

Advisory Memo
September 15, 2011

US DEPARTMENT OF EDUCATION RECOMMENDATIONS ON THE WAIVER PROCESS

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for **EDUCATION REFORM**

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Last month, President Obama and Secretary Duncan announced that the U.S. Department of Education will soon begin a formal process for considering state and local waiver requests of federal education laws, such as Title I of the Elementary and Secondary Education Act (ESEA aka the No Child Left Behind Act or NCLB, 2002). This memo conveys our concerns and recommendations about that process.

We, like the Administration, would prefer that changes to ESEA/NCLB be made legislatively. The slow pace of Congressional action on ESEA does not, however, legitimate or necessitate a sudden or major rewrite of ESEA by the Executive branch. In fact, history and experience make us cautious if not outright skeptical about any administrative waiver process on grounds of:

1) Process – administrative review of policy changes is much less transparent and less open to public input than the regular order of legislative business; and,

2) Substance – many current waiver requests, as we explain below, are based on claims that are either overstated or misinformed.

To be clear, we do not question the USDOE's authority in this matter. Section 9401 of ESEA clearly permits the Secretary to consider waiver requests from states and local education agencies and to approve or deny them based on certain stipulations. Nor do we think the waiver process necessarily will enable ineffective or irresponsible state and local education policies. Some waiver requests have merit. Moreover, we agree with Secretary Duncan that approval of such requests should be conditioned on other reforms targeted at improving state and local education policies in

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accordance with the broader purposes of Title I and other ESEA programs.

However, other waiver requests would be disastrous for public education. Some of the states that have made the least effort to improve the quality of education and close achievement gaps are now asking for waivers that in essence allow them to gloss over or abdicate responsibility for low-performing districts and schools.

We ask that USDOE strive to balance the potential benefits of states' requests with the potential costs, to consider carefully all those for whom such benefits and costs respectively accrue, and to carefully distinguish the decibel level of and political forcefulness with which calls for change are made from their real merit and potential impact on children.

History shows that waiver requests from states are often to do less for the areas and school children that are most in need of intervention. In a report on the “Ed-Flex” program conducted by the USDOE in the mid-1990’s, the General Accountability Office concluded: “Most [waivers] have sought to change the way funds are distributed or to broaden the range of individuals who may benefit.”

ESEA determines how billions of dollars are spent on behalf of low-income and minority students, English Language Learners, and students with disabilities. The advances these groups have made over the life of ESEA have been hard fought, in no small part because they put greater demands on those responsible for implementing them. That dynamic and that history will be the 800-pound gorilla in the room of any regulatory “relief” discussion.

As the process moves forward, we ask that the USDOE strive to balance the potential benefits of states' requests with the potential costs, to consider carefully all those for whom such benefits and costs respectively accrue, and to carefully distinguish the decibel level of and political forcefulness with which calls for change are made

from their real merit and potential impact on children.

With these considerations in mind, we offer the following recommendations:

Process

We are encouraged by Secretary Duncan’s stated intent to make the waiver review process transparent and public. The fact that states will be allowed time to develop and seek input on their waiver requests and that such requests will be peer reviewed are also positive steps forward. We ask that state waiver requests be posted on the Department’s website as soon as possible after they are submitted and that the public be offered the opportunity and ample time to post comments. Also, while peer review has the potential to increase the amount of knowledge, expertise, and objectivity brought to bear, history indicates the need to provide clear guidelines to reviewers and ensure that knowledge of the actual provisions in the law being waived and of specific states’ K-12 policies also drive the process, even if it means overruling the conclusions of misinformed reviewers.

Requests that Should Be Excluded from Consideration

Section 9401 delineates areas of ESEA that cannot be waived, such as the distribution or allocation of funds and civil rights requirements. After reviewing the waiver requests of several education interest groups over the past several months, we find that many claims being advanced under the banner of “regulatory relief” are overstated, misinformed, or misguided. Most would put less rather than more emphasis on those schools and those children for whom change is most needed. We review the most egregious requests below in the hope that they, like those excluded under Section 9401, will not even be considered, let alone approved.

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1) Graduation Rates

In a letter dated November 15th, 2010 the National Education Association requested, “common-sense flexibility in calculating graduation rates for students.” We strongly oppose yet another renegotiation or delay on this issue, and ask that the USDOE finally and decisively implement and enforce the common measure of graduation rates that has been negotiated ad nauseam and now exists in both federal law and statute.

In 2004, the National Governors Association announced, with some fanfare, its support for and commitment to the common graduation rate measure. In mid-2008, Secretary Spellings proposed, negotiated, and implemented a regulation consistent with the NGA proposal. Secretary Duncan went through a similar process when the regulation was put in statute under the American Recovery and Reinvestment Act (ARRA), and made some additional modifications via negotiated rule-making. We see no reason to keep moving the goalpost. States should be expected to meet the USDOE’s 2012 deadline for implementation under the current ARRA statute and the accompanying regulation [34 CFR 200.19(b)(1)].

2) Additional Flexibility Around Adequate Yearly Progress

We have seen proposals from a number of groups to let states adjust their plans on adequate yearly progress. While we do not object in principle to modifying some aspects of current law, including those that would modify or temporarily freeze annual goals, we would point out that: 1) the regulatory process has already proved to be a flawed mechanism for doing so; and, 2) many such proposals are built on faulty

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arguments or assumptions. Here are two areas of particular concern:

a. Retroactive Changes In Annual Measurable Objectives

In July of last year, for example, the USDOE approved a waiver request from Virginia that allowed the state to set its 2009-2010 annual objectives, overall and for at-risk subgroups, after the state administered and analyzed its assessment results for the school year. Moreover, the Department approved Virginia’s proposal to have its 2010-11 objectives “to be determined.” The Department recently granted a similar post-testing, goal-lowering, waiver for the 2010-11 school year to the state of Montana. We are under no illusions about the sub-optimal process for using data to drive education policy and practice, but this makes a complete mockery of the entire concept, and sends a signal to all states that the goals in effect at any one time are not to be taken seriously.

The changes made for Virginia and Montana seem to be in direct violation of Section 9401, which requires that any waiver request “describes, for each school year, specific, measurable educational goals” both for all students and for at-risk subgroups. The USDOE should be open to waiver requests from states that feel

their AMO’s will result in the identification of too many schools in need of improvement. But we urge the Department to examine the veracity of such claims closely, to make such changes only prospectively rather than post-hoc, and consider offering relief via triage i.e., in some cases loosening and in some cases tightening the remedies for low-performing schools as prescribed in ESEA Section 1116.

More broadly, we ask that the USDOE consider each state’s standards, proficiency cut scores, and school improvement history to determine whether such changes meet the best interests of students. Section 1111 of ESEA specifies

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repeatedly that state academic standards must be “challenging” and also that parents must be assured that their schools’ methods of helping students achieve such standards will prepare students for high school graduation.

For example, among state leaders calling for waivers are those from Mississippi, which is judged by multiple objective sources to have the lowest standards of any state, and consistently ranks in the bottom of such states on comparable indices of achievement and high school graduation rates. Yet, the state has identified only 25% of schools in need of improvement. Unless Mississippi raises its standards, 25% should be considered an underestimate that excludes schools in which many students are being consigned to ultimate academic failure.

b. Use of Growth Models

Growth models offer advantages over those models that do not look at gains in student performance over multiple, consecutive years. Fifteen states are currently piloting growth models that were the subject of extensive peer-review and were approved under the previous Administration between 2005 and 2008. No systematic evaluation has been done of the fifteen pilots.

A paper published last year by the Education Sector raised questions about key aspects of the Tennessee growth model. The paper notes that while Tennessee’s model has some advantages, it, and a few others, have made student achievement data proprietary and in turn have greatly reduced transparency for parents and the general public. In another case, as documented in newspapers and a more recent report by the Education Sector, a state legislator in Texas uncovered

- to the apparent surprise of the state education agency - that under its growth model, students can make no actual gains on the state assessment and still be counted as making annual progress. Clearly, more study is needed before other states implement growth models with these types of fundamental problems.

3) Eliminating Annual Testing

Some of the same proponents of expanded growth models, such as the American Association of School Administrators, also want to eliminate annual testing of students in grades 3 through 8, which is the very foundation for measuring student growth over multiple, consecutive years. We find this contradiction telling about both the integ-

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rity of such proposals and the dangers of granting waivers in a piecemeal fashion. Annual testing is also fundamental to the “value-added models” many states are pursuing as part of their new teacher evaluation systems. Eliminating annual student testing would undermine if not completely derail those systems.

4) Counting All Students

Some proposals ask the Department to allow states or districts to count students in only one subgroup category for the purposes of data reporting and accountability. If a student were, for example, both African-American and identified as having a learning disability, he or she only would be counted in one of these two categories.

States have already left hundreds of thousands of students out of their accountability systems through overly high “N” size requirements i.e., the minimum number of students in any one subgroup. “One subgroup” waiver proposals would allow an even greater number of students to be excluded in achievement gap analyses. Moreover, the ability to cross-tab students in multiple categories and hold districts and schools accountable is fundamental to being able to assess issues such as whether minority students are over- or under-identified as having certain disabilities or are disproportionately subject to suspension or expulsion.

5) So-Called “One Size Fits All” Consequences for Chronically Low-Performing Schools

Several of the groups lobbying for waivers claim that the consequences for districts or schools not making adequate yearly progress are too rigid, punitive, or hasty. Nothing could be farther from

the truth.

Section 1116 of ESEA, which specifies the conditions for corrective action, already has a huge loophole that allows chronically low-performing schools to avoid having to undertake fundamental reforms - ever. The Government Accountability Office found that the “other,” i.e., non-specific, option for school restructuring was by far the most frequently selected by districts and schools. This is the very reason the Obama Administration has pressed for more robust interventions in exchange for the \$4 billion Congress allocated to states and school districts for school improvement over the past two years.

Even with the changes Congress and the Secretary have made, many of those who pledged to undertake restructuring or other more comprehensive reforms have failed to truly follow through on those promises. We strongly oppose any retreat on current policy. If anything, rules on

Several of the groups lobbying for waivers claim that the consequences for districts or schools not making adequate yearly progress are too rigid, punitive, or hasty. Nothing could be farther from the truth. If anything, rules on the use of School Improvement Grant funds for persistently low-performing schools should be tightened even further.

Since 2002, ESEA has required states and districts to improve the quality of teachers. In 2009, Congress reaffirmed these priorities by requiring every state, in exchange for stimulus funds, to commit to “making improvements in teacher effectiveness and in the equitable distribution of qualified teachers for all students.”

States that are falling short here should have to agree to a clear and accelerated plan, with annual measurable objectives and observable action steps.

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Reforms That Should Be Part of State Waiver Agreements

We commend President Obama’s and Secretary Duncan’s stated intention to couple the approval of waivers with state commitments to step up their reform efforts in key areas. Many states seeking waivers are already failing to live up to their obligations under federal law, despite repeated assurances that they will fulfill certain obligations in exchange for federal funds. Since we expect most states will ask for changes to their accountability plans that result in the identification of fewer schools as in need of improvement, we think it not only fair but absolutely necessary that states be asked tough questions about what they’ve done to reduce the number of schools so identified to help them progress toward meeting their annual measurable objectives, rather than lowering expectations and sending a signal that such schools are no longer expected to improve.

Here are some key reforms we think states should have to pursue as part and parcel of any waiver approval process:

1) Improving Teacher Quality and Ensuring an Equitable Distribution of Effective Teachers

Since 2002, ESEA has required states and districts receiving Title I funds to take steps to improve the quality of teachers and to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, and out-of-field teachers. Under the Bush Administration, very little progress was made on this, perhaps the most powerful civil rights requirement of NCLB.

As the Citizen’s Commission on Civil Rights reported in 2008, despite additional time and encouragement from the Department, state plans turned in by the Spring of 2006 pursuant to the 2002 law were nearly all deficient, and just nine of the revised plans that most states submitted by July 2006 were deemed approvable. As in the past, the equity requirement remained a major stumbling block in terms of the quality of state

plans. Several states still did not even have an equity plan. Yet the Bush Administration decided to give most states high marks for “effort” in writing good plans.

In 2009, Congress reaffirmed these as top priorities. One of four assurances that all states had to provide in exchange for state education fiscal stabilization funding was “making improvements in teacher effectiveness and in the equitable distribution of qualified teachers for all students, particularly students who are most in need.” All 12 states that received Race to the Top funding have USDOE-approved plans for meeting these goals. Several others have even moved ahead without Race to the Top money, as in the cases of Colorado and Louisiana, because peer reviewers (we think unfairly) gave them low scores or because, in cases like Indiana and Illinois, their plans were not finalized until after the RttT competition.

All 50 states and the District of Columbia should be evaluated thoroughly and meticulously as to whether they are meeting their obligations under ESEA, the stimulus bill, Race to the Top, and other programs, around measuring and improving teacher quality and ensuring the equitable distribution of effective teachers.

Of the annual \$3 billion allocated nationally by formula via ESEA Title II for the purpose of improving teacher quality and equity, every state, for example, is authorized under ESEA Section 2113 to reserve a portion of the funding to carry out activities to meet these goals including: “Reforming teacher and principal certification or licensing requirements” [2113(c)(1)]; “Carrying out programs that establish, expand, or improve alternative routes for State certification of teachers and principals” [2113(c)(3)]; “Developing systems to

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measure the effectiveness of specific professional development programs and strategies to document gains in student academic achievement,” [2113(c)(7)]; and, “Developing, or assisting local educational agencies in developing merit-based performance systems, and strategies that provide differential and bonus pay for teachers in high-need academic subjects such as reading, mathematics, and science and teachers in high-poverty schools and districts”[2113(c)12].

Moreover, under Section 2141(c) of ESEA, each state is required to mandate improvement plans for local education agencies that are not meeting their goals for teacher quality and equity, including requiring that school districts prioritize their ESEA Title II professional development funds for this purpose.

As part of any waiver approval process, all states should be required to produce evidence as to

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whether or not they are taking full advantage of their authority and meeting all their obligations under Sections 2113, 2141, and other similar provisions in federal law. States that are falling short here should have to agree to a clear and accelerated plan, with annual measurable objectives and observable action steps, to come into compliance. Otherwise, waivers that change achievement goals or alter required uses of funds should be refused. In addition, states that have actively opposed or hampered district attempts to improve teacher equity, such as California, whose State Superintendent weighed in against a lawsuit brought by the ACLU to modify “Last In, First Out” policies in Los Angeles due to their disproportionate impact on the highest-poverty and lowest-performing schools, should be considered ineligible for goal-lowering waivers prima facie.

2) Turning Around Low-Performing Schools

States that claim too many schools are being identified as in need of improvement should have their policies scrutinized to see if all efforts have been made to reduce the number of schools meeting their annual goals by raising student achievement rather than by lowering expectations. Every state since 2002 has had the authority to set-aside 4% of all Title I funds at the state level for the purpose of turning around low-performing schools, yet there seems to have been very little oversight of the use of these funds, and virtually no evidence that such funds have been used effectively.

Over the past two years, every state also has had to renew and strengthen its commitment to school turnarounds. One of the four assurances every state made to the federal government in exchange for fiscal stabilization money (\$53.6 billion nationally) under ARRA was that they would make progress in “[p]roviding intensive support and effective interventions for the lowest-performing schools.” Congress has allocated an additional \$4 billion to states that the USDOE has allocated under new, more stringent regulations and guidance.

States should have to provide a full accounting of how they have spent these funds and, in turn, the USDOE and its peer reviewers must decide to what degree the number of low-performing schools is a function of flawed or feckless state and district school improvement policies rather than overly ambitious or unrealistic annual achievement goals. In addition, school districts that make a convincing case that their reform efforts have been ill-served by the 4% school improvement state set-aside should be considered

for waivers that would award them their fair share of these funds directly rather than having to rely on state-level intermediaries.

3) Raising Standards and Improving Assessments

As noted above, federal law requires state standards to be challenging and that parents be assured that their method of helping students achieve such standards will prepare students for high school graduation. The law also sets out other requirements, such that standards be the same for all children, that assessment systems use the “same assessments used for all students in the state,” “involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding,” and that they provide for “reasonable adaptations and accommodations for students with disabilities” and “the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations.”

Even though monitoring and oversight by the USDOE has been historically weak with regard to such provisions, the USDOE issued a status report in January of 2009 on state compliance with ESEA’s standards and assessment provisions

that identified eleven states, seven years into the new law, that were failing to meet one or more of the law’s criteria. Any of these eleven states that have not rectified their policies should be ineligible for waivers of the law’s standard, assessment, and accountability provisions. Moreover, all states remaining should be prodded as to how they plan to make progress toward meeting the letter of the law on these issues on their own or through such means as voluntary participation in the Common Core Standards Initiative and/or one of the two Race to the Top assessment consortia.

The waiver process has both potential promise and profound perils. As it embarks on this process, we urge the Obama Administration and Secretary Duncan to remain steadfast on school reform, to resist misguided, misinformed, and misleading waiver proposals, and to condition approval based on a 360 degree view of state policies that prioritizes the needs of the historically disadvantaged groups of students that are the intended beneficiaries of ESEA and other federal education laws. We look forward to working with the Administration as the process unfolds, as we also vigorously pursue comprehensive changes to ESEA in cooperation with Congress through the regular legislative process.

Districts where reform efforts have been ill-served by the 4% school improvement state set-aside under Title I should be considered for waivers that would award them their fair share of these funds directly rather than forcing them to rely on failed state-level intermediaries.