

<b>EMPLOYMENT AND TRAINING ADMINISTRATION</b> <b>ADVISORY SYSTEM</b> <b>U.S. DEPARTMENT OF LABOR</b> <b>Washington, D.C. 20210</b>	<b>CLASSIFICATION</b> WIOA
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**ADVISORY: TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 11-19, Change 2**

**TO:** STATE WORKFORCE AGENCIES  
STATE WORKFORCE ADMINISTRATORS  
STATE WORKFORCE LIAISONS  
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS  
STATE LABOR COMMISSIONERS  
STATE LMI DIRECTORS

**FROM:** JOSÉ JAVIER RODRÍGUEZ /s/  
Assistant Secretary

**SUBJECT:** Negotiations and Sanctions Guidance for the Workforce Innovation and Opportunity Act (WIOA) Core Programs

1. **Purpose.**

This guidance<sup>1</sup> supersedes Training and Employment Guidance Letter (TEGL) 11-19, Change 1, published May 10, 2023, and rescinds TEGL 03-17 *WIOA Annual Performance Report Submission*, published September 12, 2017, developed jointly by the U.S. Departments of Labor and Education (the Departments). Through this updated guidance, the Departments:

- Revise the negotiations process and requirements to incorporate changes made in the Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator final rule (89 FR 13814 (Feb. 23, 2024)) (ESE final rule). This final rule, which took effect March 25, 2024, defines the Effectiveness in Serving Employers primary indicator of performance (ESE), as required by section 116(b)(2)(A)(i)(VI) of the Workforce Innovation and Opportunity Act (WIOA), as

<sup>1</sup> This guidance is a statement of the Departments' policy regarding the Workforce Innovation and Opportunity Act (WIOA). Other than statutory and regulatory requirements included in this document, the contents of this guidance do not have the force and effect of law. This document is intended only to provide clarity regarding existing requirements under the applicable law or agency policies.

<b>RESCISSIONS</b> TEGL 11-19, Change1; TEGL 03-17	<b>EXPIRATION DATE</b> Continuing
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Retention with the Same Employer. The ESE final rule requires states to report the indicator as a shared indicator across the six WIOA core programs.

- Include requirements for the annual performance report submission requirements to encompass all requirements in TEGL 03-17.
- Clarify the standard for meeting requirements for submission of Eligible Training Provider results.
- Clarify the standard for meeting requirements for local area performance negotiations.

This guidance also continues to delineate the process for negotiating levels of performance, as required by section 116(b)(3)(A)(iv) of WIOA; the process for assessing state performance; and explains the two instances in which a state may be sanctioned (including the imposition of those sanctions), namely for performance failure or for failure to report (section 116(f) of WIOA).

## **2. Action Requested.**

Distribute this information to the appropriate state and local staff, including program, reporting, performance accountability, and technical staff.

## **3. Summary and Background.**

a. Summary – This revised guidance rescinds and replaces TEGL 11-19, Change 1, published May 10, 2023, and TEGL 3-17, published September 12, 2017. Changes included in this guidance update the portions of TEGL 11-19, Change 1 that relate to the Effectiveness in Serving Employers performance indicator to align with the recently published ESE final rule. This revised guidance also combines all WIOA annual state reporting requirements in one document. The remainder of this guidance remains unchanged from TEGL 11-19, Change 1 and continues to outline: (1) the requirements for reaching agreement on the *negotiated levels of performance*; and (2) the application of sanctions for states outlined in section 116(f) of WIOA and its implementing joint regulations in 20 CFR part 677 and 34 CFR parts 361 and 463.<sup>2</sup>

b. Background – WIOA establishes performance accountability indicators and performance reporting requirements to assess the effectiveness of states and local areas in achieving positive outcomes for individuals served by the workforce development system’s six core programs.<sup>3</sup>

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<sup>2</sup> As stated in 20 CFR § 677.150(d) and 34 CFR §§ 361.150(d) and 463.150(d), the negotiations and sanctions process only applies to states as defined in sec. 3(56) of WIOA – each of the several states of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. It does not apply to the outlying areas as defined in sec. 3(45)—American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and the Republic of Palau.

<sup>3</sup> The six core programs are the Adult, Dislocated Worker, and Youth programs, authorized under WIOA title I and administered by the U.S. Department of Labor (DOL); the Adult Education and Family Literacy Act (AEFLA) program, authorized under WIOA title II and administered by the U.S. Department of Education (ED); the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III and

Under section 116(b)(2)(A) of WIOA, there are six primary indicators of performance for which each of the state core programs must negotiate levels of performance with its respective Federal agency:

- **Employment Rate Second Quarter after Exit (ERQ2)** - The percentage of program participants who are in unsubsidized employment during the second quarter after exit from the program (for the title I Youth program, the indicator is the percentage of program participants in education or training activities, or unsubsidized employment, during the second quarter after exit);
- **Employment Rate Fourth Quarter after Exit (ERQ4)** - The percentage of program participants who are in unsubsidized employment during the fourth quarter after exit from the program (for the title I Youth program, the indicator is the percentage of program participants in education or training activities, or unsubsidized employment, during the fourth quarter after exit);
- **Median Earnings Second Quarter after Exit (MEQ2)** - The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;
- **Credential Attainment Rate (CRED)** - The percentage of program participants enrolled in an education or training program (excluding those in OJT and customized training) who attain a recognized postsecondary credential, or a secondary school diploma or its recognized equivalent, during participation in or within one year after exit from the program. Under this primary indicator, the attainment of a secondary school diploma or its recognized equivalent is included only if the participant is employed or is enrolled in an education or training program leading to a recognized postsecondary credential within one year after exit from the program (this indicator does not apply to the Employment Service program);
- **Measurable Skill Gains (MSG)** - The percentage of program participants who, during a program year (PY), are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains toward such a credential or employment (this indicator does not apply to the Employment Service program); and
- **Effectiveness in Serving Employers (ESE)** - The percentage of program participants in unsubsidized employment during the second quarter after exit from the program who were employed by the same employer in the second and fourth quarters after exit. For the six core programs, this indicator is a statewide indicator reported by one core program on behalf of all six core programs in the state.

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administered by DOL (the Employment Service program); and the Vocational Rehabilitation (VR) program authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV and administered by ED.

WIOA requires the Governor of each state to submit a Unified or Combined State Plan that includes a four-year strategy for the state's workforce development system. States are also required to submit a modification to that plan after two years (sections 102(c) and 103(b)(1) of WIOA). In both the initial submission of a Unified or Combined State Plan and in the required two-year modification of the plan (section 116(b)(3)(A)(iii) of WIOA), states must include the *expected levels of performance* for each primary indicator of performance for each core program, as applicable. The approved Unified or Combined State Plan and the required two-year modification must reflect two years of *negotiated levels of performance* (section 116(b)(3)(A)(iv) of WIOA). Additional information on the process for setting these levels of performance is provided in section 4.

#### 4. Negotiations and Sanctions Guidance.

##### Terms

In this guidance, the Departments use the following terms with respect to the process of establishing levels of performance under section 116(b) of WIOA:

- **Expected levels of performance** are the levels of performance proposed by the state in the initial submission of the Unified or Combined State Plan and in the required two-year modification of the Unified or Combined State Plan prior to negotiations (section 116(b)(3)(A)(iii) of WIOA) for each primary indicator of performance for each core program;
- **Negotiated levels of performance** are the levels of performance mutually agreed to by the state and the Departments for each respective program. The negotiations process must be based on four factors described in section 4 of this guidance. These *negotiated levels of performance* must be incorporated into the approved Unified or Combined State Plan and the approved two-year modification of that Plan (section 116(b)(3)(A)(iv) of WIOA) for each primary indicator of performance for each core program;
- **Adjusted levels of performance** are levels of performance determined by adjusting the *negotiated levels of performance* at the end of the program year to reflect actual characteristics of participants served and the actual economic conditions experienced using the *statistical adjustment model* (see below) (section 116(b)(3)(A)(vii) of WIOA);
- **Actual level of performance** is the outcome reported by a state on the Statewide Performance Report (ETA-9169 OMB No. 1205-0526) for each primary indicator of performance for each core program (section 116(d)(2) of WIOA). The Departments will compare *actual levels of performance* to the *adjusted levels of performance* at the close of the program year to determine the state's performance success or failure pursuant to section 116(b)(3)(A)(vii) of WIOA;
- **Adjustment factor** is a positive or negative difference that will be added to the *negotiated level of performance* to determine the *adjusted level of performance*. The *adjustment factor* is the difference between the estimated levels of performance predicted

by the *statistical adjustment model* based on pre-program year estimates of participant characteristics and economic conditions and the levels of performance re-estimated by the *statistical adjustment model* after the close of the program year based on the actual participant characteristics and economic conditions. This calculation will yield a positive or negative difference, which will be used as the *adjustment factor* for the program year;

- **Individual indicator score** is the proportion the *actual level of performance* represents of the *adjusted level of performance* for a single performance indicator for a single program. It is calculated by dividing the *actual level of performance* achieved by the *adjusted level of performance* (20 CFR § 677.190(c)(5) and 34 CFR §§ 361.190(c)(5) and 463.190(c)(5));
- **Overall state program score** is the average of the *individual indicator scores* for a single WIOA core program across performance indicators (20 CFR § 677.190(c)(1) and 34 CFR §§ 361.190(c)(1) and 463.190(c)(1));
- **Overall state indicator score** is the average of the *individual indicator scores* for a single performance indicator across WIOA core programs (20 CFR § 677.190(c)(3) and 34 CFR §§ 361.190(c)(3) and 463.190(c)(3)); and
- **Statistical adjustment model** is an objective regression model, developed pursuant to section 116(b)(3)(A)(viii) of WIOA, used to estimate levels of performance and derive the *adjusted levels of performance* based on participant characteristics and economic conditions. Economic conditions include differences in unemployment rates and job losses or gains in particular industries. Characteristics of participants include but are not limited to: indicators of poor work history, lack of work experience, lack of educational or occupational skills attainment, dislocation from high-wage and high-benefit employment, low levels of literacy or English proficiency, disability status, homelessness, ex-offender status, and welfare dependency (20 CFR § 677.170(c) and 34 CFR §§ 361.170(c) and 463.170(c)). The *statistical adjustment model* also considers other factors that, through empirical support, are determined to have an effect on state outcomes. The Departments are committed to a transparent process for assessing state performance. Accordingly, ETA, the Office of Career, Technical, and Adult Education (OCTAE), and the Rehabilitation Services Administration (RSA) will publish the *statistical adjustment model* for all primary indicators of performance on their websites.

## The Negotiations Process Overview

Section 116(b)(3)(A)(iv) of WIOA requires that states reach agreement with the Departments on levels of performance for each primary indicator of performance for each of the core programs at two separate and distinct times, specifically during both the State Plan and State Plan modification approval process. These agreed-upon negotiated levels of performance, commonly known as “negotiated levels of performance,” must be included in the approved State Plan and State Plan modification, as applicable. These *negotiated levels of performance* must cover the first two program years of the Unified or Combined State Plan, with new approved *negotiated levels of performance* for each of the primary indicators of performance

for each of the core programs covering the third and fourth years of the Unified or Combined State Plan (*i.e.*, for the State Plan modification approval process). The submission to the Departments of the Unified or Combined State Plan and the required modification of a plan, including the required *expected levels of performance*, initiates performance negotiations between the state and the Departments.

Before the start of the first program year, *negotiated levels of performance* for the first and second years of the Unified or Combined State Plan must be established and included in the State Plan for its approval. Likewise, *negotiated levels of performance* for the third and fourth years of the required two-year State Plan modification must be established before the start of the third program year. To ensure performance negotiations and State Plan submission and approval are completed before the beginning of the first and third program years of a Unified or Combined State Plan, states must adhere to deadlines established in separate guidance issued by the Departments that govern State Plans.

Attachment III “WIOA Negotiations/Performance Process Flow Chart” illustrates the process for negotiations and Attachment IV “Determining Performance Success or Failure” illustrates the process for assessing performance, which is detailed later in this guidance.

The negotiations process will proceed as follows:

- Pursuant to section 116(b)(3)(A)(iii) of WIOA, each state must identify *expected levels of performance* in its Unified or Combined State Plan and in the two-year modification of that plan. *Expected levels of performance* for the first two years of a State Plan must be submitted in the initial submission of the Unified or Combined State Plan and in the initial submission of the two-year modification of that Plan, for years three and four, as described in 20 CFR § 677.170(a) and 34 CFR §§ 361.170(a) and 463.170(a) and should be the result of the state’s own analyses. *Expected levels of performance* must be stated to the nearest tenth of a percent (XX.X %) or to the nearest whole dollar for median earnings. States are reminded that the *expected levels of performance* proposed by states in their plan must be published for public comment prior to plan submission in accordance with state law, regulation, and policy. In order to satisfy these requirements and deadlines, the state should not wait for the release of the latest estimated levels of performance derived from the Departments’ statistical adjustment model.
- After the Unified or Combined State Plan submission, the state must negotiate and reach agreement with the respective Federal agency on the *negotiated levels of performance* for the indicators for each of the first two years of the Unified or Combined State Plan (or for the third and fourth years of the Unified or Combined State Plan during the required two-year modification process) for each of the core programs under section 116(b)(3)(A)(iv) of WIOA. With respect to the ESE indicator, since it is a statewide measure that reflects a combined result across WIOA titles I, II, III, and IV programs, the Departments will jointly engage in negotiations with state representatives from all core programs. The factors that will be taken into account during the negotiations process for all indicators and scores are described in detail below under Negotiation Factors.

- The Departments will use the *statistical adjustment model* as a tool in the negotiations process to estimate the state’s levels of performance prior to the program year to help reach agreement on the *negotiated levels of performance*. The negotiation factors outlined in section 116(b)(3)(A)(v) of WIOA and further described below under Negotiation Factors will be taken into account during this process.
- Once *negotiated levels of performance* are agreed upon, the state must incorporate the *negotiated levels of performance* into the Unified or Combined State Plan and the two-year modification of that plan prior to the plan’s approval (section 116(b)(3)(A)(iv) of WIOA).

### **Use of the Statistical Adjustment Model in the Negotiations and State Performance Assessment Processes**

As required by section 116(b)(3)(A)(viii) of WIOA, the Departments will use the *statistical adjustment model* to ensure that the impact of participant characteristics and economic conditions in the state are accounted for in determining the *negotiated levels of performance*.

The *statistical adjustment model* will perform two major functions in performance negotiations and assessment of state performance. First, it is one of the factors used when coming to agreement on the *negotiated levels of performance*. It is used to account for the economic conditions and the characteristics of participants to be served in the state and/or local areas (section 116(b)(3)(A)(v)(II) of WIOA). Second, it will be used at the close of a program year to adjust the *negotiated levels of performance* for the actual economic conditions experienced and actual characteristics of participants served (section 116(b)(3)(A)(vii) of WIOA); these are the *adjusted levels of performance*.

The Departments will update the *statistical adjustment model* with more recent data in a manner that is aligned with the common framework the Departments outlined in the preamble to the 2016 WIOA Joint Final Rule.<sup>4</sup> This approach ensures that estimates produced before the program year begins are based on historical data and estimates produced after the program year ends are based on actual economic conditions and participant characteristics. The addition of these data will strengthen the *statistical adjustment model’s* estimates and help produce estimates that yield accurate *adjusted levels of performance* and objective state performance assessments.

The Departments use the *statistical adjustment model* at two key junctures in negotiating and assessing state performance:

- Before the program year, the Departments use the *statistical adjustment model*, based on the data available at the time, to derive estimated coefficients and pre-program year

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<sup>4</sup> Workforce Innovation and Opportunity Act; Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule. 81 FR 55792 (Aug. 19, 2016).

performance estimates. The Departments use these estimates as one of four required factors in the negotiations process, in accordance with section 116(b)(3)(A)(v) of WIOA.

- After the program year, the estimated coefficients derived from the *statistical adjustment model* are re-estimated to incorporate additional data from before the program year that were not available at the time negotiations occurred. See Attachment V for a functional example. These estimated coefficients are then applied to pre-program year estimates of participant characteristics and economic conditions to obtain updated pre-program year performance estimates. These re-estimated coefficients are also applied to the actual economic conditions and characteristics of participants served to obtain post-program year performance estimates. The difference between these two pre- and post-program year performance estimates determines the adjustment factor (section 116(b)(3)(A)(vii) of WIOA).

The *statistical adjustment model* is critically important to the WIOA performance negotiations process. As more data become available, the Departments will periodically review the model and refine it as necessary.

The Departments will assess state performance using the model containing coefficients that were re-estimated after the program year using additional data that were not available at the time of negotiations. In other words, the Departments will assess for performance using more current data, which will lead to more accurate and reliable results than under the prior approach of using data that were locked in at the time the negotiated levels of performance were approved. For all core programs, the additional data used to re-estimate the coefficients include more recent observations of economic conditions and participant characteristics up to but not including the cohorts associated with the program year being assessed. By not including economic conditions and participant characteristics for the program year being assessed, the Departments will maintain separation between the state performance results being assessed and the data used to inform the re-estimated coefficients. The Departments will analyze available data to determine if reliable estimates can be made using the statistical adjustment model for the purpose of imposing sanctions.

### **Negotiating Levels of Performance**

As discussed in more detail previously, Unified or Combined State Plan submissions and the two-year modifications to those plans must contain *expected levels of performance* for the primary indicators of performance (section 116(b)(3)(A)(iii) of WIOA). Submitting this information is the first step in the negotiations process. Once the *expected levels of performance* have been submitted, each core program must begin negotiations with its respective Federal agency (section 116(b)(3)(A)(iv) of WIOA). Title I WIOA and title III Employment Service programs will conduct these negotiations with their ETA Regional Offices. The title II AEFLA program will conduct negotiations with OCTAE's Division of Adult Education and Literacy, and the title IV VR program will conduct negotiations with the RSA's State Monitoring and Program Improvement Division.



States have access to their own historical performance information and various other tools and resources, such as data from the Bureau of Labor Statistics or U.S. Census Bureau. These tools may be used to establish the states' *expected levels of performance*. When using other resources to analyze the relationship between labor market or economic conditions and actual performance, states should consider the reference period of the resource and the timeframes associated with each of the primary indicators of performance and apply them accordingly.

## **Negotiation Factors**

In reaching agreement on the *negotiated levels of performance*, states and the Departments must apply the following factors pursuant to section 116(b)(3)(A)(v) of WIOA. Note that WIOA does not specify more or less weight on any specific negotiation factor.

1. Take into account how the levels involved compare with the *negotiated levels of performance* established for other states (section 116(b)(3)(A)(v)(I) of WIOA).

The Departments will provide the most recent performance data for all states, including previous actual, negotiated, and *adjusted levels of performance*, and will use this information throughout the negotiations process.

2. Ensure that the levels involved are adjusted using an objective *statistical adjustment model* provided by the Departments (section 116(b)(3)(A)(v)(II) of WIOA).

Before the negotiations process begins, the Departments will provide the estimated performance outcomes produced by the *statistical adjustment model*, including the coefficients and state specific values for each variable. This information will include levels of performance, as estimated by the Departments, to be used to inform the negotiations process. State agencies and their respective Federal agencies must negotiate using the levels of performance estimated by the model, as one of four factors pursuant to section 116(b)(3)(A)(v) of WIOA, for each primary indicator of performance. These estimated levels of performance may not be altered for the purposes of negotiations, including any changes in participant characteristics or economic conditions anticipated by the state that would result in changes to the levels of performance predicted by the statistical adjustment model. Any changes in participant characteristics or economic conditions will be reflected in the model by using the actual participant characteristics and economic conditions after the close of the program year, and they will not be factored into the negotiations process.

3. Take into account the extent to which the levels involved promote continuous improvement in performance accountability measures by the state and ensure optimal return on the investment of Federal funds (section 116(b)(3)(A)(v)(III) of WIOA).

The Departments consider continuous improvement to be a critical factor in the negotiations process. The Departments will consider continuous improvement factors that ensure optimal return on investment of Federal funds.

The Departments acknowledge that there are many ways to define continuous improvement as related to state or national program circumstances. For example, continuous improvement may reflect:

- An increase from the levels of performance previously attained;
- Increases in percentile rankings of levels of performance either nationally or among similar states;
- A change in service strategy and delivery, including more progressive or innovative approaches designed to better meet participants' needs;
- A change in the intensity or comprehensiveness with which individuals are served; or
- A maintenance of previous performance for the top performing states.

The Departments acknowledge that changes to service strategy or individuals served do not always lead to increases in performance levels.

States and local areas must adhere to the priority of service requirements of WIOA title I programs as established in WIOA.<sup>5</sup> Additionally, the Departments encourage all other WIOA programs to maximize service to individuals with barriers to employment who may need more intensive services to achieve a positive outcome. The effect of serving more of these individuals will be accounted for in the *adjusted levels of performance* calculated after the program year.

4. Take into account the extent to which the levels involved will assist the state in meeting the performance goals established by the Secretaries of Education and Labor in accordance with the Government Performance and Results Act of 1993 (GPRA) (section 116(b)(3)(A)(v)(IV) of WIOA).

Section 116(b)(3)(A)(vi) of WIOA requires the Departments to establish long-term goals for the *adjusted levels of performance* for each of their core programs as provided under GPRA. GPRA is a mechanism through which Congress and the Office of Management and Budget (OMB) evaluate the success of Federal programs, including those operated by states and local areas. During negotiations, the Departments will take into consideration levels of performance that will assist the Federal agencies in meeting the established GPRA goals.

### **Determination of Sanctions**

There are two different types of failure that can lead to sanctions: failure to report and failure to meet *adjusted levels of performance* (section 116(f) of WIOA). A discussion of both circumstances is below.

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<sup>5</sup> Section 134(c)(3)(E) of WIOA, 20 CFR 680.600-660, TEGL 19-16, and TEGL 07-20 provide additional information regarding priority of service populations and service requirements.

## **a. Sanctions for Failure to Report**

States must submit complete and timely WIOA annual performance reports pursuant to the WIOA Joint Final Rule at 20 CFR § 677.180(a) and 34 CFR §§ 361.180(a) and 463.180(a). The “Workforce Innovation and Opportunity Act (WIOA) Performance Accountability, Information and Reporting System” information collection request (WIOA Joint Performance ICR), approved under OMB Control Number 1205-0526, contains the performance accountability reporting requirements for the core programs.

Sanctions will be applied when a state fails to submit the performance reports to the appropriate Federal agency, as required under section 116(d) of WIOA (section 116(f)(1)(B) of WIOA). Consistent with 20 CFR § 677.185(a) and 34 CFR §§ 361.185(a) and 463.185(a), the Departments consider a state as failing to submit the performance reports if the state either: (1) does not submit performance reports by 11:59 p.m. local time on October 1 or the next business day if October 1 falls on a holiday or weekend or (2) submits performance reports by the date for timely submission, but the report is incomplete.<sup>6</sup> Annual performance reports are complete when the state<sup>7</sup>:

- Attests all reports are complete and accurate to the best of its knowledge;
- Submits a WIOA Statewide Performance Report (ETA-9169) for each of the six WIOA core programs;
- Collects and reports all required elements of the WIOA Statewide Performance Reports as applicable to the core program and uses appropriate data for the reporting period;
- Makes available a mechanism of electronic access to local area performance reports for WIOA title I programs;
- Submits Effectiveness in Serving Employers performance results reflecting the combined performance of all six core programs as one performance indicator; and
- Makes available a mechanism of electronic access to a complete and accurate Eligible Training Provider (ETP) performance report for WIOA title I programs. In accordance with section 116(d)(4) of WIOA and 20 CFR § 677.230(a), an ETP performance report is complete and accurate when:
  1. The ETP report includes all training programs on the state Eligible Training Provider List (ETPL) in the most recent program year.
  2. The ETP report includes counts of all individuals (students) in a program of study which will typically be greater than the counts of WIOA participants in the same program of study, because it will include all students in that program, some of whom may not be WIOA participants. Reporting counts of all individuals (students) that are greater than WIOA participants is required for participant

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<sup>6</sup> Local time references the state capital’s time zone.

<sup>7</sup> See 20 CFR § 677.160(d), 34 CFR § 361.160(d), and 34 CFR § 463.160(d); 20 CFR § 677.205(f), 34 CFR § 361.205(f), and 34 CFR § 463.205(f); and 20 CFR § 677.230(d), 34 CFR § 361.230(d), and 34 CFR § 463.230(d).

counts, exiter counts, completer counts, ERQ2 results, ERQ4 results, and CRED results for no less than 10% of training programs.<sup>8</sup>

3. The submitted ETP report satisfies all data quality requirements established in ETA's Workforce Integrated Performance System (WIPS) and does not intentionally subvert the required edit checks (for example, including filler words that do not provide meaningful program descriptions, entering \$1.00 to bypass logical rules requiring reported earnings, or repeating a placeholder value for all programs to satisfy valid value requirements but in reality those data are missing or were not collected as required).

The Department of Labor provided states with sufficient time to establish IT systems and processes in support of required ETP reporting. The requirements for complete ETP reports described above are efforts to improve data quality now that ETP reporting has matured, and the All-Student waiver has expired and is no longer being granted.<sup>9</sup> The Department of Labor provides technical assistance resources and tools at <https://www.dol.gov/agencies/eta/performance/wips> that include the measures of completeness listed above (among others) so that states can proactively determine if their ETP data are complete. Using this tool will help states to ensure that their ETA reports meet the above requirements, making the report complete. Incomplete reports may be subject to sanctions pursuant to 20 CFR § 677.185(a). Should these thresholds for complete reporting need to be adjusted, this guidance will be revised as necessary.

If the performance reports submitted by the state do not meet all of the above requirements by the reporting deadline, the state annual report is incomplete.

The Departments implemented sanctions provisions for failure to report beginning with the PY 2017 WIOA Statewide Performance Reports submission, which was due on October 1, 2018.<sup>10</sup>

Consistent with section 116(f)(1)(B) of WIOA and 20 CFR § 677.185(b) and 34 CFR §§ 361.185(b) and 463.185(b), sanctions will not be applied in cases where failure to report is due to exceptional circumstances outside the state's control as determined by the Departments. The Departments defined "exceptional circumstances" in 20 CFR § 677.185(b) and 34 CFR §§ 361.185(b) and 463.185(b). Exceptional circumstances may include, but are not limited to:

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<sup>8</sup> See WIOA Eligible Training Provider (ETP) Performance Report Specifications and WIOA Eligible Training Provider (ETP) Performance Report Definitions (ETA-9171) OMB Control No. 1205-0526 for definitions and ETP reporting requirements.

<sup>9</sup> See Training and Employment Notice 7-21 *Expiration of the Workforce Innovation and Opportunity Act (WIOA) Waiver of the Obligation of Eligible Training Providers (ETP) to Report Performance Data on All Students in a Program of Study*  
<https://www.dol.gov/agencies/eta/advisories/training-and-employment-notice-no-07-21>

<sup>10</sup> ETP performance reports were required to be submitted beginning with the PY 2018 Annual Report due on October 1, 2019.

- Natural disasters;
- Unexpected personnel transitions; and
- Unexpected technology-related issues.

### **Extension Requests**

In the event of exceptional circumstances as described in the preceding section, the state must notify the Secretary of Labor or Education, as appropriate, in writing of a potential impact on the state's ability to submit its annual performance report, and request an extension, in order not to be considered failing to report (20 CFR § 677.185(c) and 34 CFR §§ 361.185(c) and 463.185(c)). The state's request for an extension should include a detailed account identifying the unexpected events precluding timely reporting sufficient for the Departments to make a determination. The following information should be included in an extension request:

- Sufficient detail of the unexpected circumstances that will lead to untimely or incomplete reporting to warrant an extension;
- A proposed extension, fitting of the circumstances causing the delay, which should not exceed 30 calendar days after the established annual reporting deadline;
- The names and contact information of each responsible state designee or designated point of contact who will ensure that any extended deadline will be met; and
- Any other information that the state deems relevant to help explain the need for an extension.

The state must submit the extension request as soon as possible, but not later than 30 calendar days prior to the established annual reporting deadline (20 CFR § 677.185(c)(1) and 34 CFR §§ 361.185(c)(1) and 463.185(c)(1)). The annual reporting deadline is October 1 each year or the next business day if October 1 falls on a holiday or weekend. Therefore, states must submit reporting extension requests no later than September 1 (or the next business day if September 1 falls on a holiday or weekend).

In cases where unexpected, exceptional circumstances occur within 30 calendar days of the established annual reporting deadline, the state must submit an extension request to the Secretary of Labor or Education, as applicable, as soon as possible but not later than the established annual reporting deadline (20 CFR § 677.185(c)(2) and 34 CFR §§ 361.185(c)(2) and 463.185(c)(2)). Under these circumstances, in addition to the information described above, the request should include sufficient explanation as to why notification of the delay could not be provided 30 calendar days prior to the established annual reporting deadline.

All extension requests will be reviewed by the Departments for completeness and a thorough explanation of exceptional circumstances. The Departments may grant extension requests as submitted, grant extension requests with revisions, or reject the extension requests. Proposed reporting extensions should not exceed 30 calendar days after the established annual reporting deadline and should be appropriate to and commensurate with the exceptional circumstances.

In the event of failure to report timely or completely, pursuant to section 116(f)(1)(B) of WIOA, the Governor’s discretionary funds provided under section 128(a) of WIOA will be reduced by five percent of the maximum available allotment in the immediately succeeding program year. The WIOA Joint Final Rule at 20 CFR § 677.195(a) and 34 CFR §§ 361.195(a) and 463.195(a) provide that the sanction is equal to five percent of the maximum allotment percentage that could be reserved by the Governor in the succeeding program year, not a five percentage-point reduction from the amount that a Governor elected to reserve. This sanction will be enforced for each year in which a state fails to report timely or completely.

#### **b. Sanctions for Failure to Meet Adjusted Levels of Performance**

In accordance with 20 CFR § 677.190(d) and 34 CFR §§ 361.190(d) and 463.190(d), a performance failure occurs if:

- Any single *Individual Indicator Score* for any single core program falls below 50 percent of the adjusted level of performance;
- The *Overall State Program Score* falls below 90 percent for that single core program; or
- The *Overall State Indicator Score* falls below 90 percent for that single measure.

Any state that fails to meet *adjusted levels of performance* for the primary indicators of performance for any year will receive technical assistance, including assistance in the development of a performance improvement plan provided by the Secretary of Labor or Secretary of Education (20 CFR § 677.190(b) and 34 CFR §§ 361.190(b) and 463.190(b)). However, if the state has the same performance failure occur in two consecutive program years, the Departments will apply sanctions. Further explanation of how technical assistance and sanctions will be applied is provided later in this section. A description of how this applies to assessing the ESE performance indicator can be found in the next section.

#### **Determining Performance Success or Failure**

The Departments will determine state performance success or failure at the end of each program year. In order to make a determination of success or failure, the *negotiated levels of performance* for that year will be adjusted using the *statistical adjustment model*, which will factor in data on the actual economic conditions of the state and the actual characteristics of the populations served by the program during that year. This adjustment will be calculated using the *adjustment factor* to produce the *adjusted levels of performance* described in the “Terms” section above. A detailed explanation of this calculation is found in Attachment II “Calculation—Adjusted Level of Performance.” This will determine the *adjusted levels of performance* for the program year against which the state’s *actual levels of performance* will be evaluated through the calculation of the performance score. Attachment IV, “Determining Performance Success or Failure,” provides an overview of the entire process.

The *individual indicator score* is calculated by dividing the *actual level of performance* achieved by the *adjusted level of performance*. The *adjusted level of performance* is

calculated by adding the *adjustment factor* to the *negotiated level of performance*. The *individual indicator score* will not be rounded; it will be truncated to the first decimal place. A detailed example can be found in Attachment I.

Table 1 illustrates an example calculation of the Overall State Program Scores. An Overall State Program Score is derived for each WIOA core program reflecting all applicable primary indicators of performance. Because ESE is reported on a statewide basis, it is not included in the calculation. The performance scores are calculated for each applicable primary indicator of performance and the average is computed. In this example, the *Individual Indicator Score* for Employment Rate—4<sup>th</sup> Quarter after Exit of 46.8 percent is a performance failure because it is below the 50.0 percent threshold.

The *Overall State Program Score* of 81.5 percent is obtained by averaging the scores for each applicable indicator in the program. Again, the ESE indicator is not included in this calculation because it is reported on a statewide basis. In this example, the core program did not achieve 90 percent, which is considered a performance failure. Percentages will not be rounded in this calculation; they will be truncated to the tenth of a percent.

Table 1: Calculation of Overall State Program Score

Primary Indicator of Performance	Actual Level of Performance (Numerator/Denominator)	Adjusted Level of Performance	Individual Indicator Score Calculation
Employment Rate—2 <sup>nd</sup> Quarter after Exit	$\frac{14,720}{20,000}$	75.1%	$\left(\frac{14,720}{20,000}\right) \div 75.1\% = 98.0\%$
Employment Rate—4 <sup>th</sup> Quarter after Exit	$\frac{8,200}{25,000}$	70.0%	$\left(\frac{8,200}{25,000}\right) \div 70.0\% = 46.8\%$
Median Earnings—2 <sup>nd</sup> Quarter after Exit	\$3,434	\$3,890	$\$3,434 \div \$3,890 = 88.2\%$
Credential Attainment	$\frac{12,500}{25,000}$	55.2%	$\left(\frac{12,500}{25,000}\right) \div 55.2\% = 90.5\%$
Measurable Skill Gains	$\frac{21,600}{30,000}$	85.6%	$\left(\frac{21,600}{30,000}\right) \div 85.6\% = 84.1\%$
Overall State Program Score* (Average of Individual Indicator Scores for this Core Program)	-	-	81.5%

\*For a detailed explanation of the calculation behind the Overall State Program Score, please refer to Attachment I.

Table 2 illustrates an example calculation of the Overall State Indicator Scores. An Overall State Indicator Score is derived for each primary indicator of performance across all WIOA core programs, other than ESE, which is reported on a statewide basis. In this example, the performance scores are calculated for the Employment—2<sup>nd</sup> Quarter after Exit indicator for each core program, and the average is computed. In this case, the *Overall State Indicator Score*, which is the average of all *Individual Indicator Scores*, is 92.6 percent, meaning that the core program achieved performance success. Again, percentages will not be rounded in this calculation; they will be truncated to the tenth of a percent.

Table 2: Calculation of Overall State Indicator Score

Program	Title I-Adult	Title I-Youth	Title I-DW	Title II	Title III	Title IV	Overall State Indicator Score* (Average of Individual Indicator Scores Across Core Programs)
Actual Level of Performance (Numerator/Denominator)	$\frac{14,720}{20,000}$	$\frac{8,820}{15,000}$	$\frac{12,648}{17,000}$	$\frac{9,300}{15,000}$	$\frac{21,330}{30,000}$	$\frac{6,792}{12,000}$	-
Adjusted Level of Performance	75.1%	70.2%	75.5%	67.5%	70.0%	69.0%	-
Individual Indicator Score Calculation	$\left(\frac{14,720}{20,000}\right) \div 75.1\% = 98.0\%$	$\left(\frac{8,820}{15,000}\right) \div 70.2\% = 83.7\%$	$\left(\frac{12,648}{17,000}\right) \div 75.5\% = 98.5\%$	$\left(\frac{9,300}{15,000}\right) \div 67.5\% = 91.8\%$	$\left(\frac{21,330}{30,000}\right) \div 70.0\% = 101.5\%$	$\left(\frac{6,792}{12,000}\right) \div 69.0\% = 82.0\%$	92.6%

\*For a detailed explanation of the calculation behind the Overall State Indicator Score, please refer to Attachment I.

In accordance with 20 CFR § 677.190(c)(3)(ii) and 34 CFR §§ 361.190 (c)(3)(ii) and 463.190 (c)(3)(ii), the Overall State Indicator Score for ESE, as reported by one core program on behalf of all six core programs in the state, is a statewide indicator that reflects the performance for all core programs. The Overall State Indicator Score for ESE is calculated by dividing the state's



unduplicated, aggregated annual result for all six core programs by the state's adjusted level of performance.

### **Phasing in Sanctions for Performance Failure**

The Departments used their transition authority under section 503(a) of WIOA to implement a phased-in approach to determine performance success or failure for each indicator or program, due to lack of available data, consistent with the requirements of 20 CFR § 677.190(c) and 34 CFR §§ 361.190(c) and 463.190(c). Consistent with past practice, the Departments will continue to inform states when the assessment of any performance indicator is delayed.<sup>11</sup>

The ESE indicator has been defined in the ESE final rule and PY 2024 will be the first year of data for the newly defined performance indicator. However a minimum of at least two baseline years of data must be collected to support a statistical adjustment model that could produce sufficiently reliable estimates for the purposes of performance negotiations and state performance assessments.<sup>12</sup> The Departments, in accordance with 20 CFR § 677.190(c)(4) and 34 CFR §§ 361.190(c)(4) and 463.190(c)(4), will collect and monitor state ESE performance results for at least PY 2024 and PY 2025 to establish a credible baseline and provide technical assistance. After PY 2025 data are collected the Departments will develop a statistical adjustment model for ESE in accordance with section 116(b)(3)(A)(viii) of WIOA. The Departments will notify the states of the model estimates' reliability and the Departments' ability to use the model for the purposes of fair and objective state performance assessments.

If a performance failure occurs at the end of the program year, the respective Federal agency and the state agency will work to develop a performance improvement plan, and the Federal agency will provide technical assistance in accordance with section 116(f)(1)(A) of WIOA.

In this guidance, the Departments want to make clear that if the state has the same performance failure occur in two consecutive program years, the Departments will apply sanctions, pursuant to section 116(f)(1)(B) of WIOA. This applies regardless of where those program years fall within the negotiations cycle. That is, although state *negotiated levels of performance* are negotiated at two-year intervals, a failure in the second year of one negotiation cycle followed by the same failure in the first year of the subsequent negotiation cycle is considered a failure in two consecutive program years. For example, the Departments will establish *negotiated levels of performance* for PYs 2024 and 2025 in one negotiation cycle and *negotiated levels of performance* for PYs 2026 and 2027 in another negotiation cycle. A state will be sanctioned if it has a repeat performance failure in PYs 2025 and 2026.

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<sup>11</sup> See Training and Employment Notice 04-24 *Workforce Innovation and Opportunity Act (WIOA) Core Program Performance Accountability Assessment for Program Year (PY) 2023*

<https://www.dol.gov/agencies/eta/advisories/ten-04-24>

<sup>12</sup> See Training and Employment Notice 24-23 *Effectiveness in Serving Employers Final Rule Publication Notice*

<https://www.dol.gov/agencies/eta/advisories/ten-24-23>

Specifically, the Departments will reduce the Governor’s discretionary funds provided under section 128(a) of WIOA by five percent of the maximum available amount in the program year immediately succeeding the second consecutive performance failure. This sanction will be enforced each successive year in which the state continues to have the same performance failure.

**c. Sanctions for Failure to Report and Repeat Failure to Meet Adjusted Levels of Performance in the Same Program Year**

If the state, in the same year, has both types of failure that would result in sanctions being applied as described in sections (a) and (b) above, meaning the state has both a failure to report and a failure to meet *adjusted levels of performance* for a second consecutive program year, then the Departments will apply sanctions for both types of failure. The WIOA Joint Final Rule at 20 CFR § 677.195(b) and 34 CFR §§ 361.195(b) and 463.195 provide that the sanction is equal to ten percent of the maximum allotment percentage that could be reserved by the Governor in the succeeding program year. The Departments will enforce this sanction each successive year in which the state continues to have the same reporting and performance failures.

**Local Performance and Negotiations under WIOA Title I**

**a. Negotiations with Local Areas**

Section 116(c)(1)(A)(i) of WIOA requires that all of the primary indicators of performance, including the ESE indicator, must be applied at the local level for the WIOA title I programs (Adult, Dislocated Worker, and Youth). Furthermore, 20 CFR § 677.205(a) provides that “[e]ach local area in a state under WIOA title I is subject to the same primary indicators of performance for the core programs for WIOA title I under 20 CFR § 677.155(a)(1) and (c) that apply to the state.”

**i. Local Performance and Negotiations for the ESE Indicator**

The same methods described in the *Negotiating Levels of Performance* and *Determining Performance Success or Failure* sections of this guidance, for defining performance levels and assessing performance at the state level, also apply at the local level. For ESE, this means that states and local areas must agree to a single, shared level of performance for the WIOA Adult, Dislocated Worker, and Youth programs in the local area. This single, shared level will be used to assess the one shared ESE result for all WIOA title I programs in the local area. For all other primary indicators of performance, each WIOA title I program will have individual negotiated levels of performance and will be assessed as individual programs.

The state is required to negotiate the ESE indicator with all local areas in program years in which this measure is also negotiated between the state and DOL. For PYs 2024 and 2025, baseline data will be reported by states. This means that states should be collecting baseline

data for these two years from their local areas to incorporate in the state's future local area statistical adjustment model as well.

## ii. Criteria for Complete Local Area Negotiations

In accordance with 20 CFR § 677.210(c), states must incorporate the following criteria into the negotiations dialogue with each local area:

1. The local board, the Chief Elected Official, and the Governor must negotiate and reach agreement on local levels of performance based on each local area's historical performance results and service capacity levels, and how each individual local area assists in/contributes to the aggregate attainment of the state *negotiated levels of performance*.
2. In negotiating the local levels of performance, the local board, the Chief Elected Official, and the Governor also must use the above-listed four factors of negotiation used at the state level.
3. In addition, the state's *statistical adjustment model* that aligns with the framework of the state-level model must be used at the beginning of the program year to negotiate and at the end of the program year to adjust negotiated local levels of performance in order to reflect the actual economic conditions experienced in the local area and the characteristics of the actual individuals served according to the state's established policies.

This means the negotiated levels of performance for a given local area will differentiate from the negotiated levels of the other local areas and the state for each program and performance indicator based on the characteristics of participants served, past performance, economic conditions of the local area, and the other required factors of negotiations listed above.

States should make available to the state's DOL-ETA Regional Office these negotiated and adjusted levels when completed, as well as making available the established policies for local performance negotiations and assessment, to the local boards and the state's DOL-ETA Regional Office prior to the start of the program year in which the policies will be applied.

The Departments have developed the framework for an objective *statistical adjustment model* that satisfies the WIOA requirements at the state level. States must use this framework and develop a model that satisfies their needs at the local level, both in the performance negotiations and year-end adjustment of local levels of performance.

The local board, the Chief Elected Official, and the Governor must negotiate and reach agreement on local levels of performance for two program years at a time, based on the state's *negotiated levels of performance*, no later than September 30 in each year in which state negotiations occur. The state must notify its DOL-ETA Regional Office that negotiations are complete and include in the notification the agreed-upon levels of performance for each local area.

## **b. Local Performance Success and Failure**

States must use local performance goals for WIOA title I programs for two required purposes: (1) to determine if a local area “performed successfully” for subsequent local area designation, and (2) to determine when a state must take corrective action when a local area fails to meet the *adjusted levels of performance*.

For the purpose of determining subsequent local area designation, the term “performed successfully” means that the local area met or exceeded the levels of performance the Governor negotiated with the local board and chief elected official for WIOA primary indicators of performance and that the local area has not failed any individual measure for the last two consecutive program years in accordance with a state-established definition, provided in the Unified or Combined State Plan, of “met or exceeded performance.” For subsequent designation determinations made at the conclusion of PY 2018, or at any point thereafter, states must base their findings of whether a local area performed successfully for the two most recently completed program years on all six of the WIOA primary indicators of performance where at least two years of negotiated and adjusted performance levels are available.

Before coming to agreement on the *negotiated levels of performance* for the local area, a state must establish the threshold for failure to meet *adjusted levels of performance* for a local area. Following the conclusion of the program year, a state must establish the adjusted level of performance for a local area, using the *statistical adjustment model* described. At least two years of complete data on any indicator for any local core program are required in order to establish *adjusted levels of performance* for a local area. States must provide technical assistance if a local area fails to meet the *adjusted levels of performance* agreed to for the primary indicators of performance in WIOA title I programs in any program year. Upon the state’s request to the Secretary of Labor, DOL may provide this technical assistance. The technical assistance may include:

- Assistance in the development of a performance improvement plan;
- The development of a modified local or regional plan; or
- Other actions designed to assist the local area in improving performance.

If a local area fails to meet the *adjusted levels of performance* agreed to for the same primary indicators of performance for the same core program authorized under WIOA title I for a third consecutive program year, the Governor must take corrective actions. If the Governor takes corrective action against a local area for failing to meet the negotiated goals, the state workforce agency should advise its Federal Project Officer of this action. The corrective actions must include the development of a reorganization plan under which the Governor:

- Requires the appointment and certification of a new local board, consistent with the criteria in 20 CFR § 679.350;
- Prohibits the use of eligible providers and one-stop partners that have been identified as achieving poor levels of performance; or

- Takes such other significant actions as the Governor determines are appropriate, which may include local area redesignation without the support of the local area in accordance with section 116(g)(2)(A) of WIOA and 20 CFR § 677.220(b).

5. **Inquiries.** Questions regarding this guidance should be directed to the appropriate ETA, OCTAE, or RSA office.

6. **References.** Refer to Attachment VI of this guidance.

7. **Attachments.**

Attachment I: Calculation—Overall State Indicator and Program Scores

Attachment II: Calculation—Adjusted Level of Performance

Attachment III: WIOA Negotiations / Performance Process Flow Chart

Attachment IV: Determining Performance Success or Failure

Attachment V: Functional Example of the Approach for Using the Statistical Adjustment Model

Attachment VI: References—Joint Negotiations and Sanctions Guidance