



National Association of State Directors of Special Education, Inc.

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June 23, 2008

Zollie Stevenson, Jr.
U.S. Department of Education
400 Maryland Avenue, SW
Room 3W230
Washington, DC 20202-6132

RE: Docket ID ED-2008-OESE-0003

Dear Dr. Stevenson:

The National Association of State Directors of Special Education (NASDSE) appreciates this opportunity to submit comments in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on April 23, 2008 addressing Title I of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act (NCLB). NASDSE is a not-for-profit organization representing the state directors of special education in all 50 states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, U.S. territories and the Freely Associated States (FAS).

NASDSE strongly supports accountability and high standards for states, local education agencies (LEAs) and schools that include students with disabilities. At the same time, we hear from our members that some provisions of NCLB and its regulations are particularly difficult to implement, especially in small states with small staff and in very small rural school districts where access to alternate schools or the availability of supplemental educational services (SES) may be severely limited. As we reviewed the proposed regulatory changes, we considered them in light of their impact on students with disabilities and their families as well as the capacity of all states and LEAs, particularly small states and rural school districts. We also hold all new data collection/breakout reporting to a single standard: will the specific reporting help improve outcomes for students? Will the data, or the disaggregation of data, help target and focus services to improve outcomes? With limited resources and capacity, adding to the significant data burden states and LEAs already face, collecting and/or disaggregating more data must serve this purpose. Further, as a new report released this past week by the National Governors Association indicates, state budgets are suffering from the downturn in the economy.¹ States simply lack the financial resources to meet additional requirements under the ESEA. Our comments will thus reflect these underlying concerns.

We also are particularly concerned about making major regulatory changes to the ESEA at this time. As you know, Congress is currently considering the reauthorization of the ESEA. While reauthorization is stalled, we know that the law will in all likelihood be reauthorized in the next 12-18 months. There is a strong likelihood that the

¹ This report, *The Fiscal Survey of States* (June 2008) can be found at <http://www.nga.org/Files/pdf/FSS0806.PDF>.

reauthorization will address some of the changes being proposed by these regulations. The resulting changes could very well cost SEAs and LEAs millions of dollars to make two rounds of significant changes – some of which may contradict earlier changes – in a very short period of time.

Further, as we have indicated in previous comments on regulatory and other data reporting requirements, states and LEAs need appropriate time to implement significant changes in accountability requirements. While these proposed regulations include ‘ramp up’ time for implementation of the NGA graduation rate component, other implementation timeframes are unrealistically short and fail to take into account the very real capacity issues for both staff and fiscal resources that states and LEAs face. Should the Department issue final regulations at the end of 2008 or early 2009, it is not practical to implement the changes in the middle of the school year so we urge setting an implementation date of no earlier than the 2009-10 school year.

Our specific comments by section follow.

Section 200.7 Disaggregation of data

NASDSE supports the underlying intent of these proposed regulations -- to ensure that states have adopted appropriate minimum N sizes for the purpose of ensuring that AYP determinations based on statistically reliable data while also measuring subgroup performance for accountability purposes. NASDSE has been concerned that N sizes that are too large have left students with disabilities out of the school accountability system in some instances. At the same time, there are valid reasons for states having the flexibility to select an N size that meets the needs of their school districts and is pleased that this flexibility remains in the proposed regulations.

NASDSE does not support the requirement in 200.7(iii)(C) that requires states to disaggregate the data to include the number of students and student subgroups excluded from school-level accountability determinations. NASDSE believes that this requirement simply serves to identify those students for whom the minimum N size is meant to protect from identification. Further, as indicated above, disaggregation of this data does not meet the litmus test we referenced in our overarching comments: this data will not help improve student outcomes because schools already have the assessment data for these students and know whether or not they are proficient.

NASDSE also does not support the provision that states resubmit their consolidated Accountability Workbooks in their entirety. We question why each and every state should have to submit a completely revised Workbook, a task that will require significant person hours and financial resources to undertake on the eve of a reauthorization that in all likelihood will require additional changes to the Accountability Workbooks in the very near future. Furthermore, without better guidance from the Department, it would be difficult for states to gauge precisely what information the Department would accept for justification of its N size.

NASDSE recommends that rather than requiring all states to resubmit their consolidated Accountability Workbook, the Secretary follow up administratively on a case-by-case basis with states whose minimum N ranges appear to be ‘outliers’ from the range of N sizes chosen by the majority of states.

Section 200.11 Participation in NAEP

NASDSE supports raising educational standards in a transparent fashion that is easily understandable to the public. However, NASDSE does not support the proposed regulation that would require states to report its NAEP results on its report card and would require LEAs to report NAEP data to the SEA. The accountability assessments under NCLB must be aligned to state academic standards and content. However, the NAEP assessments are not necessarily aligned with state standards as content may vary from state to state and from grade to grade. Furthermore, NAEP is not administered to all students in a given state, nor is the data broken out by the same subgroups as required by NCLB assessments. In addition, the two assessments are not given at the same time in the school year, which can have an impact on the test scores. Thus cross-comparisons between results from a NAEP assessment cannot automatically be compared to results from NCLB assessments and posting the two scores side-by-side presents a false impression suggesting that you are comparing 'apples to apples' when in fact it would be a comparison of 'apples and oranges.' For these reasons, NASDSE believes it is more than sufficient for the states and LEAs to continue to post their own assessment data and for the federal government to release the NAEP data.

Section 200.19 Other Academic Indicators

Out of all of these proposed regulations, NASDSE is most troubled by the proposal surrounding the calculation of graduation rates. Although we support the effort to develop a uniform graduation rate, we believe that the methodology proposed by the Department is seriously flawed for the following reasons:

- The proposal fails to adequately address the 'counting' of students who take more than four years to graduate from high school. While the proposed regulation makes mention of including a five-year graduation rate for 'some students,' we are concerned that the Department has failed to take into consideration the diverse needs of students who need five years, six years or even longer to complete a high school curriculum. The Individuals with Disabilities Education Act (IDEA) clearly recognizes that some students will need more time and allows through age 21 to complete high school, if necessary. NASDSE believes that we should be acknowledging, not discounting, the success of some students with disabilities (and some students without disabilities), as well as their educators, in helping students with special needs graduate with a meaningful diploma regardless of how long it takes them. Otherwise, the message we are giving these students is 'they don't count' or 'you shouldn't have taken so long.' The unintended consequence of this is that students may either drop out or be pushed out when it becomes apparent that they will not graduate in five years.

We do not believe that these are messages that we should be giving struggling students who can ultimately be successful in completing school. In addition to this small number of students with disabilities, there are numerous other students who can be successful when given extra time. These include, for example, students who have suffered a serious medical setback (through either accident or illness) and miss a portion or a school year (or longer) due to hospitalization and rehabilitation. It would also include students who become pregnant and drop out

of school to care for an infant before returning. Indeed, it would include any student who drops out and then is coaxed back to school to graduate with a regular diploma. NASDSE believes that all of these students matter and that their successes should count, regardless of the number of years involved.

- NASDSE believes that the Department has placed too heavy an emphasis on a four-year graduation rate. While it would be helpful and more transparent to have a uniform approach to measuring graduation rates, we question why it is only a four (or in some cases, five) year graduation rate that matters. We would ask the Department to document any scientifically based research that indicates that students who complete high school in four years have better post-school outcomes than students who complete high school in five or six years. If this research is not available, then we urge the Department to instruct the Institute for Education Statistics (IES) to undertake such research prior to mandating a four or five year graduation rate calculation. In the absence of such research, NASDSE believes that LEAs and schools should focus on decreasing the dropout rate because there is significant data documenting that students who drop out of school have poorer post-school outcomes in terms of employment options and future earnings.
- The graduation calculation that the Department proposes states and LEAs use requires them to discount any student in a cohort for which they do not have documented evidence that the student received a regular diploma elsewhere. In essence, this requirement makes an LEA responsible for students who move to another school district in the middle of high school who do not finish high school in their new school districts. Once a student leaves an LEA for another district, the original LEA has no control over what that student does with his or her education. The student may turn to drugs or crime but the original LEA has no control over that and should not be penalized for what happens to a student once he or she moves away from a district. Furthermore, a small number of students may move overseas (or in the case of illegal immigrants, be removed from this country) and not request school records, making it difficult if not impossible to follow up on these students.
- The proposed regulations require that to be counted as a graduate, the student must graduate with a 'regular' diploma. We believe that the Department's reference to a 'regular' diploma is somewhat vague in light of the multiple diploma options that some states have (e.g., a diploma may be given to students who complete coursework but are unable to pass the high stakes exit exam). NASDSE believes that it is important for students to graduate with a meaningful document that will leave them prepared for their post-school lives. For some students, an alternate diploma or a GED may be sufficient, especially for students who have dropped out and are returning to complete their high school education. We believe that all of these students should be counted in the graduation rate and that a GED should be considered an acceptable school completion certificate.
- Finally, NASDSE opposes the requirement that states develop an alternate 'averaged freshman graduation rate (AFGR).' This puts an additional financial and personnel burden on states when it would be more desirable for them to

focus on development of the necessary infrastructure for the long-term uniform approach that the Department wishes to implement.

At a minimum, NASDSE supports an approach to the development of a uniform graduation rate calculation agreed to by many education and disability organizations. See, for example, comments submitted on this point by the Council of Chief State School Officers (CCSSO) and the Consortium for Citizens with Disabilities (CCD). (NASDSE has endorsed the CCD's comments on graduation rates.) However, we believe that even if the Department approves the 'consensus' proposal that our comments above be addressed in the final regulation.

Section 200.20 Making Adequate Yearly Progress

NASDSE strongly supports the inclusion of growth models as a means of measuring student proficiency, but we are very concerned that the proposed language does not sufficiently take students with disabilities into account. The proposed regulations essentially scale up the Department's existing pilot program for growth models. However, the parameters placed around the current pilot models require that students with disabilities make more growth progress than students without disabilities in a given year, particularly if they are struggling to master grade-level content (e.g., the 1% and 2% students). The Department is undoubtedly aware that the pilot states have for the most part excluded students with disabilities from their programs for this very reason. Therefore, we oppose the language that would require *all* students to "be on trajectory to meet or exceed within 3 years, the State's proficient level." The growth model language, while requiring the demonstration of growth, must reflect that for some students with disabilities, growth may come at a slower rate. NASDSE recommends that growth models not be scaled up on a national level until an analysis has been done of the currently approved growth models so that future policy may be based on lessons learned from the field.

Section 200.22 National Technical Advisory Council

NASDSE supports the establishment of a National Technical Advisory Council that would advise the Secretary on issues surrounding state standards assessments and accountability systems. We recognize that issues surrounding assessment and accountability have presented ongoing challenges to states. This panel, unlike many other panels that the Department has convened on matters related to NCLB (e.g., the panel that initially reviewed growth model proposals) **MUST** include an expert or experts from the field of special education and assessment. Appropriately assessing students with disabilities has proven to be a challenge and NASDSE strongly feels that the TAC should make recommendations to the Secretary that are informed by experts who have direct experience in developing assessments for students with disabilities.

Section 200.37 Notice of identification for Improvement, Corrective Action or Restructuring

NASDSE supports the proposed regulation that would require LEAs to inform parents whose children qualify for school choice with an explanation of the available school choices no later than 14 calendar days prior to the start of the school year. NASDSE believes that while the proposed regulation will place additional burden on the SEAs and LEAs, the proposed regulation does a fair job of balancing the rights of parents to have

adequate time to make educational decisions for their children and the need for SEAs and LEAs to have adequate time to review their assessment results and make determinations about schools. At the same time, it is our understanding that not all LEAs receive their assessment results in time to meet the 14-day timeframe. Therefore, if an LEA misses this timeframe, we believe that they should provide an appropriate explanation for the delay along with a projected target date (not to exceed 30 days) and accordingly, not be penalized for failing to meet this requirement.

Section 200.39 Responsibilities Resulting From Identification for School Improvement

NASDSE supports an approach that encourages eligible students to take advantage of supplemental education services (SES). However, we think the proposed regulation emphasizes the wrong components of reporting on this issue. First, we question whether the additional reporting elements link either directly, or indirectly, to improved outcomes for students. States are already required to oversee the selection of SES providers and provide information about providers. Likewise, LEAs are required to provide information about school choice options. The Department offers no explanation or examples as to why the current approach is not working other than to say that in its view, insufficient numbers of students are participating. That may well be the case, but it is not clear that reporting on the number of students who were eligible for and who participated in SES or public school choice will help parents considering such services or that improved outcomes for these students will result simply by reporting on the number of students who received such services. There may be many reasons why parents opt out of transferring their children to another school or elect not to participate in SES, so the number by itself tells you nothing and we therefore urge the Department to remove this requirement from the final regulation.

Section 200.43 Restructuring

NASDSE supports rigorous interventions for schools that repeatedly fail to make AYP. However, NASDSE also believes that while federal policy can guide implementation, a one-size-fits-all approach at the state and LEA level for school-wide intervention and restructuring is not appropriate. Specifically, we take note of the widely varying nature and needs of both states and LEAs and believe that the proposed regulation fails to take this into account by its prescriptive nature. Additionally, the proposed regulation specifies that an intervention implemented must be 'significantly more rigorous' and comprehensive than those implemented under the school's previous corrective action plan. However, these terms are subject to interpretation and the regulation provides little guidance as to what would be acceptable to the Department. Our concern with this provision is simple: change often takes time and this proposed regulation may serve to disrupt an effective intervention that is beginning to result in effective change. Finally, we are not convinced that replacing the school principal is ALWAYS insufficient when there is a body of growing research that illustrates the effectiveness of replacing the school principal versus the majority of a school staff.

Section 200.44 Public School Choice

While NASDSE agrees in theory with this requirement, we once again note that this may not be a viable option for some states or LEAs that do not receive their assessment result back in time to comply. Before making this a requirement, we urge the Department

to check with all states to ensure that their assessments can be reported in time to meet this requirement. If the answer for some states is no, then we recommend that those states be allowed to request an additional 30 days to meet this requirement by providing documentation as to when the results will be available.

Section 200.50 SEA Review of LEA Progress

NASDSE suggests that this proposed regulation be postponed pending reauthorization of the ESEA. If this requirement were to be put into place in the middle of the 2008-09 school year, we believe that it would place an undue burden on states by requiring them to change their review policies on the eve of the reauthorization of ESEA, only to have them make additional changes in their policies and procedures within the next two years. This is a costly duplication of effort that can be postponed.

Section 200.56 Definition of “Highly Qualified Teacher”

In theory, NASDSE supports efforts by the Department to facilitate coordination of policies and practices under IDEA and NCLB. Nevertheless, we are troubled by the precedent being set by incorporating a regulation from one law (IDEA) into a regulation for another law (NCLB) that contains no reference to special education teachers. We believe there are more meaningful steps that the Department could take that would address its concerns about cross-referencing the two laws without taking the unprecedented step of including a regulation under ESEA that cannot be required by the law upon which the proposed regulation is based. For example, LEAs are required to report numbers of highly qualified teachers under both NCLB and IDEA. However, the reporting requirements are different (e.g., under ESEA, LEAs report on the number of classes being taught by HQT). It would ease the data reporting burden on states tremendously to bring the reporting requirements and timelines for reporting data more in synch and we urge the Department to establish a taskforce with representation from both the OESE and OSEP and outside stakeholders to address this issue.

Thank you again for the opportunity to provide these comments. Should you have any questions, please feel free to contact me at bill.east@nasdse.org or Nancy Reder, NASDSE’s director of government relations at nancy.reder@nasdse.org.

Sincerely,



Bill East, Ed.D.
Executive Director