



May 27, 2011

Honorable Arne Duncan
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Request for Regulatory Relief for K-12 Schools

Dear Secretary Duncan:

As we come to the close of another school year without a long overdue ESEA reauthorization, students, schools, and school districts languish in a myriad of confused and conflicting federal constraints. Despite massive budget cuts, layoffs and ballooning class sizes, thousands of public schools are continuing to strive to meet federal mandates imposed by No Child Left Behind and related regulations promulgated by the U.S. Department of Education (“Department”). Many of these narrow and punitive mandates are widely thought to be unreasonable, and even counterproductive, and would be difficult if not impossible to meet under the best circumstances.

We are gravely concerned that the quality and integrity of school systems nationwide are suffering unnecessarily and will continue to do so without swift action by the Department to offer specific avenues of relief. Therefore, on behalf of the 3.2 million members of the National Education Association (NEA), we urge the Department to take the following steps to offer immediate regulatory relief to our nation’s public schools:

- 1. Revise current regulations and guidance to clarify that supplemental educational service (SES) providers are, in fact, recipients of federal funds for purposes of determining applicability of laws.**

The No Child Left Behind Act contains a critically important civil rights provision:

SEC. 9534. CIVIL RIGHTS.

- (a) IN GENERAL - Nothing in this Act shall be construed to permit discrimination on the basis of race, color, religion, sex (except as otherwise permitted under title IX of the Education Amendments of 1972), national origin, or disability in any program funded under this Act.

NEA strongly supported the inclusion of this provision, because SES, as well as other new provisions of NCLB, expanded eligibility for federal ESEA funds to a broad range of non-governmental entities, including faith-based providers. The Congress clearly intended through

the inclusion of this provision to ensure that all entities receiving NCLB funds would be subjected to federal civil rights laws.

However, the U.S. Department of Education in its regulations implementing the law has stated that "...an SES provider, merely by being a provider, is not a recipient of Federal financial assistance. The regulations that define 'Federal financial assistance' do not contemplate that a school or other organization that receives a contract from an LEA procuring its services as a provider of SES is thereby a recipient of Federal financial assistance."

Based on that interpretation, which we believe is a complete misreading of the law, the Department has further stated that private SES providers are generally not covered by federal civil rights laws but that a school district, "on the other hand, is responsible for any discrimination that occurs in obtaining services through a procurement contract. ... However, the provider would have no direct nondiscrimination responsibilities under the civil rights statutes mentioned above, unless it otherwise receives Federal financial assistance for other purposes."

In addition, the Department has said that religious organizations that are SES providers may "limit employment to persons of a particular religion." We simply do not understand why an afterschool tutoring program would need to only employ someone of a particular religion to help students improve their math or reading skills.

Therefore, NEA proposes that the Department of Education revise its regulations to require that all SES providers be covered by all applicable civil rights laws, and that faith-based providers not be permitted to limit employment in their SES program to persons of a particular religion.

Doing otherwise is simply allowing federal funds—taxpayer dollars—to subsidize discrimination.

2. Increase flexibility around AYP and the allowance of multiple measures of accountability.

As you know, a large percentage of schools have been designated or remain "in need of improvement, corrective action or restructuring" only a few years in advance of the 2014 NCLB deadline for 100% proficiency among all students and schools. We have long advocated that the poor quality and design of the current state standardized tests render them insufficient for serving as scientifically valid and reliable instruments for determining the overall quality and effectiveness of an individual school. As such, the resulting accountability labels for the schools are not reliable, and the sanctions prescribed by the statute are not designed to address the actual and specific needs of the schools. Furthermore, the level of rigor across the states regarding their content standards and their proficiency targets vary widely. Collectively, these factors have created a label-and-punish system that is neither credible, nor effective.

The law as currently constructed fails to give parents and educators a fair and accurate picture of which schools are improving and why. As such, the NEA believes the 2014 deadline should be eliminated not only because it is part of a fundamentally flawed accountability structure, but because states are in the process of transitioning to what we believe will be much better content standards and assessment systems.

To be clear, however, the current requirements to disaggregate student data should continue and be enhanced. For example, we need much more disaggregated data for the bilingual/ELL student subgroup, including mobility, national origin, proficiency levels, and years in United States' schools.

As we move to an era of “reciprocal accountability” that is essential to long-term sustained effectiveness of any program for change, a few key steps would help target resources to schools and student populations that need them the most:

- Provide more widely for differentiated interventions for schools rather than the one-size-fits-all sanctions, so that a school that falls short in just one or two AYP criteria would be required to develop and implement a targeted improvement plan for the specific subgroup of students.
- Allow states to limit identification of schools in need of improvement to those in which the same subgroup of students fails to meet AYP in the same subject for two consecutive years.
- Eliminate any associated participation rate penalties against schools and districts if parents exercise their rights to have their children opt out of taking required tests under state law. Parents exercising their legal rights and acting in the best interest of their children should not result in penalties for schools.

In addition, in light of the fact that the Department itself has recognized that NCLB and AYP have fostered inaccurate data and results on school accountability, it should allow states to develop richer, research-based school accountability formulae or matrices that consider multiple measures of school performance beyond the current use of just two statewide test scores and graduation rates (for high school). Other measures states could use include district-level assessments, attendance rates, mobility rates, school-level assessments, performance or portfolio assessments, and the percent of students participating in advanced coursework, which may include dual enrollment, honors, AP, or IB courses.

3. Provide additional common-sense flexibility for assessing and counting test scores of students with disabilities and ELL students.

The Department has stated on multiple occasions that we need a better and fairer way to assess students with disabilities and ELL students. Therefore, it should allow school IEP teams to determine the appropriate assessment and standards (regular, alternate, or modified) for each child and remove the current arbitrary 1 percent and 2 percent limits on students who may take alternate or modified assessments and be counted for accountability purposes.

For newly arrived, late-entry immigrant ELL students who do not speak English, for whom appropriate native language assessments or other valid assessments in the required core content subjects are not available, the Department should extend to *three* years the period of time before their test scores must be included in AYP calculations. Students who begin their educational

careers in the United States obtain three years of education prior to being assessed with NCLB-mandated state standardized assessments, and newly arrived immigrant ELL students should be afforded the same opportunity to succeed.

Recognizing that next generation assessment systems hold promise for the valid assessment of all students' learning progress, the Department can use its existing authority to provide immediate support for students until the new assessment systems are implemented. For example, there needs to be much more attention paid to aligning English language proficiency standards to content area standards to ensure that ELLs have access to the core curriculum and assessment of student learning is not strictly focused on language proficiency. Additionally, the Department can use its authority to require states to fund, develop, monitor, and implement valid, reliable, and measurable assessments of language proficiency and academic assessments.

4. Modify SES/choice regulations to allow (a) targeted SES/choice to certain student populations in need; (b) local input into SES certification; (c) SES providers to be on the SEAs 'approved list' only if they are able to provide instruction to all eligible student populations; and (d) more flexibility in implementing SES/choice.

The SES/choice regulations should be changed as follows:

(a) Currently neither SES nor the public school choice provisions of NCLB target help to students based on their academic achievement needs. The Department should allow LEAs to limit or target eligibility for both of these programs, such as to students in the specific subgroups that fail to meet AYP. Doing so would eliminate some of the logistical problems that currently exist and allow limited federal dollars to be used where the need is greatest.

(b) The Department should require that states give LEAs input into the certification of new SES providers. Doing so could help ensure that all SES providers' instructors are highly qualified and meet the needs of local student populations, including students with disabilities and ELLs.

(c) The instruction provided and content used by SES providers must be accessible to all eligible students, including those with disabilities and those learning English. SES providers must be required to demonstrate that they are able to provide services to all eligible children without discrimination.

(d) The NEA believes that schools should be afforded the flexibility to provide SES services and choice in a manner that helps students the most. The Department should allow states to offer only SES, rather than requiring both SES and school choice, in year one of school improvement. The guidance should further clarify that states that are participating in the flexible SES pilot should be allowed to provide SES *only* in year one of school improvement if this is consistent with their approved plan.

5. Align the ‘highly qualified’ requirements to account for the workforce and staffing realities faced by rural/small school districts.

Under current law, public school teachers (and some paraprofessionals) have to meet “highly qualified” requirements. While NEA supports and advocates for putting the best possible teacher in the front of every classroom and the best paraprofessionals, the Department could do much to ease the immense pressure this puts on small rural and small school districts that face unique obstacles when it comes to recruiting and retaining highly qualified teachers and education support professionals. In addition, special education teachers often need five or six certifications in core subjects beyond special education in order to satisfy current HQT requirements. Some special education teachers have one or two additional subject matter certifications, but in many states they have only two years to obtain an additional three, four, or five certifications they will need to be “highly qualified” in their district.

Moreover, in many rural and frontier schools, teachers are assigned to teach multiple subjects in which they have expertise. While we believe that all teachers should be competent in all subjects they teach, we urge the Department to continue to provide additional time and flexibility for teachers of multiple subjects to become highly qualified, especially when they already have achieved HQT status in one or more subjects.

Finally, the Department should recognize and encourage educators who voluntarily go through the distinguished and rigorous process of earning National Board Certification by deeming such teachers highly qualified in their area of expertise.

6. Revise regulations to allow all Title I SIG schools to reset their NCLB timeline, not just turnaround and restart schools; to give flexibility around the ‘Rule of 9’ with respect to the transformation model; and to allow the use of other intervention models and strategies.

Currently, the School Improvement Grants program only allows LEAs and schools that choose the turnaround and restart models to “start over” in the timeline for achieving AYP before sanctions are imposed. Moreover, currently, if an LEA has nine or more Tier I or Tier II schools, it may choose the transformation model in only half of such schools (the so-called “Rule of 9”). The Department should revise its SIG regulations to (1) allow *all* SIG Tier I and II schools to reset the NCLB timeline and (2) enable more schools to choose the transformation model.

Within the “transformation model,” the Department has articulated important reform elements, including high-quality professional development; recruiting, placing, and retaining the most effective school personnel; comprehensive instructional reform; extended learning time and community-oriented schools; increased operating flexibility; and sustained support from local, state or external partners. The other three intervention “models” over-rely on a single decision about staffing, leadership, or management and thus do not, *per se*, provide strong alternative models for sustainable, systemic reform.

We urge the Department to also embrace other models or strategies that have proven effective and sustainable, such as well-designed magnet schools; teacher-led schools such as Denver’s

Math and Science Leadership Academy; and the education reform design that is part of California's Quality Education Investment Act (QEIA), which encourages innovation as determined by local conditions, priorities, and innovation.

And as we stated in our public comments on the Race to the Top Program,

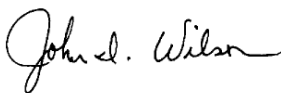
We urge the Administration to . . . embrace the diversity of choices available to students, parents, school districts, and states across the country. Well-designed charters are not the only way to innovate, and we need to embrace and champion other models such as magnet schools . . . magnets promote racial and socioeconomic integration more effectively than charters, while offering the same advanced academics and unique courses that make both models popular among parents, according to a 2008 report from the Civil Rights Project at University of California, Los Angeles.

CONCLUSION

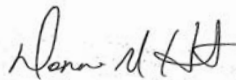
It is time to provide schools and school districts a regulatory lifeline given Congress' inability to reauthorize ESEA. We urge the Department to creatively use its authority to provide immediate relief to schools across this nation. We also urge the Department to reinforce through word and deed the need for foundational fiscal support for schools in lieu of overly promoting competition that can leave some districts unable to compete, resulting in students who continue to be left behind. Lastly, we urge the Department to continue to enforce the provisions in current law requiring respect for collective bargaining provisions.

Thank you for your consideration of the above comments. Please do not hesitate to call Donna Harris-Aikens at (202) 822-7409 or dharris-aikens@nea.org if you have any questions.

Sincerely,



John I. Wilson
Executive Director



Donna M. Harris-Aikens
Director, Education Policy and Practice Department