities and State administration and use those funds for any educational purpose authorized under the ESEA in order to meet the State's definition of adequate yearly progress (AYP) under section 1111(b)(2) of the ESEA and advance the education priorities of the State and its LEAs; and (2) specify how LEAs in the State may use funds allocated under section 5112(a) of the ESEA (State Grants for Innovative Programs). In addition, an SEA with State-Flex authority must enter into performance agreements with not fewer than four, nor more than ten, LEAs (at least half of which must be high-poverty LEAs), giving those LEAs the flexibility to consolidate certain Federal education funds and to use those funds for any educational purpose permitted under the ESEA in order to meet the State's definition of AYP and specific, measurable goals for improving student achievement and narrowing achievement gaps. An SEA must propose the LEA performance agreements as part of its State-Flex application to the Secretary, and the Secretary will approve the agreements as part of the grant of State-Flex authority.

The purpose of the program is to create options for SEAs selected for State-Flex authority and for LEAs that enter into performance agreements to —

(1) Improve the academic achievement of all students and to focus the resources of the Federal government on this achievement;

(2) Improve teacher quality and subject matter mastery, especially in mathematics, reading, and science;

(3) Better empower parents, educators, administrators, and schools to effectively address the needs of their children and students;

(4) Provide greater flexibility in determining how to increase their students' academic achievement and implement education reforms in their schools;

(5) Eliminate barriers to implementing effective State and local education reform, while preserving the goals of opportunity for all students and accountability for student progress;

(6) Hold them accountable for increasing the academic achievement of all students, especially disadvantaged students; and

(7) Narrow achievement gaps between the lowest and highest achieving groups of students so that no child is left behind.

The Secretary will grant State-Flex authority to SEAs on a competitive basis using a peer review process. The grant of State-Flex authority will be for a period of five years, but that time period may be shortened or extended depending on an SEA's compliance with the terms of the grant of authority and the performance of SEAs and LEAs with performance agreements under that authority.

To be eligible for State-Flex, an SEA must submit to the Department an application that, among other things, demonstrates that the grant of authority offers substantial promise of (1) assisting the SEA in making adequate yearly progress; and (2) aligning State and local reforms and assisting the LEAs that enter into performance agreements with the SEA in making adequate yearly progress.

An SEA does not receive additional Federal funding for participating in State-Flex. Rather, an SEA with State-Flex authority receives greater flexibility in spending funds allocated for State-level activities and for State administration under the following ESEA provisions: section 1004 (Improving the Academic Achievement of Disadvantaged Children); paragraphs (4) and (5) of section 1202(d) (Reading First); section 2113(a)(3) (Teacher and Principal Training and Recruitment); section 2412(a)(1) (Enhancing Education

through Technology); subsection (a) of section 4112 (Safe and Drug-Free Schools and Communities Governor's funds, with agreement of the Governor); subsection (b)(2) and (c)(1) of section 4112 (Safe and Drug-Free Schools and Communities SEA funds); paragraphs (2) and (3) of section 4202(c) (21st Century Community Learning Centers); and section 5112(b) (Innovative Programs). An SEA with State-Flex authority may consolidate and use these funds for any educational purpose authorized under the ESEA in order to make adequate yearly progress and advance the educational priorities of the State and the LEAs with which the SEA enters into performance agreements. In addition, an SEA with State-Flex authority may specify how all LEAs in the State must use the funds that they receive under section 5112(a) of the ESEA, but the SEA must comply with the requirements in part A of title V for allocating those funds.

As noted above, an SEA seeking State-Flex authority must propose to enter into performance agreements with not less than four, nor more than ten, LEAs. At least half of these LEAs must be "high-poverty LEAs," which are defined in section 6141(b)(2) of the ESEA as LEAs in which 20 percent or more of the children who are age five through seventeen and served by the LEAs are from families with incomes below the Federal poverty line. The term "poverty line" is defined in section 9101(33) of the ESEA.

If any of an SEA's proposed performance agreements involve a consortium of two or more LEAs rather than an individual LEA, each LEA in the consortium is counted separately for purposes of determining compliance with the statutory provision governing the number of LEAs in a State that may enter into agreements and of determining if at least half of the participating LEAs are high-poverty LEAs.

The Secretary will approve the performance agreements as part of his initial grant of State-Flex authority to an SEA. An SEA may subsequently seek to amend its grant of authority to add or remove performance agreements, but at no time may there be performance agreements with fewer than four nor more than ten LEAs, at least half of which must be with high-poverty LEAs.

Like an SEA that receives State-Flex authority from the Secretary, an LEA that enters into a performance agreement with its SEA does not receive additional Federal funding for entering into the agreement. Rather, the LEA receives additional flexibility in spending funds that are allocated to it

by formula under the following ESEA provisions: Subpart 2 of part A of title II (Teacher and Principal Training and Recruiting); subpart 1 of part D of title II (Enhancing Education Through Technology); subpart 1 of part A of title IV (Safe and Drug-Free Schools and Communities); and subpart 1 of part A of title V (Innovative Programs). An LEA with a performance agreement may consolidate and use these funds for any educational purpose authorized under the ESEA in order to make adequate yearly progress and meet specific, measurable goals for improving student achievement and narrowing achievement gaps. The activities that an LEA would undertake under a performance agreement must be consistent with the activities that an SEA would undertake with its grant of authority. An LEA must also demonstrate that it would meet the general purposes of the programs included in the consolidation.

Participation in State-Flex does not relieve an SEA or the LEAs with which it enters into performance agreements of their responsibility to provide equitable services for private school students and teachers under the affected programs.

The performance agreements between an SEA and LEAs in States with State-Flex authority are essentially the same as the local flexibility (Local-Flex) demonstration agreements between the Secretary and LEAs in States that do not have State-Flex authority. On February 22, 2002, the Secretary published in the **Federal Register** (67 FR 8442-8444) a notice proposing application requirements and selection criteria for the Local-Flex program, which is authorized under sections 6151 through 6156 of the ESEA, and announcing that the Department intends to conduct two Local-Flex and two State-Flex competitions. We encourage you to review the Local-Flex notice in order to gain a better understanding of the relationship between State-Flex and Local-Flex. This notice is available on the Department's web site at: <http://www.ed.gov/legislation/FedRegister>.

As discussed in the Local-Flex notice, under the Local-Flex program the Secretary may enter into local flexibility demonstration agreements with (1) no more than three LEAs in a State; (2) a total of no more than 80 LEAs; and (3) only LEAs in States that do not have State-Flex authority. Furthermore, under the Local-Flex legislation, if an SEA notifies the Secretary, by May 8, 2002, that it will be applying for State-Flex, an LEA in that State will be precluded from applying for Local-Flex until the Department makes a final determination concerning the SEA's

State-Flex application, should the SEA subsequently submit one. The May 8, 2002 date is not the deadline for submission of a State-Flex application. Rather, it is the final date by which an SEA may preclude its LEAs from applying for Local-Flex by the SEA notifying the Department that it intends to apply for State-Flex.

An SEA that chooses not to notify the Department prior to May 8, 2002 that it will be applying for State-Flex may nonetheless seek State-Flex authority when the State-Flex competitions are conducted. LEAs in that State, however, would have an opportunity to seek Local-Flex before that SEA seeks State-Flex. An SEA would not be precluded from applying for State-Flex so long as it agrees to incorporate into its State-Flex proposal any Local-Flex agreements already entered into between the Secretary and LEAs in the State.

In the February 22, 2002 **Federal Register** notice, the Secretary indicated that he intends to publish a notice inviting applications for the first Local-Flex competition during the spring and would select the initial group of Local-Flex participants shortly thereafter. The Secretary also announced that he intends to conduct the initial State-Flex competition in late summer and would select three to four SEAs for State-Flex during that competition. Later this year, the Secretary would hold another Local-Flex and State-Flex competition. The Secretary invited comments on the proposed two-staged processes and will announce the final State-Flex and Local-Flex competition processes in a future notice in the **Federal Register**.

### **I. Proposed State-Flex Application Requirements**

In order that the Secretary can select State-Flex participants in accordance with the statutory requirements, the Secretary proposes that State-Flex applicants be required to submit the following information, together with other information addressing the application requirements in sections 6141(b) and (c) of the ESEA and the proposed selection criteria:

(a) *Evidence of the State's definition of adequate yearly progress.* Each SEA seeking a grant of State-Flex authority from the Secretary would be required to provide, as part of its application, evidence that the State has established a definition of adequate yearly progress (AYP) that meets the requirements in section 1111(b)(2)(B) of the reauthorized ESEA, unless the SEA has already submitted to the Department evidence that it has established an AYP definition that meets the new statutory

requirements. An SEA would be eligible to participate in State-Flex only if the State has established the required AYP definition and its definition is reviewed by peer reviewers and approved by the Secretary either prior to the SEA's submission of a State-Flex application or as part of the State-Flex review process. (A description of the new AYP requirements is provided in a January 18, 2002 **Federal Register** notice (67 FR 2770–2772) requesting advice and recommendations on regulatory issues, which is available on the Department's website at <http://www.ed.gov/legislation/FedRegister>.)

(b) *The SEA's strategies for consolidating funds, making adequate yearly progress, and advancing the education priorities of the State.* Each SEA seeking State-Flex authority would submit a five-year plan that describes how the SEA would consolidate and use funds from programs included in the scope of the State-Flex authority to assist the SEA in making adequate yearly progress and in advancing the education priorities of the State and the LEAs with which the SEA enters into performance agreements. In describing strategies for using State-Flex to make adequate yearly progress and to advance its education priorities, an SEA would also describe the specific limitations, if any, that it would impose on the use of funds provided to LEAs in the State under section 5112(a) of the ESEA.

(c) *Proposed performance agreements with LEAs.* Each SEA seeking State-Flex authority would submit, as part of its application, five-year performance agreements that the SEA proposes to enter into with not fewer than four, and not more than ten, LEAs (at least half of which must be high-poverty LEAs). The SEA would indicate why it proposes to enter into agreements with these LEAs rather than other LEAs in the State.

The SEA would describe the strategies that each LEA with a performance agreement would implement in order to meet the State's definition of adequate yearly progress and the LEA's specific, measurable goals for improving student achievement and narrowing achievement gaps. In particular, the SEA would describe how each of these LEAs would consolidate and use funds received under subpart 2 of part A of title II (Teacher and Principal Training and Recruitment); subpart 1 of part D of title II (Enhancing Education Through Technology); subpart 1 of part A of title IV (Safe and Drug-Free Schools and Communities); and subpart 1 of part A of title V (Innovative Programs); and what each LEA would seek to achieve under its proposed agreement. The SEA would describe how an LEA's use of

consolidated funds under a performance agreement would be consistent with the activities that the SEA would undertake with its grant of State-Flex authority. The goals in each LEA's proposed performance agreement would have to relate to the State's definition of AYP under section 1111(b)(2)(B) of the ESEA.

## II. Proposed State-Flex Selection Criteria

The Secretary proposes to use the following criteria in selecting the SEAs to which he will grant State-Flex authority:

(a) *Identification of the Need for the State-Flex Authority and the Proposed Performance Agreements.* The Secretary considers the SEA's need for State-Flex authority, including the need for the performance agreements that the SEA proposes in its State-Flex application. In determining need, the Secretary considers the extent to which—

(i) The SEA's proposal identifies achievement gaps among different groups of students, particularly in each of the LEAs with which the SEA proposes to enter into a performance agreement.

(ii) The State-Flex authority and proposed performance agreements would address the needs of students most at risk of educational failure.

(iii) The LEAs that would enter into performance agreements with the SEA serve a substantial portion of the students in the State who are most at risk of educational failure.

(iv) Requirements in the Federal programs that the SEA and LEAs with performance agreements would consolidate create barriers to implementing specific State and local education reform strategies.

(b) *Quality of SEA and LEA Strategies for Making Adequate Yearly Progress and Enhancing Education Priorities.* The Secretary considers the quality of the strategies that the SEA will implement under its grant of State-Flex authority, including the quality of the strategies in each of the proposed performance agreements, for making adequate yearly progress and for enhancing State and local education priorities. In determining the quality of these strategies, the Secretary considers the extent to which—

(i) The strategies that the SEA proposes for consolidating and using funds under the scope of the State-Flex authority and for directing how LEAs in the State will use funds under section 5112(a) of the ESEA will likely assist the State in meeting its definition of adequate yearly progress and in advancing its education priorities.

(ii) The performance agreements that the SEA proposes to enter into with LEAs in the State will likely assist the State in meeting its definition of adequate yearly progress and in advancing its education priorities.

(iii) The strategies in each of the proposed performance agreements, especially the strategies for consolidating and using funds under the scope of the agreements, will likely assist each affected LEA in meeting the State's definition of adequate yearly progress and specific, measurable goals for improving student achievement and narrowing achievement gaps.

(iv) The State-Flex proposal and each of the proposed performance agreements represent a coherent, sustained approach for meeting the purposes of the State-Flex program.

(v) The timelines for implementing the strategies in the State-Flex proposal, including timelines in the proposed performance agreements, are reasonable.

(c) *Quality of the Management Plans.* The Secretary considers that quality of the management plans that the SEA and affected LEAs would follow in implementing State-Flex activities. In reviewing the quality of the management plans, the Secretary considers the extent to which—

(i) The SEA will provide effective technical assistance and support to LEAs with performance agreements.

(ii) The SEA and each LEA with a performance agreement will use disaggregated student achievement data and data on other academic indicators to manage their proposed activities, to monitor their own progress on an ongoing basis, and to make appropriate adjustments to their implementation strategies.

(iii) The SEA will monitor LEA activities under each of the performance agreements, evaluate the effectiveness of each agreement, and propose modifications to LEA activities or to the agreements, as appropriate.

(d) *Adequacy of the Resources.* The Secretary considers the adequacy of the resources for the grant of State-Flex authority and the proposed performance agreements. In considering the adequacy of the resources, the Secretary considers the extent to which—

(i) The funds that the SEA proposes to consolidate under the grant of State-Flex authority are adequate to support the strategies that it seeks to implement with these funds.

(ii) The funds that each LEA would consolidate under its respective performance agreement are adequate to support the strategies in its agreement.

(iii) The SEA will coordinate the activities supported with funds

consolidated under its grant of State-Flex authority with activities funded with other resources to meet the purposes of the State-Flex initiative.

(iv) Each LEA with a performance agreement will coordinate the activities supported with funds consolidated under its agreement with activities funded with other resources to meet the purposes of the agreement.

(v) The costs that the SEA and affected LEAs will incur under the grant of State-Flex authority and the proposed performance agreements are reasonable in relationship to the goals that will be achieved.

### III. Proposed Competition Schedule

In the notice proposing application requirements and selection criteria for the Local-Flex program (67 FR 8442–8444), the Secretary announced that the Department intends to conduct two Local-Flex competitions and two State-Flex competitions. The Secretary received no comments on the two-staged processes for these flexibility programs.

The Secretary plans to publish a notice inviting applications for the first round of State-flex applications during June 2002. Those applications would be due on October 1, 2002. Under the application requirements that are proposed above, an SEA seeking State-Flex authority at that time would be required to submit, among other things, evidence that the State has established a definition of adequate yearly progress that meets the requirements in section 1111(b)(2)(B) of the reauthorized ESEA, unless the SEA has already submitted to the Department evidence that the State has already established an AYP definition that meets the new statutory requirements. The SEA would also have to submit its strategies for consolidating funds, and proposed performance agreements with not fewer than four, nor more than ten, LEAs.

The Secretary proposes to grant three to four SEAs State-Flex authority in the initial competition, and would award the remaining State-Flex slots in a subsequent competition that would be announced later this year.

The Secretary invites comments on whether this competition schedule is reasonable and provides SEAs with sufficient time and opportunity to seek State-Flex authority in light of the new Title I requirements.

### Executive Order 12866

This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice, we have determined that the benefits justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

*Summary of Potential Costs and Benefits:* It is not anticipated that the application requirements proposed in this notice will impose any significant costs on applicants. Since these regulations provide a basis for the Secretary to grant State-Flex authority to up to seven SEAs, giving the SEAs the flexibility to consolidate certain Federal education funds, direct LEAs' use of funds under part A of title V of the ESEA, and enter into performance agreements with four to ten LEAs, the regulations would not impose any unfunded mandates on States or LEAs. The benefits of the program are described in the SUMMARY section of this notice.

### Regulatory Flexibility Act Certification

The Secretary certifies that the requirements in this notice would not have a significant economic impact on a substantial number of small entities. The small entities affected by this notice would be small LEAs. Since the Secretary is authorized to grant State-Flex authority only to seven SEAs, and each of those SEAs must enter into performance agreements with four to ten LEAs, the requirements proposed in this notice will not affect a significant number of LEAs. In addition, these requirements are minimal and are necessary to ensure effective program management.

### Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that

have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Although we do not believe these proposed application requirements and selection criteria would have federalism implications as defined in Executive Order 13132, we encourage State and local elected officials to review them and to provide comments.

### Paperwork Reduction Act of 1995

This document contains proposed data requirements. The feedback received on these data requirements will eventually result in a new information collection and will be under the review of the Office of Management and Budget (OMB) until OMB approves the data requirements at the time of the final notice.

If you want to comment on the proposed information collection requirements, please send your comments to Mr. Charles Lovett, Office of School Support and Technology Programs, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E241, Washington, DC 20202. *Electronic Access to this Document:* You may view this document, as well as other Department of Education documents published in the **Federal Register** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: [www.ed.gov/legislation/FedRegister](http://www.ed.gov/legislation/FedRegister).

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll-free, at 1–888–293–6498; or in the Washington DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official version of the **Federal Register** and the Code of Federal Regulations is available on GPO access at: [www.access.gpo.gov/nara/index.html](http://www.access.gpo.gov/nara/index.html).

**Program Authority:** 20 U.S.C. 7311 *et seq.*

Dated: April 17, 2002.

**Susan B. Neuman,**

*Assistant Secretary for Elementary and Secondary Education.*

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