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September 15, 2011

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

Re: Recommendations of The Leadership Conference on Civil and Human Rights Regarding Waivers of ESEA Requirements

Dear Secretary Duncan,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of 210 national organizations charged with the promotion and protection of the rights of all persons in the United States, we are writing regarding your intention to grant states waivers of key provisions of the Elementary and Secondary Education Act (ESEA).

We continue to believe, as many of our member organizations have recently noted, that the best way to update ESEA is through a full reauthorization of the law. Providing waivers to states for selected aspects of the law runs the risk of creating confusion and exacerbating inequity among students, schools, and school districts. Therefore, we are convinced that granting waivers has tremendous potential to adversely affect children, especially students of color and those living in poverty, learning English, or with disabilities. The recommendations that follow contain our suggestions for ways to defend against this unfortunate but probable outcome.

The document has two sections: the first provides steps that should guide the consideration of waiver applications and communication regarding the potential impact of waivers to the public. The second section provides suggestions regarding specific areas of the law that will most probably be impacted through waivers. This section is based on media accounts that have discussed potential areas of the law that may be addressed through waivers. Should you consider addressing areas of the law that are not covered in this document, it is our sincere hope that you will reach out to us and continue this conversation regarding ways to ensure that any waivers issued are focused on maximally benefiting children, especially the most vulnerable.

Again, while this letter contains suggestions regarding the parameters that we believe should guide the issuance of waivers, our submission of this document should in no



way be construed to indicate support from The Leadership Conference for the idea of providing states and school districts permission to flout parts of ESEA.

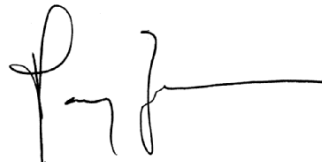
Early last month, representatives of The Leadership Conference had an opportunity to meet at the White House with Special Assistant to the President Roberto Rodriguez, Acting Assistant Secretary Michael Yudin, and other representatives of the administration. We would welcome an additional opportunity to meet with you at your earliest convenience for an in-depth discussion of our concerns.

Thank you for your consideration. Please direct further questions or communications to Dianne Piché, Senior Counsel, at Piche@civilrights.org or to Fatima Goss-Graves, fgraves@nwlc.org, and James Ferg-Cadima, jferg-cadima@maldef.org, Co-Chairs of the Leadership Conference Education Task Force.

Sincerely,



Wade Henderson
President & CEO



Nancy Zirkin
Executive Vice President

Title I Procedural Requirements and Conditions

1. Transparency

Any waiver process should be fully transparent at the state and federal levels, including the immediate posting of all waiver requests and supporting documents on each state's website and on ed.gov, as well as the posting of the names of peer reviewers and all peer review comments on ed.gov.

2. Meaningful and Targeted Public Input

States should be required to develop their waiver proposals in the sunshine. State applicants and the Department should have an affirmative duty to engage a diverse cross-section of stakeholders in developing and reviewing waiver requests and to explain to parents and members of the communities most impacted how the waivers will improve performance of students in the subgroups identified in Section 1111(b)(3)(C)(xiii), not simply how the waivers will provide "regulatory relief" to states.

To this end, each state considering a waiver request should be required, at minimum, to conduct accessible public hearings in communities in the state with high percentages of:

- a) low-income students,
- b) students in the subgroups identified in Section 1111(b)(3)(C)(xiii), performing below proficient on the current state assessments,
- c) students attending high schools with graduation rates of less than 60 percent, or elementary and middle schools that feed into such high schools,
- d) students eligible to participate in school transfers or supplemental educational services under Section 1116 of Title I,
- e) students who attend schools with significant and/or persistent achievement gaps between subgroups identified in Section 1111(b)(3)(C)(xiii), and,
- f) students who attend schools with high rates of exclusionary discipline or significant racial or-disability-related disparities in rates of exclusionary discipline.

3. Demonstrated Community Support

After undertaking a robust effort to engage the community, states should be required to obtain statements in support of their waiver proposals from a broad cross-section of stakeholders – including program beneficiaries (i.e., students) and their representatives – in advance of submission to the Department. States should also submit copies of all statements received from, or on behalf of, students whose interests could be adversely affected by the waiver proposals. This requirement is analogous to the provision for stakeholder buy-in under the "Race to the Top" competitions.

4. Peer Review

Peer review teams should include an equitable balance of knowledgeable representatives of recipients and beneficiaries of federal assistance under Title I, including civil rights and parent advocates. To realize this goal, the Department should solicit nominations for reviewers from

communities that will be affected by the waivers. This process would be similar to the one used to appoint members of the Department's Equity and Excellence Commission.

5. Monitoring and Enforcement

The Department should monitor and enforce commitments 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; ARRA, including Race to the Top; and EAG grants. The Secretary should annually collect and disseminate information to the public on the impact of waivers on student achievement.

6. Advancing Priorities

In considering applications for waivers, the Department should provide a competitive preference for applications that advance the goals stated in the Department's competitive priorities that were announced last year. Of particular importance to our member organizations are the following competitive priorities:

- a. Implementing internationally benchmarked, college-and career-ready elementary and secondary academic standards;
- b. Improving the effectiveness and distribution of effective teachers or principals,
- c. promoting diversity; and
- d. Supporting programs, practices, or strategies for which there is strong or moderate evidence of effectiveness.

These priorities should guide the Secretary's evaluation of waiver applications. Because the process for requesting waivers is voluntary and non-competitive, proposals from states will likely vary a great deal. The use of competitive priorities provides an opportunity to ensure the actions and, more importantly, the desired outcomes of states that apply for waivers are aligned with those of the Department. Similar to other federal funding opportunities like Race to the Top, states will maintain the discretion to propose innovative solutions crafted with local input, while the competitive priorities will help ensure that state-devised solutions are aligned with federal goals.

Title I Substantive Requirements and Conditions

7. Maintain Subgroup Accountability

All states should continue to hold schools accountable for meeting aggressive and attainable performance targets for subgroups and for reporting annual progress. Waivers should also require states to ensure that all required ESEA data may be cross-tabulated and reported by gender, race and other categories specified in Sections 1111(b)(3)(C)(xiii) and 1111(h).

8. Better Benchmarks for Performance

In conjunction with any waivers provided by the Department, an improved and reliable 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 each state's reference point would create a more ambitious goal that would be more stable than the standards implemented to date. Finally, it should go without saying that during this phase-in period, states will be required to continue to use their currently approved and validated Title I assessments to report and measure school and LEA progress. States, of course, may also begin to report and compare performance on new tests with their current tests. Consistent with prior positions we have taken on appropriate uses of tests, however, The Leadership Conference believes that when states use the new assessments for school accountability ratings, they must meet the same validity and reliability standards as those required by current law.

9. Maintain Graduated Interventions for *All* Issues that Undermine Student Achievement

While the schools that have the worst records of performance may merit the most intensive intervention, an exclusive focus on an arbitrary percentage of the very worst performing schools (e.g., the "bottom 5 percent" of schools) would fail to reach the majority of schools and students that are truly struggling.¹

Furthermore, research indicates that the academic problems at issue in these schools are often fueled by other practices and conditions that can create barriers to learning, such as an over-reliance on exclusionary discipline² or exposure to dangers such as bullying and harassment. Any meaningful proposal for increasing academic achievement must also address these issues. Therefore, waivers issued by the Department must require states and LEAs to implement accountability systems that reduce or eliminate the following problems through evidence-based practices:

- 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 indicators of student engagement, including:
 - o exclusionary or overly-punitive disciplinary practices;

¹ The Alliance for Excellent Education identifies U.S. public secondary schools graduating less than 60 percent of their students in four years' time. Most recently, the Alliance found that in 20 states and the District of Columbia, at least 10 percent of high schools fell into this category, which they have termed "dropout factories". In eight states, the Alliance termed more than 20 percent of high schools "dropout factories." Therefore, it stands to reason that focusing solely on the bottom five percent of schools is simply insufficient to address the worst schools in the country. Data from: the Alliance for Excellent Education, *Prioritizing the Nation's Lowest Performing High Schools*. Issue Brief (April 2010). Moreover, with extreme variation in standards and quality among schools in various states, an elementary, middle or high school performing in the fifth percentile in one state might actually out-perform an elementary, middle or high school performing in the 25th percentile in another state. Unless linked to some absolute standard that will not shift from state to state, the "bottom 5 percent" approach is entirely too arbitrary to be meaningful.

² *Breaking Schools' Rules: A Statewide Study on How School Discipline Relates to Students' Success and Juvenile Justice Involvement* – found here: <http://justicecenter.csg.org/resources/juveniles> and the Secretary's public statements connecting school discipline disparities to achievement disparities.

- referrals to law enforcement;
- corporal punishment;
- assignment to alternative education placements for disciplinary reasons;
- bullying and harassment;
- attendance; and
- truancy (i.e. unexcused absences).

10. Maintain and Improve Federal Support for Struggling Schools

In all instances where state-mandated interventions fail to address the issues that undermine student achievement noted in section nine of this document, the Department should require the implementation of more intensive interventions to address the specific indicators that adversely affect student and school performance. Such interventions should be incorporated into the accountability framework created by the Department for states that receive waivers.

States should be required to conduct a needs assessment for every school whose data indicate low student engagement or achievement. After identifying the strengths and areas for improvement in the school, states should be required to select research-based interventions that have track records of success in best addressing the specific indicators evident in each school's data. To assist this process, the Department should develop a list of intervention options that have proven effective in addressing issues for each indicator measured in Section 1116 including those described in sections seven and nine of this document. For example, significant racial disparities in exclusionary discipline data should be addressed through an approach that has been proven to be effective at attenuating such disparities. Funding for these interventions should come from each school's Title I funds or other funds provided by the Department for the purpose of school improvement.

11. Support Additional Turnaround Models

Waivers should not be conditioned upon on applicants' employment of only the four School Improvement Grant ("SIG") models for turning around the lowest-performing schools. Overall, we believe that the four options are too narrow, rigid, and preclude the very reforms that have proven to be effective. In addition, some SIG models have not been proven to improve student achievement. Finally, the models do not leave room for the balancing of federal guidance and support with local input and context-driven strategies that we believe is needed to improve struggling schools.

We recommend offering states and school districts additional models that would allow schools to choose appropriate, evidence-based approaches that match the needs of students and schools, including interventions such as those used in "chancellor's district" schools, community schools, and magnet schools. For example, magnet schools have a long history of accelerating student achievement while supporting the additional benefit of creating diverse learning environments for students. The Department's own Magnet Schools Assistance Program has enjoyed wide support and participation over the years.

In addition, there should be no limitation on the use of any one intervention; such restrictions inhibit innovation and systemic reform by preventing districts from bringing to scale a variety of successful, research-based interventions. We further recommend that all schools targeted for turnaround also receive the appropriate supports from experienced technical-assistance providers to facilitate successful, coordinated implementation of the strategies.

12. Require Data Collection and Reporting

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 disaggregated by gender for each subgroup currently identified in Sec. 1111(b)(3)(xiii), cross-tabulated for all subgroups, and further disaggregated by ancestry for major racial and ethnic groups (e.g., for sub-subgroups of Asian/Pacific Islanders). 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 the categories above.

13. Resource Equity

Despite clear data on the fiscal inequities present between high- and low-poverty districts, few states have made significant progress in providing high-poverty schools with needed resources. Funding inequities hamper the ability of high-poverty schools to attract, develop, support, and retain qualified and effective teachers; and to provide necessary services and adequate instructional tools. Therefore, the Department should require any state that applies for a waiver to document per-pupil expenditures for each school and district. To receive a waiver, states must be able to show evidence of a plan to increase resources for those high-poverty districts in the state that also have low per-pupil expenditures.

14. Equitable Distribution of Teachers

Current law requires that states have a plan in place to ensure that students from low-income families and minority students are not taught at higher rates than other students by inexperienced, unqualified, or out-of-field teachers. In granting waivers, the Department has an opportunity to improve state efforts to ensure that low-income and minority students have equal and adequate access to highly qualified teachers. To this end, any state that applies for a waiver should submit evidence (including school-by-school and district-level data) of how the state in the past has, and how over the next four years will, comply with provisions of current law regarding the equitable assignment of teachers within and among LEAs. The state should further demonstrate how the state and each LEA will ensure that high-poverty/majority minority schools are able to attract, develop, support, and retain highly qualified teachers, particularly in high-need subjects and fields, through measures that may include financial and other incentives, state and district teacher recruitment plans, “grow-your-own” teacher preparation models, and measures to improve the culture, climate and working conditions at schools.

15. Maintain Mandatory Allocation of Funds

Recent reports suggest that the Secretary intends to forego the mandatory allocation of funds by LEAs for school choice and supplemental educational services (SES) through state waivers.³ If this is the case, the Department should require that funds that would have been set aside under the choice and the SES provisions should still be reserved by LEAs and used to *directly* benefit the students who are eligible for choice or SES.

The Department should also provide a robust framework to guide the development and implementation of interventions provided using these funds. For example, should an LEA choose to implement additional programming through Extended Learning Time (ELT), the LEA would need to assure the state and the Department that such ELT programming would be comprised of specific, research-based components that have been proven effective in accelerating student achievement and improving school climate in similar schools.

In addition, because of teachers' integral roles in improving schools and student performance, LEAs that receive waivers that release them from the requirements of the choice and SES provisions in Title I should be required to demonstrate how they are complying with the comparability of resources (Section 1120A) and teacher equity provisions (Section 1112(c)(1)(L)). In addition, states should be required to demonstrate compliance with Section 1111(b)(8). Such measures would ensure that LEAs and schools are provided with the resources necessary to attract, develop, support, and retain the great teachers and staff needed to accelerate student performance. Likewise, progress in these areas would provide recourse, in the form of additional effective school options, which would not have been available otherwise to students trapped in failing schools.

16. Require Supports for Implementing College- and Career-Ready Standards

At a minimum, in order to be eligible for a waiver, each state should demonstrate equitable access to the core college preparatory curriculum (ranging from availability of Algebra I in middle school to a robust offering of AP, IB, or dual enrollment college-credit bearing classes in high school). Evidence submitted should include an analysis of the relevant portions of Department's 2010 Civil Rights Data Collection. States and districts that report statistically significant disparities in course offering, enrollment, completion, and passage should not be eligible for waivers unless they submit to OCR and obtain an approved agreement, with annual goals and timetables, to achieve equity in these areas.

17. Create a Sunset Provision for All Waivers

We believe waivers should be granted for two years. An additional two years may be granted if the state provides the Department with evidence of adherence to the plan and of improved student achievement (including the closing of gaps and the raising of subgroup performance). This evidence should be subject to the same disclosure, consultation and transparency requirements we have recommended in previous sections of this document.

³ See "New Details Emerge on Duncan's Waiver Plan" at http://blogs.edweek.org/edweek/campaign-k-12/2011/07/so_about_a_month_ago.html?qs=waivers

19. Preservation of the Rights of Parents and Employees

In recognition of the fact that improvement efforts and interventions are more likely to succeed when all stakeholders are involved and invested in the process, we urge the Department not to waive provisions of Title I respecting the rights and interests of both parents and employees, including the right to collective bargaining. See, e.g., Sections 1116 and 1118.

Title III Requirements and Conditions

Today, almost one in five students in the United States speaks a language other than English at home and roughly half of these students – about ten percent of all students – have not mastered English well enough to be considered fluent. Our nation’s educational outlook, accordingly, is directly linked to raising the achievement of all English language learner (ELL) students in both language acquisition and content knowledge.

Currently, Title III of ESEA, which: (1) provides language acquisition grants to supplement classroom instruction and encourages greater professional development; and (2) fosters some educational connectivity for ELL instruction across states and districts, is a solid foundation that should be respected and strengthened through any grant of waiver authority. A wise use of waiver authority would provide reasonable flexibility to states and LEAs, but require those states and LEAs to better address the lingering ELL issues outlined below before they are granted waivers:

1. ELL Definition

As a condition for a waiver, states should harmonize their approach to identifying which students are deemed “limited English proficient” within an individual state. Greater uniformity in definitional approach would provide a more meaningful census of this growing and diverse student population and prevent bureaucratic “fuzzy math.”

2. English Language Proficiency Assessments

All states have developed diagnostic and summative assessments that measure an ELL’s baseline proficiency upon entering a district and eventual progress in listening, speaking, reading, and writing English. These assessments are the primary determinant of who is designated an ELL student. Similar to the Enhanced Assessment Instrument Grant approach outlined by the Department in the January 7, 2011 Federal Register, the waiver process should expect states and LEAs to: (1) adopt valid and reliable diagnostic and summative assessment instruments linked to content standards; (2) eliminate reliance on a single cut-off score approach; and (3) incorporate multiple measures to trigger an ELL (re)designation (i.e., a multi-pronged home language survey to assess student use of languages in multiple contexts, the use of student interviews to assess student communicative competencies in multiple contexts, and other assessment scores).

3. Home Language Surveys

The waiver process should expect states to demonstrate that all LEAs using a legally sufficient, multi-pronged home language survey that seeks to determine student use of languages in

multiple contexts such as the: (1) primary language used at home; (2) language most often spoken by the student; and (3) language the student first acquired.

4. ELL Sub-Subgroup Data Disaggregation

The waiver process should expect states to collect, disaggregate, and report ELL student data in a manner that will enable states and LEAs to use the data to provide support and services to the total ELL population and several key sub-subgroup populations within, including “recently arrived” ELLs who have been in the U.S. school system for less than twelve months; “late arrival” ELLs who enter the U.S. school system at 9th grade or above; “interrupted” ELLs who have left the U.S. school system and then re-entered; “long-term” ELLs who have been identified as such for at least five years; and “former” ELLs who have exited the category within the last three years. Cross-tabulation of ELL data – for example, ELLs with special education needs and “migratory” ELLs – would also help complete the overall picture of this diverse student group.

5. Challenging Yet Realistic Developmental Trajectories and Curriculums

Waiver authority should be exercised in a manner to respect a presumption against modification of an AMAO for ELLs by requiring a state seeking a modification to an existing AMAO scheme to use existing data to empirically establish a more appropriate timeframe for attaining English proficiency and content standard mastery. Meaningful markers of progress and quantifiable accountability targets must be part of any AMAO revised under waiver authority. To completely abandon AMAOs would not be acceptable. Waiver authority should also challenge states to collaborate on creating: (1) model testing and curriculum that are aligned to the state language proficiency and content standards for ELLs; and (2) best practices/resources that are open-source and available for easy adoption.

6. Content Assessments and Reasonable Accommodations

Waiver authority should be implemented in a manner to ensure compliance with provisions of current law requiring states to adopt and administer valid and reliable content assessments for ELLs and non-ELLs. Until such time as valid and reliable assessments of college- and career-ready standards for both ELLs and non-ELLs are developed and field-tested by the states and approved by the Department, states should provide evidence that they have adopted and are using appropriate accommodations to current assessments that are: (1) narrowly tailored to various ELL subgroups; (2) reviewed and vetted by an expert panel; and (3) better support the ELL test-taker without invalidating the assessment or providing an unfair advantage. Such steps would increase the reliability of ELL assessment scores.

7. “Supplement Not Supplant” Safeguards

Section 9401(c)(4) of NCLB prohibits the Secretary from waiving “supplement not supplant” safeguards. By extension, no waiver authority deliberation or decision should have the effect of weakening this core Title III concept.

8. OELA Oversight

The Office of English Language Acquisition (OELA) should play a greater role in monitoring and oversight of any waivers tied to Title III or Title I obligations that apply to ELL students. Underutilizing OELA and limiting the authority of the office is unacceptable.

9. Maintenance and Use of Native Language

Waiver authority should be exercised in a way to incentivize states to: (1) adopt approaches such as bilingual education or dual-immersion programs that encourage English mastery *and* maintenance of a student's native language; and (2) adopt native language assessments in content areas except for English language arts (i.e., math, science) if more than 25 percent of an ELL population is of a particular language group or the state's ELL enrollment exceeds a numerical threshold of enrollment in the state.

10. Parental Engagement

Any waiver application should require a state to show how LEAs and schools within the state have implemented their "language that a parent can understand" duties found throughout ESEA in a manner that matches or exceeds their obligations under Title VI and other federal law.

11. ELL Teacher and Other Professional Preparation

Waiver authority should foster collaboration across states so that states and LEAs can develop joint certification/preparation programs and continuing professional development for: (1) ELL instructors; and (2) content area teachers that work with ELLs, affording them current evidenced-based research practices, pedagogies, resources, and strategies to teach, evaluate, and nurture ELL students.