



# INDIANA STATE BOARD OF EDUCATION

**To:** Indiana State Board of Education Members  
**From:** Timothy Schultz, General Counsel Indiana State Board of Education  
**Date:** June 7, 2017  
**RE:** Lutheran South Unity School Waiver Request

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## I. Summary of the Applicable Law.

Pursuant to IC 20-51-4, certain nonpublic schools may qualify for choice scholarship funds. These qualifying schools are referred to as “eligible schools”.<sup>1</sup> However, eligible schools receiving choice scholarship funds that are placed in the lowest two grade designations for consecutive years will have their ability to receive choice scholarship funds suspended. Indiana Code 20-51-4-9(a) reads:

(a) The department shall enforce the following consequences for an eligible school that is nonpublic:

(1) If the school is placed in either of the lowest two (2) categories or designations under IC 20-31-8-3 for two (2) consecutive years, the department shall suspend choice scholarship payments for one (1) year for new students who would otherwise use a choice scholarship to attend the school.

(2) If the school is placed in either of the lowest two (2) categories or designations under IC 20-31-8-3 for three (3) consecutive years, the department shall suspend choice scholarship payments for new students who would otherwise use a choice scholarship to attend the school until the school is placed in the middle category or higher category or designation, for two (2) consecutive years.

(3) If the school is placed in the lowest category or designation under IC 20-31-8-3 for three (3) consecutive years, the department shall suspend choice scholarship payments for new students who would otherwise use a choice scholarship to attend the school until the school is placed in the middle category or higher category or designation, for three (3) consecutive years.

(4) Students who:

(A) are currently enrolled at a school described in subdivision (1), (2), or (3); and

(B) qualify for a choice scholarship for the upcoming school year;  
may continue to receive a choice scholarship at the school.

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<sup>1</sup> IC 20-51-1-4.7

“Eligible school” refers to a public or nonpublic elementary school or high school that:

(1) is located in Indiana;

(2) requires an eligible choice scholarship student to pay tuition or transfer tuition to attend;

(3) voluntarily agrees to enroll an eligible choice scholarship student;

(4) is accredited by either the state board or a national or regional accreditation agency that is recognized by the state board;

(5) administers the Indiana statewide testing for educational progress (ISTEP) program under IC 20-32-5;

(6) is not a charter school or the school corporation in which an eligible choice scholarship student has legal settlement under IC 20-26-11; and

(7) submits to the department only the student performance data required for a category designation under IC 20-31-8-3.

Based on the language contained in IC 20-51-4-9(a), eligible schools are subject to three categories of consequences. Every category of consequences contains four stages: Earn, Learn, Turn, and Return (“ELTR”).

<b><u>Earn</u></b>	<b><u>Learn</u></b>	<b><u>Turn (away)</u></b>	<b><u>Return</u></b>
The years the school <b><u>“earns”</u></b> the grades that result in choice scholarship suspension.	The years a school <b><u>“learns”</u></b> that it has been placed in Category 1-3 of consequences. Alternatively, when the school <b><u>“learns”</u></b> that it has demonstrated sufficient improvement to be taken out of a consequence category.	The years during which a school’s ability to receive new choice scholarship students is suspended. Thus, the school must <b><u>“turn”</u></b> away new students.	The year when new choice scholarship students may <b><u>“return”</u></b> to the school.

### **Category 1 of Consequences**

<b>Year 1 &amp; Year 2</b>	<b>Year 3</b>	<b>Year 4</b>	<b>Year 5</b>
Any combination of D's or F's.	School receives a C or better.	School receives a C or better.	School receives a C or better.
School <b><u>“earns”</u></b> Category 1 of Consequences.	School <b><u>“learns”</u></b> that it received a second consecutive D or F and that its ability to receive new choice scholarship students will be suspended in Year 4.	As the school received a combination of D and F for two consecutive years (Year 1 and Year 2), the school must <b><u>“turn”</u></b> away new choice scholarship students during Year 4. Additionally, the school will <b><u>“learn”</u></b> that it received a C in Year 3 and will be able to accept new students in Year 5.	As the school received a C or better in Year 3, new choice scholarship students may <b><u>“return”</u></b> to the school.

### **Category 2 of Consequences**

<b>Year 1 &amp; Year 2</b>	<b>Year 3</b>	<b>Year 4 &amp; Year 5</b>	<b>Year 6</b>	<b>Year 7</b>
Any combination of D's or F's.		School receives a C or better.	School receives a C or better.	School receives a C or better.
School <b><u>“earns”</u></b> Category 1 of Consequences.	School <b><u>“learns”</u></b> that it received a second consecutive D or F and that its ability to receive new choice scholarship students will be suspended in Year 4.	School <b><u>“learns”</u></b> that it received a third consecutive D or F in Year 3 and is placed in Category 2 of Consequences. Therefore, the school must <b><u>“turn”</u></b> away new choice scholarship students during Year 4 and Year 5.	The school will <b><u>“learn”</u></b> that it received a second consecutive C or better during Year 5, and will be able to accept new students in Year 7.	New choice scholarship students may <b><u>“return”</u></b> to the school.

## Category 3 of Consequences

Year 1 & Year 2	Year 3	Year 4, Year 5, Year 6	Year 7	Year 8
Three consecutive F's		School receives a C or better.	School receives a C or better.	School receives a C or better.
School <b><u>“earns”</u></b> Category 1 of Consequences.	School <b><u>“learns”</u></b> that it received a two consecutive F's and that its ability to receive new choice scholarship students will be suspended in Year 4.	School <b><u>“learns”</u></b> that it received a third consecutive F in Year 3 and is placed in Category 3 of Consequences. Therefore, the school must <b><u>“turn”</u></b> away new choice scholarship students during Year 4, Year 5, & Year 6.	The school will <b><u>“learns”</u></b> that it received a third consecutive C or better during Year 6, and will be able to accept new students in Year 8.	New choice scholarship students may <b><u>“return”</u></b> to the school.

### II. New Legislation.

During the most recent legislative session, the legislature enacted P.L. 251, which permits eligible schools to submit a request to the state board to waive or delay the consequences contained in IC 20-51-4-9(a).<sup>2</sup> Specifically, P.L. 251 amended IC 20-51-4-9 to include the following provision:

(b) An eligible school may submit a request to the state board to waive or delay consequences imposed under subsection (a) for a particular school year. The state board may grant a request to an eligible school that requests a waiver or delay under this subsection **if the eligible school demonstrates that a majority of students in the eligible school demonstrated academic improvement during the preceding school year.** A waiver or delay granted to an eligible school under this subsection is for one (1) school year only. An eligible school must make an additional request under this subsection to the state board to receive further delay or waiver of consequences imposed under subsection (a).

In short, the changes to IC 20-51-4-9 allow an eligible school to request the ability to continue accepting new choice scholarship students, despite receiving consecutive D's or F's, if the school can show that a majority of the school's students demonstrated "academic improvement during the preceding school year." However, the granting of a waiver or delay is not automatic even if a school is able to demonstrate that it has satisfied the legal threshold of academic improvement. Instead, the newly added language states that the "state board *may* grant a request." This language suggests that the Board has the ability to employ discretion when considering a school's request, even if the school is able to demonstrate that it satisfied the legal threshold of academic improvement during the preceding school year.

<sup>2</sup> P.L. 251, signed by the Governor on 4/28/17. As the legislation stated that an emergency was declared for the act, it became effective upon signing.

It is important to note that the newly added language states that any waiver granted by the Board will be for one year only. The receipt of a waiver does not reset a school's grades. If a school is in a situation in which it needs to achieve three consecutive C's or better, and it is granted a waiver, the school will need to continue asking for waivers until it has received the necessary grades to be taken out of the consequence categories contained in IC 20-51-4-9(a). For example, a school could receive three consecutive F's, and then in its 4<sup>th</sup> year the school could request and be granted a waiver. The school would still need to achieve a C or better for years 5 and 6 in order to be taken out of the consequence categories contained in IC 20-51-4-9(a), unless granted waivers for those years.

#### **A. Legal Threshold to Approve a Waiver Request.**

The first issue that must be addressed when the Board is considering a waiver request is whether "the eligible school demonstrates that a majority of students in the eligible school demonstrated academic improvement during the preceding school year." Unfortunately, the amendment does not define academic improvement, but the statutory language cited above does provide some guidance regarding the legislature's intent.

The newly added waiver provision states that successful waiver requests must be based on academic improvement "*during the preceding school year.*" 511 IAC 6.2-10 details the methodology for calculating school A-F grades. The methodology details numerous data points such as the growth, performance, and multiple measures. In other words, a school's previous school year grade is the single best indicator of a school's overall academic status for that year. If a school receives an "F" in one school year, and then receives an "A" or "B" in the immediately subsequent school year, such a change would indicate that a majority of students demonstrated academic improvement.

Relying on a school's grade not only takes into account multiple factors to measure academic improvement, but also has a practical element. Schools are assigned consequences, per IC 20-51-4-9, based on the grade designations that they receive. As grade designations result in consequences, it is practical to rely on grades to determine whether a school's waiver request should be granted. Put simply, grades result in consequences, thus grades should be used to provide relief from consequences. Therefore, a school must demonstrate academic improvement by improving the school's grade designation.

#### **B. Board Discretion.**

Despite the fact that a school requesting the grant of a waiver may satisfy the legal threshold of showing academic improvement in the preceding year by earning a better grade designation, the granting of the waiver is not automatic. As noted above, the waiver provision states that the "state board *may* grant a request" if the school demonstrates that a majority of students demonstrated academic improvement during the preceding school year.

As the Board has discretion pursuant to the statute, it is reasonable to conclude that the Board may consider additional factors beyond the school's grade when considering whether a waiver is appropriate. One factor that the Board could consider is the school's growth. Growth is a reasonable alternative factor to consider as the growth domain<sup>3</sup> for a single school year is actually comprised of a student's current and prior year scores. Thus, reviewing student growth figures from one school year allows for the determination of whether the students have shown "academic improvement" over the prior year. Although reviewing a school's growth data has certain advantages, it does not provide an overall picture of a school's academic improvement as not all students can receive growth. Thus, while reviewing growth data may assist with the Board's review of a waiver request, a school's grade should be the primary consideration.

Reviewing school growth data is only one example of an additional factor the Board may consider when employing its discretion. It is possible that a future law or regulation could be drafted in such a way that it could impose unintended consequences on a particular school, or the State's assessment system could be altered, etc. Thus, the first question the Board should address is whether a school requesting a waiver has improved its grade designation, but there may be situations in which the Board may consider alternative factors to support the school's waiver request.

### **III. The Waiver Request.**

Lutheran South Unity School ("LSUS") has submitted a waiver request to the Board pursuant to the amended version of IC 20-51-4-9. The request seeks a waiver for the 2017-18 school year, and shall apply to the 2017-18 school year only.

LSUS received an "F" for the 2012-13 school year, and a "D" for the 2013-14 and the 2014-14 school years. As LSUS received a "D" or "F" for three consecutive years, its ability to receive choice scholarship funds for new students has been suspended until the school receives a "C" or higher grade for two consecutive years. IC 20-51-4-9(a)(2). However, LSUS's grade designation has improved, as it received a "B" during the 2015-16 school year. Thus, LSUS has satisfied the legal threshold to receive a waiver for the 2017-18 school year.

LSUS's waiver request also includes materials demonstrating that the majority of LSUS's students, which were eligible to receive growth points, demonstrated typical or high growth during the preceding school year (2015-16). Specifically, records<sup>4</sup> indicate that over 80% of LSUS's eligible students received typical or high growth in math, and over 70% of LSUS's eligible students received typical or high growth in math, during the 2015-16 school year.

Therefore, the data demonstrates that LSUS has satisfied the waiver requirements contained in IC 20-51-4-9.

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<sup>3</sup> 511 IAC 6.2-10-1(24) "Growth domain" means the points awarded for scores of an eligible student on the mandatory statewide annual assessment administered in the accountable year, as compared with the scores of the same eligible student on the mandatory statewide annual assessment administered during the school year immediately preceding the accountable year.

<sup>4</sup> Growth data provided by the Indiana Department of Education.