



September 6, 2011

Submitted Via Electronic Mail to ESEA.Comments@ed.gov

The Honorable Arne Duncan
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-2110

Re: Waivers Under the Elementary and Secondary Education Act of 1965, As Amended

Dear Secretary Duncan:

The National Women's Law Center submits this letter to express its position on the Department of Education's use of waivers under the Elementary and Secondary Education Act of 1965 (ESEA). The Center is a nonprofit organization that has worked since 1972 to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health. The Center is a leader in the struggle to ensure equal educational opportunities and has worked since Congress enacted Title IX of the Education Amendments of 1972 to advance and protect the rights of students in educational institutions. To that end, the Center believes that children should have equal access to high quality education programs and that federal education policy must ensure that all students can benefit equally from rigorous academic standards.

The number of ESEA statutory and regulatory waivers granted by the Department has grown dramatically in recent years.¹ Moreover, the Department has indicated that it may vastly expand ESEA waivers in Fall 2011 if Congress does not reauthorize the statute.² The Center has serious concerns that an expanded waiver process will improperly focus our nation's energies on stopgap educational measures in the form of waivers rather than on reauthorization. Moreover, an expansion of the waiver process may also undermine the law's focus on high expectations for low-income students and vulnerable student populations,

¹ See U.S. DEPARTMENT OF EDUCATION, REPORT TO CONGRESS ON WAIVERS GRANTED UNDER SECTION 9401 OF THE ELEMENTARY AND SECONDARY EDUCATION ACT DURING CALENDAR YEAR 2009, at 9 (2010) [hereinafter 2009 REPORT TO CONGRESS], available at <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters/2010waiverreport.pdf> (noting that "the Department granted more waivers under . . . ESEA than in previous years").

² See, e.g., Alyson Klein, *New Details Emerge on Duncan's NCLB Waiver Plan*, EDUC. WK., July 15, 2011; Winnie Hu, *Schools Chiefs See a Path to Proposing Their Own Accountability Systems*, N.Y. TIMES, July 12, 2011; Michele McNeil, *As NCLB Renewal Stalls, Duncan Vows Flexibility*, EDUC. WK., June 12, 2011.

which include pregnant and parenting students, students who experience excessive discipline, and those who are exposed to bullying and harassment

However, should the Department expand its ESEA waiver process despite such concerns, it is essential that ESEA's core provisions are maintained without exception, that the process for granting waivers is transparent and guided by public input, and that states and districts receiving waivers agree to additional obligations that further the interests of vulnerable student populations. It is especially important that states and districts receiving waivers agree to collect and disseminate data on graduation rates, academic assessments, and any other indicators of student performance that is fully disaggregated, including by gender, and that is cross-tabulated by gender and race/ethnicity.

Specifically, the Center makes the following recommendations:

I. ESEA's Core Statutory and Regulatory Provisions Should Not Be Subject to Waiver.

ESEA is, at its core, a civil rights law. It was designed to address educational inequity by targeting federal dollars and attention to students who have historically been overlooked and underserved in our nation's schools. Although unworkable in some respects, ESEA's most recent iteration was unprecedented for its requirement that schools, districts, and states be held accountable in a meaningful way for the achievement of vulnerable student groups, such as students of color, poor students, students with disabilities, and English Language Learners.

It is, therefore, imperative that the Department maintain core provisions of ESEA's accountability system, making clear that they are not subject to waiver.³ It is critically important, for example, that the Department maintain the requirement that states, districts, and schools demonstrate continued progress toward and be held accountable for improving student academic achievement, *including among subgroups of students*. Moreover, the existing data reporting requirements of ESEA, including graduation rates based on a uniform definition, are key to ensuring accountability, transparency, and parental involvement and should not be subject to waiver of any kind.

II. The Department's Process for Considering Waivers Must Be More Transparent and Deliberative.

ESEA requires the Secretary to report to Congress each year regarding the number and type of waivers granted in the previous year.⁴ It also requires the Secretary to provide notice in the Federal Register of the Department's decision to grant each waiver and disseminate that information to interested stakeholders.⁵ But under the Department's current reporting

³ In addition, the Department must of course comply with statutory provisions that already limit its waiver authority. *See* 20 U.S.C. § 7861(c) (outlining restrictions on the Secretary's statutory waiver authority, including a provision that precludes waiver of "applicable civil rights requirements" and "parental participation and involvement" under ESEA).

⁴ *Id.* § 7861(e)(4).

⁵ *Id.* § 7861(g).

scheme, the Department may not inform stakeholders of waivers until months, sometimes even more than one year, after they have been granted.⁶

If the Department expands the use of ESEA waivers, it must ensure that the waiver process is open and transparent. The Department should, for example, give real-time notice to stakeholders of pending and approved requests for waivers, including by posting applications on the Department's website as they are received. It should also solicit meaningful input from local communities and establish clear guidelines about how that input will be used.

In addition, the Department should make clear how it plans to evaluate waiver applications. In its current non-regulatory guidance on Title I, part A, waivers under ESEA, the Department indicates that the Secretary will simply review each request for compliance with the standards set forth in the statute and "may also consider other relevant policy factors."⁷ This description of the waiver consideration process is far too vague given the Department's contemplated expansion of waivers. It is important that the Department make public how it plans to weigh the statutory elements of waiver applications and whether it will use any non-statutory criteria to evaluate applications. Moreover, it should identify how it plans to ensure that student academic performance and instructional quality are improved as a result of waivers, and explain how these factors affect its decision to grant or deny waivers. Finally, the Department should subject all waiver applications to a peer review process for evaluation.

III. The Department Must Ensure that the Waiver Process Actually Improves Student Academic Achievement and Instructional Quality.

Congress identified in ESEA's statutory waiver provision the requisite goals underlying the waiver process. By statute, waiver applicants must describe how the waiver would "increase the quality of instruction for students" and "improve the academic achievement of students."⁸ In any expansion of ESEA waivers, then, it is critical that the Department's process for granting waivers hew closely to these statutory goals, demanding that no child be worse off as a result of the waiver than he or she would have been had all statutory and regulatory requirements applied.

⁶ See, e.g., U.S. Department of Education, Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended, 75 Fed. Reg. 56,834 (Sept. 16, 2010), available at <http://www2.ed.gov/legislation/FedRegister/other/2010-3/091610c.pdf> (reporting waivers granted in 2009). It is unclear to what extent the statutory waiver provisions requiring states and districts requesting waivers to provide notice and information about the waiver to the public have been effective. See 20 U.S.C. § 7861(b)(3)(A)(iii) (regarding state agencies); *id.* § 7861(b)(3)(B)(ii) (regarding local educational agencies). Those provisions specify only that the states and districts must provide notice in the same manner that they "customarily" use to provide notice or information to the public on other issues.

⁷ U.S. DEPARTMENT OF EDUCATION, NON-REGULATORY GUIDANCE ON TITLE I, PART A WAIVERS 11 (2009), available at www2.ed.gov/programs/titleiparta/title-i-waiver.doc.

⁸ 20 U.S.C. § 7861(b)(1)(B).

We are not aware of evidence that prior waivers have actually “increased the quality of instruction to students” or “improved the academic achievement of students.”⁹ For example, in the Department’s report on Calendar Year 2009, the Department devoted only one paragraph to such analysis, promising to provide data in future years on the effects of growth model, differentiated accountability, and SES pilot waivers on student academic achievement.¹⁰ If the Department expands its use of ESEA waivers, reliable evidence that waivers are actually in students’ best interests is even more important.

Furthermore, the Department should monitor and enforce commitments to improve student achievement made by states in their waiver applications and in other ESEA plans and proposals submitted to the Department in connection with their receipt of federal financial assistance under ESEA, SIG and Race to the Top. The Secretary should annually collect and disseminate information to the public on the impact of waivers on student achievement.

In Exchange for Waiving Statutory or Regulatory Requirements, the Department Should Impose Additional Obligations on States, Districts, and Schools to Ensure Educational Equity and High Standards for All Students. The Center strongly believes that if the Department waives a statutory or regulatory requirement for a state or district, it should require, in exchange, additional obligations and assurances from those entities. Significant non-academic barriers to learning exist, which hamper student engagement and achievement, some of which are based on categories protected by existing civil rights laws. For example, while Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs or activities by recipients of federal funding, including bullying and harassment based on sex, in many schools harmful conduct goes unaddressed, contributing to a school climate that limits the academic performance and success of any affected students. In waiving ESEA statutory or regulatory requirements, we urge the Department to at least address barriers to learning that conflict with civil rights laws. We also urge the Department to limit waivers to those entities with a proven track record of compliance with civil rights laws and of improvement in academic performance. Specifically, the following parameters should apply to an expanded waiver program:

- States and districts receiving waivers must agree to collect and disseminate more detailed disaggregated data to track the performance of student subgroups, including by gender. Data reported by states and districts on graduation rates, academic assessments, and any other indicators of student performance should be fully disaggregated and cross-tabulated by gender and race/ethnicity. In addition, the Department should hold states and districts receiving waivers accountable for the performance of all subgroups of students, fully disaggregated, and cross-tabulated by gender and race/ethnicity.
- A state or district should be ineligible for an ESEA waiver if it has been the subject of a recent civil rights investigation for which a violation was found, or if it has been subject to suit or administrative proceedings for recently confirmed civil rights

⁹ *Id.* § 7861(e)(4).

¹⁰ 2009 REPORT TO CONGRESS, *supra* n.1, at 9.

violations. The Department’s consideration of a waiver application should also take into account a state or district’s civil rights track record based on data from the Civil Rights Data Collection dataset.

- States and districts applying for waivers must indicate not only that they have provided public notice as required by 20 U.S.C. § 7861(b)(3), but also that they have solicited stakeholder participation in and comments on the application process. They must further indicate how they will continue to keep the public apprised of the waiver request and implementation. States and districts should attach to their waiver applications not only a copy of the public notice, as is arguably required by the Department’s Non-Regulatory Guidance on Title I, Part A Waivers,¹¹ but also all public comments received on the proposed waiver.
- The Department should require state and district recipients of waivers to provide evidence (or realistic plans to ensure) that all students are provided equal access to curriculum, coursework materials (including technology), and other supports aligned with college- and career-ready standards (e.g., college-preparatory courses in middle and high schools; college-credit-eligible classes like AP, IB, dual enrollment programs; and high quality career and technical education programs). Given the historical underrepresentation of women and girls in STEM fields, information about such access should be disaggregated by gender within each subgroup, to expose disparities in access and barriers to equal opportunity.
- The Department should maintain graduated interventions for all issues that undermine student achievement, including non-academic barriers to learning such as an over-reliance on exclusionary discipline¹² or exposure to dangers such as bullying and harassment. Any meaningful proposal for increasing academic achievement must address these issues. Therefore, waivers issued by the Department must require states and LEAs to implement accountability systems that reduce or eliminate – through evidence-based practices – the following problems:
 - Low academic achievement by any subgroup identified in Section 1111(b)(3)(C)(xiii),
 - Significant and persistent achievement gaps on statewide assessments between subgroups identified in Section 1111(b)(3)(C)(xiii), and
 - High rates and/or substantial or persistent subgroup disparities in non-academic indicators of student engagement, including:

¹¹ See NON-REGULATORY GUIDANCE, *supra* n.7, at 10-11 (restating generally 20 U.S.C. § 7861’s public notice provision applicable to states and districts), App’x A-H (providing model waiver applications, which state that “[State] has also provided notice and information regarding this waiver request to the public in the manner in which [State] customarily provides such notice and information to the public [*insert description of public notice . . .*] (see attached copy of public notice)”).

¹² *Breaking Schools’ Rules: A Statewide Study on How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, at <http://justicecenter.csg.org/resources/juveniles>.

- exclusionary or overly-punitive disciplinary practices, referrals to law enforcement, corporal punishment, or assignment to alternative education placements for disciplinary reasons;
- bullying and harassment;
- attendance;
- truancy (*i.e.* unexcused absences).

States should be required to conduct a needs assessment for every school whose data indicate low student engagement or achievement, and to select research-based interventions that have track records of success in best addressing the specific indicators evident in each school’s data. For example, in secondary schools where pregnancy or parenting are identified as barriers to student achievement or attendance, interventions should be adopted that address push-out factors for these students and that target academic and related services to them. To assist in this process, the Department should develop a list of intervention options that have proven effective in addressing issues for each indicator, and provide technical assistance to facilitate successful, coordinated implementation of the strategies. We further recommend, instead of mandating the use of the four School Improvement Grant (“SIG”) models for turning around the lowest-performing schools, that school districts be permitted to choose from appropriate, evidence-based models that match the needs of the students in their schools.

- In conjunction with any waivers provided by the Department, an improved set of benchmarks for improvement must be implemented. In addition to reporting on student performance based on state assessments, we suggest that states and school districts be required to compare student performance to the more objective and rigorous standard provided by the National Assessment of Educational Progress (NAEP). As states are phasing in performance targets aligned to new state standards, and until the new assessments and state-determined performance levels are determined to be valid and reliable measures of college and career-readiness, using NAEP for states’ reference points would create a more ambitious goal which would be more stable than the standards implemented to date.

IV. The Department Should Create a Sunset Provision for All Waivers.

The Center recommends that all waivers expire within two years of their issuance. It may be that an additional two years will be appropriate for some states, if they can demonstrate adherence to their approved plans, as well as improved student achievement (including narrowing gaps and raising subgroup performance).

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We hope that the Department will consider the Center’s views and these comments as it determines whether and how to expand ESEA waivers. We would be happy to discuss our comments further or answer any questions you may have. Please contact Fatima Goss Graves, Vice President for Education and Employment, at (202) 588-5180.

Sincerely,



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Lara Kaufmann
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