



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

January 29, 2018

The Honorable Kirsten Baesler  
Superintendent of Public Instruction  
North Dakota Department of Public Instruction  
600 East Boulevard Avenue, Department 201  
Bismarck, ND 58505

Dear Superintendent Baesler:

I am writing in response to North Dakota's request on November 30, 2017, for a waiver of section 1111(b)(2)(H) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), and 34 CFR 200.3(b)(2)(ii), which stipulates that, before a State may approve a locally selected, nationally recognized high school academic assessment for use by a local educational agency (LEA), the State must submit evidence to the U.S. Department of Education (Department) that demonstrates that each locally selected, nationally recognized high school assessment meets the requirements under 34 CFR 200.3, including peer review by the Department under section 1111(a)(4) of the ESEA. The North Dakota Department of Public Instruction (NDDPI) requested this waiver in order to allow for the administration in spring 2018 of the ACT by LEAs that request to replace the North Dakota State Assessment (NDSA) in reading/language arts and mathematics with the ACT.

Prior to a State's submitting a locally selected, nationally recognized high school assessment for peer review by the Department and allowing its use by LEAs in place of the statewide assessment, ESEA section 1111(b)(2)(H) and 34 CFR 200.3(b)(1) requires that the State conduct a technical review of the assessment. That review must determine if the assessment: 1) is aligned with the State's challenging academic standards; 2) addresses the depth and breadth of those standards; 3) is equivalent to or more rigorous than the statewide assessment with respect to the coverage of academic content, the difficulty of the assessment, the overall quality of the assessment, and other aspects that address the State's technical criteria; 4) meets the requirements in 34 CFR 200.2(b); and 5) produces valid and reliable data on student academic achievement that are comparable to student academic achievement data for all high school students and each subgroup on the statewide assessment at each academic achievement level and are expressed in terms consistent with the State's academic achievement standards, and provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system. 34 CFR 200.3(b)(2)(i) also requires the State to ensure that the use of appropriate accommodations does not deny a student with a disability or an English learner the opportunity to participate in the assessment nor any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners. The regulations require that this evidence be submitted for Department assessment peer review. These

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regulations are in place to ensure that, before a locally selected, nationally recognized high school assessment may be used in place of the statewide assessment, it fairly evaluates the achievement of the State's challenging academic standards for all students and each subgroup of students in an LEA that selects the assessment.

I appreciate the additional information that NDDPI submitted on December 29, 2017, to support this waiver request. After carefully reviewing this information in the context of NDDPI's request, I do not believe it sufficiently demonstrates that the ACT would meet all statutory and regulatory requirements. It is my understanding that NDDPI is administering the new NDSA for the first time in spring 2018 and likely has not yet set final academic achievement standards. As a result, it is unclear, for example, how NDDPI can be sure that the ACT produces valid and reliable data on student academic achievement that are comparable to student academic achievement data for all high school students and each subgroup on the NDSA at each academic achievement level, are expressed in terms consistent with the State's academic achievement standards, and provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system. Moreover, the information does not sufficiently demonstrate that the ACT is equivalent to (or more rigorous than) the NDSA regarding academic content coverage and alignment. I also think it is important that NDDPI evaluate that whether accommodations permitted by the ACT do not deny a student with a disability or an English learner any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners. For these reasons, I do not believe that the ACT warrants use by LEAs in North Dakota prior to formal review. Therefore, I am declining to approve NDDPI's request to waive ESEA section 1111(b)(2)(H) and 34 CFR 200.3(b)(2)(ii).

NDDPI may revise its waiver request, consistent with section 8401(b)(4)(B)(ii) of the ESEA to meet the requirements under sections 8401(b)(1)(C) and (F), and resubmit the revised waiver request. If NDDPI decides to resubmit, it must do so no later than 60 days from the date of this letter.

I appreciate the work you are doing to improve your schools and provide a high-quality education for your students. If you have any questions, please contact Megan Oberst or Jameel Scott of my staff at: [OSS.NorthDakota@ed.gov](mailto:OSS.NorthDakota@ed.gov).

Sincerely,

/s/

Jason Botel  
Principal Deputy Assistant Secretary,  
Delegated the Authority to Perform the  
Functions and Duties of the Position of  
Assistant Secretary of Elementary and  
Secondary Education

cc: Robert Bauer, Assessment Director  
Laurie Matzke, Assistant Superintendent of Public Instruction