

July 19, 2011

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

RE: Regulatory Relief Under NCLB

Dear Secretary Duncan:

We wish to express our appreciation for your willingness to grant regulatory relief from those requirements of the No Child Left Behind Act that are having a serious and growing negative impact on schools and student learning as we await the reauthorization of the Elementary and Secondary Education Act (ESEA).

Following our conference call with you and subsequent conversations with colleagues at the Department of Education, we are responding to the three major areas of our discussions:

- Identifying the specific waivers that would be most useful to school districts.
- The use of a state application process for ED to grant waivers in exchange for the further implementation of education reforms.
- Identifying the types of school reform that school districts would find appropriate in exchange for regulatory relief.

As you review our recommended list of locally needed waivers, we hope you will agree that they are vitally needed at this time. Please consider that the very localized and operational nature of these problems is not likely to be adequately addressed by the relief agenda sought by states, nor do they lend themselves to a state application process rather than general relief—especially in light of the timing. We also ask you to consider the difficulties school districts will likely face by tying relief to the implementation of (specific) reforms in light of costs, varying local needs and capacity, timing for the school year, and the forthcoming reauthorization of ESEA.

A. The specific waivers that would be most useful to school districts.

NSBA surveyed school boards to determine the most important types of regulatory relief they would want. We received responses from school districts across thirty-six states and the District of Columbia. That list appears in Attachment A.

It is important to reiterate that these priorities for regulatory relief may differ from the types of relief that states are seeking under a state application process. Hence, for example, if a



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Associations, NSBA
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state wants to substitute its own accountability system for the federal system, the need to remove the federal burdens of local on-the-ground operations by way of a general policy would still be needed.

B. The use of a state application process for ED granting waivers in exchange for further implementation of education reforms.

As we indicated in our conference call with you, NSBA does not believe that a state application process is the appropriate approach given factors relating to timing and current local conditions. Rather, the necessity for relieving school districts from NCLB's unnecessary and counter-productive burdens would be better served by simply using your authority to eliminate the continuation of those requirements. Our concerns with the proposed state application process are as follows:

- A state application process for waiving requirements is not likely to operate in time for the opening of school to be effective, especially for activities that must occur prior to the opening of school that involve program implementation and contract obligations.
- As states pursue their own regulatory relief goals, they may not be applying for the kind of regulatory relief that school districts need.
- Some states may not be willing or be financially able to implement the reform conditions sought by ED.
- Many local school districts may not have the funds to implement the reforms their state agrees to—especially if there are limited savings from the waivers they are seeking.
- A needed process for local school districts to apply for waivers if the state doesn't apply or doesn't apply for waivers that school districts want would be time consuming and costly compared to simply eliminating onerous requirements as a matter of general policy.
- The ESEA reauthorization may go in a different direction than ED's reform criteria—including the alternatives that states might be seeking in the exchange.

In viewing our support for a locally based approach to relief by general rule rather than state application, we continue to support providing states with needed flexibility at their level, including amendments to their state accountability plans. The essential point we raise is that the need for relief and the best approach for achieving it at this particular time to meet the on-the-ground operations of local school districts is very different from that at the state level and must be addressed in a locally useful practical manner.

C. The types of school reform that school districts would find appropriate in exchange for regulatory relief.

Primarily, NSBA views this important effort to provide regulatory relief as a short term patch to provide a bridge over the expanding dysfunctional impact that NCLB is having on schools and school districts while Congress reauthorizes ESEA. As such, we recommend that the focus be on providing local relief not initiating additional broadbased reforms given the short turn-around for the development and approval of state applications and the uncertainty in direction that the reauthorization process will take.

However, if there were to be a requirement for the initiation of new reforms during this interim period, there should be local flexibility in the selection of which new reform measure will be initiated or which existing reform initiatives will be enhanced. Any requirement for local school districts to adopt or enhance any specific reform should be rejected as it may not address the highest priority needs or may be too costly to implement, including yielding too few savings in dollars or the time of those staff who can address new requirements. Accordingly, the price for relief from a bad policy should not be an exchange mandating specific reforms—especially since unlike Race to the Top grants there is no new money attached to the relief program.

While we firmly believe that regulatory relief should stand on its own merit during this interim period, Attachment B provides a partial list of the kinds of locally determined reform activities that school districts could initiate or develop in exchange for the relief granted to address their specific local circumstances.

Conclusion

In sum, NSBA strongly supports efforts to raise student achievement, including various bold and meritorious initiatives that have come under your leadership. Your desire to provide regulatory relief is an additional refreshing and locally welcome step to avert unnecessary and counter-productive results from the operation of NCLB during this interim period pending the reauthorization of ESEA. In approaching regulatory relief we in no way intend to undermine an accountability system that appropriately identifies low performing or high achieving students, schools, or districts. We are simply calling for regulatory relief in areas where the current program is flawed or in need of immediate change. For the reasons outlined above, we believe that the regulatory relief needed should be locally directed, be accomplished through general regulatory waiver not a state application process, and not be tied to an exchange for new or specific top-down requirements.

Given the importance of this issue, we would like to further discuss the best means for providing regulatory relief with you.

Sincerely,



Anne L. Bryant
Executive Director



Michael A. Resnick
Associate Executive Director



Attachment A

Needed Regulatory Relief Identified By local School Districts

The following recommendations for regulatory relief from the No Child Left Behind Act were identified by a survey conducted by NSBA in July, 2011. This list does not identify items that were more random or that are likely to be applicable only after the 2011-12 school year by which time we would expect more guidance from the reauthorization of ESEA.

Sanctions

1. The 20% set –aside for choice and supplemental services should be eliminated.

Rationale: In tough economic times, school districts need more flexibility to make the best use of these dollars. In this regard, choice is rarely used and supplemental services do not produce compelling results—and both are costly to administer. Further, school districts complain that too many vendors are not of sufficient quality and that a school should be allowed to use its own certified and accomplished teachers to provide tutoring services if it determines that to do so would be effective. This mandate is not cost justified.

2. SES should not be scored in determining the 15% carryover limit.

Rationale: Currently, to the extent a school district cannot use the entirety of its 20% set-aside for choice/SES, those funds are retained and scored against the 15% limit on the amount of Title I funds that a school district can carry-over from one year to the next. The 20% set-aside is an arbitrary figure that was not contemplated when the 15% carry-over limit was established. Given that choice is rarely used by parents and SES providers are not always readily available, of sufficient quality, or needed, to necessitate spending the entire 20% set-aside, school districts and their students should not be penalized for not being able to have their unused funds available for educational services in a subsequent year. Accordingly, either the carry-over limit should be raised or these set-aside funds should be excluded from the calculation—to the extent that the set-aside itself isn't eliminated.

3. Do not limit school improvement interventions to a narrow group of models—especially models that are not research-based or lack a record of broad success.

Rationale: NCLB coupled with School Improvement Grants and Race to the Top Grants drive resources to compel the use of four specific models for turning around low performing schools. Yet these models are not supported by a track record of broad-based success as to warrant their exclusivity. At the very least school districts should be allowed to innovate with their own research-based approaches if they are more promising than the current required models to meet their unique local needs.

4. Do not require principals to be replaced in all school turn-around interventions—especially if the school is moving on a course that is likely to produce measureable school improvement in the near future.

Rationale: It should be recognized that the failure of a school to make AYP for one or more groups over a period of several years is not always the fault of leadership by its principal. Nor would it always be preferable to change principals or even feasible to recruit a principal with the needed skill set, particularly, in many remote areas. Especially with the flawed AYP performance bar rising and local budget cuts that may be reducing staff and other resources, a universal requirement to replace principals will set many up to fail and/or be discouraged from taking positions in challenging schools. Rather than assuming that removing the principal is the sine qua non for success, it is more important to look at the school's strategy for success and its commitment to implementation, including the principal's leadership.

5. Accelerate the time-table for the removal of sanctions when schools make AYP.

Rationale: Schools that are in improvement status who subsequently make AYP for all subgroups will still have to implement sanctions for the following year. If all groups are making AYP there should be no need to continue sanctions in the following school year.

6. Relieve whole school districts from being identified as needing improvement when the focus should be on specific schools or groups.

Rationale: As the AYP bar rises, n-size, among other factors will result in whole districts being identified as needing improvement even if the basis for needing improvement is school specific, group specific, or resulting from one or two students in a few schools (that each makes AYP) but is sufficient in their district-wide aggregate number to identifying the school district as failing. Beyond unjustified negative public labeling, the result unnecessarily is discouraging to school district employees and the most strategic use of their time and resources.

Adequate Yearly Progress

7. Freeze state annual measurable objectives (AMO).

Rationale: With the timetable for the enactment and the effective date (school year) of the ESEA reauthorization still unknown, the state AMOs should be frozen to prevent, what Secretary Duncan estimates, will be an unnecessary rise from 37% to 82% of the nation's schools being identified as not making Adequate Yearly Progress. With that rise an increased number of schools will also face sanctions. The reason for the rising AYP failure rate is that the percentage of students needed to score proficient is now

reaching unattainable levels under the current method of determining accountability. Given the high percentage of students needed to make AYP, there is less “wobble” room to accommodate the broadly recognized flaws in the AYP accountability system—which, in turn, then negatively impacts many schools through a system of sanctions which are also flawed.

The spike in AYP failure will especially be a problem in the many states that “back loaded” the trajectory of their AMO’s. For school districts in these states the likelihood that some accountability “cell” of what could be dozens of ways a school district could fail will rise dramatically even if they are experiencing a significant rise in the percentage of their students scoring proficient—but a percentage that is not rising fast enough. Simply stated, at this point in time what is to be gained by requiring states to raise their AMOs rather than freezing them until a new accountability measure is adopted?

8. Enable more states to utilize growth for determining AYP instead of cohort cut scores.

Rationale: It has been amply demonstrated that individual student growth is a better method of determining success and driving improvement than the use of static cohort scores.

9. Enable states to use multiple measures for determining AYP instead of one test.

Rationale: It has been amply demonstrated that multiple measures are a better indicator of student achievement, of the range of knowledge and skills that a student should possess than one test on day. Further, retesting should be available for accountability purposes.

Accountability

10. Students who are identified in multiple subgroups should only be counted as belonging to one subgroup for determining AYP.

Rationale: Many students can belong to three or more subgroups so that a student who does not score proficient will be counted against making AYP for each such subgroup. Not only does the current system over-represent students in multiple subgroups but students in multiple subgroups (e.g. low income, ELL, and SWD) are more likely to be academically challenged than students with one potential challenge. Schools should be able to count the student as only belonging to one subgroup for accountability purposes—with the assumption that, where appropriate—it will be the group in which the school’s services will best correspond to the student’s needs.

11. Enable late graduates who earn a regular high school diploma to be counted with on-time graduates in calculating the graduation rate for AYP purposes.

Rationale: It is estimated that about 5% of students receive a high school diploma that meets state standards for all high school students late—typically in their fifth year of high school. Generally, these students need extra time through no fault of their own or their school stemming from factors as, a family or personal crisis, a health condition, special educational needs, immigration from a country that provided years of sub-

standard education, etc. If the student is willing to achieve and the school district is willing to invest the time and money to educate this child for the fifth year or beyond—why not adjust the formula to give them credit for their success rather than treating them and their school as a failure?

12. Adjust the high school graduation rate for accountability in order to credit schools for students with disabilities (SWD) if their IEP specifies an extended graduation date.

Rationale: Schools are being put on the “watch” list and subsequently identified as needing improvement because they cannot achieve a four year on-time graduation rate for SWD—even when their IEP calls for a later graduation date. While an on-time graduation rate is an absolutely necessary benchmark for students in general, it is not realistic for some. Especially for SWD, where an IEP team closely evaluates the student and designs a plan—with parental involvement—meeting the individualized plan should be the school’s measure of accountability not the standard four year graduation date.

13. Allow students in the special education subgroup to be evaluated on the basis of progress made rather than group cut scores as a means of enabling a school or district to be relieved of sanctions.

Rationale: Because students in the special education subgroup have IEPs that are tailored to them and developed with parent involvement, measures of progress based on their individual needs, where appropriate, would be a better determinant than grade level tests of whether a school continues to be in improvement status.

14. Allow a three-year transition year for new ELL students to learn English before counting them for AYP purposes.

Rationale: ELL students may need more than one year, including those who enter the United States after years of sub-standard education in their country of origin. To expect all such students to learn English and meet state standards after one year is not realistic.

15. Flexibility for schools in unusual situations.

Rationale: Across states there are schools with unusual situations for which they are held accountable, such as educating students in underfunded juvenile detention facilities or unusual circumstances involving alternative schools and other district schools that merit AYP flexibility.

16. Relief from the Highly Qualified Teacher requirement.

Rationale: Especially where the state determines that an alternative requirement would be more suitable to the ability of school districts generally or specific school districts to hire and retain qualified teachers, including special education and ELL teachers, the federal requirement should be waived.

17. Reduction in paperwork/administrative requirements including parent outreach activities.

Rationale: At a time when school districts are cutting budgets and staff, the extensive administrative and paperwork requirements associated with NCLB need to be prioritized. For example, the choice/SES set-aside involves substantial requirements such as parent notification, student records, contracts, and invoices, in proportion to the outcomes produced. Yet, there are other parent involvement activities and other school improvement strategies that would yield better results for the time and money currently being spent. The same is true for various reports that need to be distributed such as the four week parent letters to state that a teacher is not qualified or the school's improvement plan.



Attachment B

School District Reforms that NCLB Regulatory Relief Could Provide

NSBA strongly believes that regulatory relief to school districts from those NCLB requirements that are flawed, counter-productive, or not cost justified should be provided as a matter of good public policy—not as an exchange for new reform requirements, especially in light of the forthcoming reauthorization of ESEA.

However, in identifying possible reforms it should be recognized that the list of specific activities that best meet local needs is not exhaustive, nor is any particular reform so broadly suitable or affordable to merit its being mandated. It should also be recognized that the benefits of regulatory relief will vary in terms of money or staff time that may be freed up. For example, some districts could realize a significant cost and financial savings by eliminating the mandate for the 20% choice/supplemental service set-aside, whereas others may not be subject to the set-aside. Other areas of relief may not bring a savings at all, but simply address misdirected or counter-productive policies.

Therefore, if school districts were to commit to reform activities in exchange for the relief they could benefit from, they should not be presented as a “Hobson’s Choice”. Rather, they should emanate from an open-ended list of locally determined activities, including but not limited to the following possible examples:

1. Implement current plans pursuant to Race to the Top and School Improvement Grants.
2. Institute data systems to improve tracking of individual student performance.
3. Work with the teacher union to engage in a collaborative approach to collective bargaining that is designed to strengthen the connection between labor-management issues within the scope of bargaining and student achievement goals agreed to by the district’s school board and union.
4. Provide professional development to ensure the proper role-appropriate use of data by teachers, administrators, and school boards.
5. Strengthen the connection between the teacher evaluation process and student performance.
6. Increase mentoring of new and weak teachers.
7. Provide teacher/administrator/school board training to prepare for the implementation of core standards.

8. Strengthen professional development programs generally, such as understanding and implementing the standards, and developing aligned curriculum and instruction.
9. Encourage all students to take Algebra II.
10. Expand the use of technology for instruction to support student learning—including long distance learning and the use of data to assign, diagnose, monitor and support effective instruction.
11. Engage in parent involvement activities that have a proven positive impact on student achievement.
12. Hire (re-instate) reading and math teachers for students at risk of academic failure.
13. Increase in early identification of potential dropouts and proven prevention programs.
14. Increase planning, development, improvement, or access in Pre-K programs.