



STATE OF MAINE
DEPARTMENT OF EDUCATION
23 STATE HOUSE STATION
AUGUSTA, ME 04333-0023

JANET T. MILLS
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COMMISSIONER

March 10, 2023

The Honorable James F. Lane, Ed.D.
Senior Advisor, Office of the Secretary
Office of Elementary and Secondary Education
US Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Dear Dr. Lane:

In response to the US Department of Education's February 24, 2023, letter concerning Maine's assessment system, the Maine Department of Education is providing additional information demonstrating that Maine met federal requirements and rules and acted in good faith. The Maine Department of Education's actions were guided, as always, by what the Department believed to be in the best interest of students, families, and educators, were made following substantial input from educators and education leaders in the state and occurred in the context of a global pandemic.

Below, please find the Department's response outlining and providing evidence to support three reasons why it would be improper for the US Department of Education to impose a "high risk" designation or a financial sanction against Maine's Title 1-A program. First, Maine should not be considered out of compliance with federal law based on a specific technical requirement that is not stated anywhere in ESEA statute nor in publicly developed rule. Second, the Department made this decision in the context of student and educator needs in the middle of a global pandemic and made good faith efforts to meet ESEA requirements. The Department made a well thought out and careful decision after weighing the risks associated with every option for Maine's assessment system during that challenging time and made this decision in partnership and full communication with the US Department of Education assessment and accountability team. Maine provided written formal notification to the US Department of Education of the state's intent to revise its assessment approach on September 22, 2020. Lastly, the Department believes that the US Department of Education's recommended sanctions would be unreasonable, disproportionate, and unfair, given the fact that no other state has received such sanctions. There are several examples of states that have failed to enact some of the key requirements stated directly in ESEA statute, and those states have not received comparable sanctions.

We urge you to give consideration to the explanations and evidence outlined below and to reevaluate your decision to impose such unprecedented and disproportionate sanctions against Maine based on a technicality not mentioned in law and during the extraordinary conditions caused by the COVID-19 pandemic.

Rationale #1: The Maine Department of Education Did Not Act Out of Compliance with Federal Law.

During the two school years severely impacted by COVID-19 (2021 and 2022), Maine administered temporary implementations of Measures of Academic Progress (MAP) Growth assessments for Reading and Math while the Department and NWEA engaged in the processes necessary for developing a new assessment plan.

These administrations, combined with the other components of the overall assessment system, met the key requirements, and supported the key goals in of ESEA “to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.” ESEA states that all schools must assess all students in grades 3-8 and once in high school in both Reading and Math. The statutes also specifically require that the same assessment be given to all students and that it be aligned to the state’s challenging academic standards. Maine complied with all of these statutes.

The MAP Growth assessments are aligned to Maine’s challenging academic standards for Mathematics and Reading at both the structural level and item level. [According to NWEA](#), at the structural level, NWEA Content Specialists “begin the development of tests by closely studying the standards and accompanying materials and appendices. They look for areas of focus within each subject and map the learning progressions from one grade to the next. Content Specialists then organize the critical concepts and progressions within the standards into a framework for each test. This two-tier framework contains the instructional areas and sub-areas that form the structure of the test. The result is a test aligned to the state standards at a structural level.” [At the item level, items are] “carefully selected and aligned to the state standards by NWEA Content Specialists...Items [from NWEA’s robust item bank] are aligned to individual standard statements when the content within the item clearly assesses the concept within the standard at the appropriate reading level, difficulty level, and level of cognitive complexity. Item alignments for these tests receive a second review for quality and consistency by at least one additional Content Specialist. As a result of this process, each item in the assessment item pool has a confirmed alignment to the state standards.”

The statute also requires the identification of three achievement levels and requires states to publicly post these, including disaggregated data to show achievement gaps for specific demographic groups. Maine complied with this requirement also and published the results on the Department’s online dashboard.

The Department complied with every key requirement stated in the ESEA statute, even during the transitional implementation of the MAP Growth assessment and during an unprecedented pandemic. There is no mention of “criterion referenced” achievement levels in the federal statute, and this is the technicality for which the US Department of Education’s letter claims that Maine is out of compliance with federal law.

Further, the applicable regulatory language, 34 CFR 200: [eCFR :: 34 CFR Part 200 -- Title I - Improving the Academic Achievement of the Disadvantaged](#), fails to mention a “criterion referenced achievement levels” requirement.

The Department understands that the US Department of Education has provided interpretive guidance in the “Critical Elements” guide for state agencies, which further describes the requirement as follows:

- **“Critical Element 6.1 – State Adoption of Academic Achievement Standards and ELP Achievement Standards for All Students:** The State formally adopted challenging academic standards in reading/language arts, mathematics, and science for all students, specifically:
 - The State formally adopted academic achievement standards in the required tested grades and, at its option, alternate academic achievement standards for students with the most significant cognitive disabilities. **(Maine completed this requirement)**
 - The State applies its academic achievement standards to all public elementary and secondary school students enrolled in the grade to which they apply, with the exception of students with the most significant cognitive disabilities to whom alternate academic achievement standards may apply. **(Maine applied the standards to all students as required)**
 - The State’s academic achievement standards and, as applicable, alternate academic achievement standards, include: (1) at least three levels of achievement, with two for high achievement and a third for lower achievement; (2) descriptions of the competencies associated with each achievement level; and (3) achievement scores that differentiate among the achievement levels. **(Maine completed these requirements)**

The allegation that the Department was out of compliance with federal law is a serious one and we can provide several examples of conflicting information from the US Department of Education, vacillating interpretations of the law, and uneven application of the law across the states who look to you for steady guidance. We maintain that our implementation of ESEA requirements in the 2021/2022 school years technically met the letter of the law and the following argument underscores our good faith efforts to do so, while following self-contradictory US Education Department guidance.

Rationale #2: The Maine Department of Education Acted in Good Faith to Meet ESEA Requirements While Keeping the Best Interests of Students and Schools at the Center.

The Department’s decision to change Maine’s assessment system was difficult and was prompted by a combination of issues and concerns about the effects upon student learning. Prior to the COVID-19 pandemic, the Department conducted statewide focus groups with teachers, families, school and district leaders, community partners, and policy makers. The Department learned that the assessment system in place was causing a variety of logistical challenges at schools, disrupting classes and internet access for three weeks each spring. These groups also noted that the provision of results from the assessments was consistently delayed until the following school year, rendering the assessment useless for educational or programing purposes. Although that previous assessment met the letter of the ESEA law, including statute as adopted by Congress and including the associated regulatory language, it was deemed neither valid nor reliable as an assessment instrument, as evidenced by the following citations from the peer review process:

- 3.1 Overall validity
- 3.2 Validity based on cognitive processes
- 3.3 Validity based on internal structure
- 3.4 Validity based on other variables
- 4.2 Fairness and accessibility
- 4.3 Full performance continuum

4.5 Multiple assessment forms

4.6 Multiple versions of the assessment

In addition to what the Department heard from practitioners and communities, on September 3, 2020, then-US Education Secretary Betsy DeVos sent a [letter to state education chiefs](#), explaining that assessment waivers would not be considered or granted for the spring of 2021, and stating that “necessity is the mother of invention”, encouraging states to take a hard look at their assessment systems and leverage this situation as an opportunity to reimagine better systems.

Before making our final decision to transition to an NWEA assessment product, the Department met with the US Department of Education’s assessment and accountability team in the Fall of 2020. The Department shared our dilemma of having to choose whether to sign a contract renewal with the current vendor or whether to incur the risks inherent in transitioning to a more meaningful assessment system for our state. The Department explained our hope that the NWEA product would ensure that schools could receive immediate and useful data, an especially critical need during the pandemic, that the assessment could be implemented remotely if necessary, and would be far less disruptive to valuable instructional time. The US Department of Education team warned that MAP Growth would not meet the peer review standards, but they also said that only about one third of all states had ever met those standards. No recently developed state assessments pass the validity and reliability standard. The Department then asked what types of sanctions had been imposed on states that failed repeatedly to meet peer review standards and US Department of Education team members said that no sanctions had ever been applied for that. Also, during a peer review process with the US Department of Education, the Department was told that harsh penalties associated with lack of compliance in these areas was reserved for states that did not openly communicate their plans or work with the US Department of Education toward compliance. In a meeting with several of the US Department of Education’s assessment and accountability team members, the Department was provided with an example where Tennessee did not offer an assessment and failed to communicate with the US Department of Education for a few consecutive years. They only received a warning letter.

The Department weighed the risks based on our conversation with the US Department of Education team and decided that it would be a bigger risk to renew a contract to continue using an assessment that was deemed not valid by peer reviewers and that would take a great deal of time away from instruction during a school year impacted heavily by COVID disruptions only to provide results in the following school year.

The Department moved ahead with an assessment for Reading and Math that would better support the best interests of Maine’s students, educators, and schools as an interim measure while we designed our Through Year Assessment. During the transition to Maine’s Through-Year Assessment, a “MAP Growth-like” assessment system that will meet all three levels of the US Department of Education’s expectations (statute, rule, and interpretive guidance), the state utilized the MAP Growth assessment to measure student achievement in Math and Reading as a temporary transitional assessment in the springs of 2021 and 2022. Given the fact that Maine’s previous assessment wasn’t deemed to be a valid measure, the Department felt that a pivot to an assessment with decades of validity and reliability evidence, with grade level expectations based on a well-vetted normative study derived from nation-wide student performance on that same assessment in the 2017 and 2018 pre-COVID school years, and that offered the capability for remote administration, if needed, was the best decision the state could make on behalf of the students, educators, schools, and families during the two most uniquely challenging school years ever faced by US public education systems.

The NWEA MAP Growth Assessment has been used by a majority of Maine school administrative units (SAUs) for decades as a progress monitoring instrument. This assessment measures student performance on Maine's Accountability Standards in Reading and Mathematics and was already being used by most schools to identify grade level performance in order to target instructional interventions. Also, most families have received the MAP individual student reports over the years and have become familiar with the format and with the diagnostic information provided

Maine provided written formal notification to the US Department of Education of Maine's intent to revise the state assessment approach on September 22, 2020.

ESEA Section 8401 grants the US Department of Education significant authority to waive ESEA provisions, including assessment requirements, "if the waiving of such requirements will advance student academic achievement." Because we knew that we were taking the best action for Maine's children and their academic achievement, we considered requesting an assessment waiver, as some states receive those waivers when they are transitioning to a new assessment. The US Department of Education discouraged Maine from applying for a waiver, however, confirming that despite the Secretary's broad authority to support sound assessment practices that will better advance student achievement there would be no assessment waivers granted to any states. Instead, the US Department of Education encouraged the Department to pursue a waiver from accountability requirements. We later learned that, in fact, some states were granted assessment waivers, after all. Below is an excerpt from the US Department of Education's notice granting Maine's accountability waiver:

After reviewing Maine's request, I am pleased to approve a waiver of the requirements listed above. The intent of these accountability waivers is to focus on assessments to provide information to parents, educators, and the public about student performance and to help target resources and supports. This is particularly crucial this year, due to the COVID pandemic. As a result, we also encourage you and your school districts to consider other steps within your purview to further reduce the stakes of assessments this year, such as excluding their use from students' final grades, grade promotion decisions, educator evaluations, and local school ratings.

Therefore, with extensive communication and relying on guidance from Secretary DeVos and from the US Department of Education assessment and accountability team, Maine implemented the key statutory requirements for assessing in all of the required areas, including Math and Reading, and adopted achievement levels for the specific purposes outlined in the letter excerpt above ("providing information to educators, parents and the public about student performance to help them target resources and supports"). We were not adopting achievement levels for the purposes of identifying failing schools, as we received a waiver from that part of ESEA, and therefore, we selected the appropriate cut scores, based on a reliable and well-vetted normative study and in a format familiar and useful to educators, parents, and the public.

Rationale #3: The Suggested Sanctions Are Unreasonable, Disproportionate, and Unfair Compared with the Allegation and with the US Department of Education's Treatment of Other States Believed to be Out of Compliance.

Given the specific allegation and given the US Department of Education's previous responses to states that have, in fact, been directly out of compliance with federal law, it would be improper to apply a high-risk designation or to fine Maine's administrative funds.

The ESEA statutes specifically state the requirement of a Reading and Math assessment to be given to all students in grades 3-8 and one year in high school. Maine accomplished that during both the 2021 and 2022 school years. Other states, including Massachusetts, Tennessee, and Arizona have previously failed to assess students, all outside of the context of a federally declared disaster, and were sanctioned less

harshly or not at all. The ESEA statutes specifically state a requirement that the same assessment be given to all students. Maine ensured that all schools were provided with the same assessments.

You mentioned in your letter that Massachusetts received a sanction more than eight years ago, when they didn't meet the baseline statutory requirement for providing all students with the same assessment. This is a poor example of parity, however, as Massachusetts was directly out of compliance with ESEA statute, and the withheld dollar amount was approximately the same as the amount the US Department of Education is planning to withhold from Maine. Maine receives approximately one fifth the amount of Title 1-A funds that Massachusetts receives (\$55 million compared with \$245 million).

A surface examination of the US Department of Education's treatment of other states alleged to have been out of compliance illustrates the disproportionate and unfair response in Maine's case. Taking into account Maine's relatively small Title I allocation and taking into account the fact that no other states have been sanctioned for their lack of compliance during the COVID pandemic, the disparity is even more confounding.

I urge you to give serious consideration to the arguments outlined in this letter to quickly resolve this matter. I also urge you and your team to work with members of Congress to address systemic issues that diverge from the intentions behind ESEA. State agencies are increasingly bound to prioritize the interests of the assessment companies over the best interests of the people we serve. Complicated and expensive processes determined to be required by "peer" reviewers (who are, in fact, largely representative of test company employees and contractors) must be built into the increasingly expensive contracts and these negotiations involve increased access to student information beyond what is necessary for conducting ESEA-mandated activities. Under your threat of these sanctions, our state is disadvantaged as we face the reopening of our contract with non-profit NWEA when they are acquired by a large for-profit curriculum publisher/digital learning company owned by Veritas Capitol. In the event that we are unable or refuse to comply with any contractual additions presented during this process, the new company could choose to pull out of the contract. Should that happen, our state would be unable to complete the requirements outlined in ESEA later this spring and further sanctions against our Title 1 program would be inevitable.

We look forward to your response and remain eager to partner in ways that are beneficial to students, schools, and the next to sacred work of public education.

Sincerely,

A handwritten signature in blue ink that reads "Pender Makin". The signature is written in a cursive, flowing style.

Pender Makin

Commissioner of Education