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

Comments on Draft, Non-Regulatory Guidance on Title I, Part A Waivers
Submitted via Electronic Mail to: OIRA-Submissions@omb.eop.gov

Dear Secretary Duncan:

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, submits these comments on the Draft Non-Regulatory Guidance on Title I, Part A Waivers. The Council believes that providing this comment period, albeit brief, on an important guidance document is a positive policy that should result in a more useful final product. Nonetheless, earlier outreach by the Administration during the development of the guidance would have produced a better draft and reduced the volume of comments submitted below.

The Council's comments reflect our difficulty in dealing with the framework and organization of the Draft Title I Waiver Guidance. The Council strongly supports the Department's statement in A-2 that individual LEAs may directly request waivers, if they desire, as an alternative to having statewide waivers submitted by their SEAs. Section A also recognizes the authority for Indian tribes, and schools through their own LEAs to request waivers under ESEA section 9401.

Unfortunately, many of the Q&As in the draft guidance, as well as in the Appendices, seem to be excessively State-oriented. While many of the Q&As in Section A address requests for waivers from LEAs and other entities, and C-4 expressly addresses direct LEA waiver requests from the Title I "set-aside" provisions and per-pupil expenditure calculation, the bulk of the draft waiver guidance is addressed primarily to SEAs. And, while the statewide waiver process may be preferable and less burdensome on LEAs on the front end, there remain major local level uncertainties regarding: 1) whether an SEA will request a blanket waiver for each of the Title I requirements in the Guidance, and 2) how protracted and elaborate the LEA-to-SEA waiver process and subsequent Title I plan/application modification process may become. Department clarity on direct LEA waiver requests and any directions to SEAs regarding expeditious handling and minimal burdens for LEA implementation of approved statewide waivers are essential from a school district perspective.

Local school district officials have waited far too long for this Title I Waiver Guidance -- since the early March waiver announcement by the Secretary in the Title I Fact Sheet for the American Recovery and Reinvestment Act (ARRA). The confusion that existed in the interim resulted in prolonged and duplicative ARRA planning, budgeting, and application development by local school districts. Local school officials can ill afford further delays in the application, processing, and approval of local waiver requests by either the U.S. Department of Education or the State Departments of Education.

The Council submits these detailed comments in hopes of improving the utility of this important Title I Waiver Guidance. Please feel free to contact the Council of the Great City Schools at 202-393-2427 or jsimering@cgcs.org if further clarification of these comments is needed.

Sincerely,

Michael Casserly
Executive Director

COMMENTS ON DRAFT NON-REGULATORY GUIDANCE ON TITLE I, PART A WAIVERS FROM THE COUNCIL OF THE GREAT CITY SCHOOLS

General Recommendation

In order to address the concerns in our preceding cover letter about the approval of local waivers, the Council recommends clarifying, reorganizing and highlighting the local waiver options in the Guidance document.

Though not preferred, one approach could include a more detailed description of the local direct waiver process in the Section A – General Requirements of the Waiver Guidance. Such a broader general local waiver description could be made applicable by reference for all the subsequent Q&As, which would refer to the SEA only for ease of reading while applying to LEAs, tribes, and applicable schools as well.

A more preferable approach, however, is reflected in the current draft C-4 relating to Title I "set-asides" and "per-pupil amount" requirements. C-4 specifically states how the process of an LEA applying directly to the Secretary for a waiver differs from the SEA statewide waiver process. Replicating this same Q&A format from C-4 regarding direct LEA waiver requests for each type of waiver enumerated in the Guidance would cure the narrow SEA-orientation found in most of the guidance document.

Recommendation: The Council recommends that an analogous C-4 type of Q&A is included in each separate section of the Guidance dealing with the different waiver invitations.

Comments on Specific Draft Questions and Answers

Comment on A-2: The Council appreciates the unambiguous statement that LEAs may apply for waivers individually if desired. The clarification that a school must submit its waiver request through the LEA is useful.

Comment on A-6: The answer provides a clear and useful delineation of the notice and comment responsibilities for waiver requests.

Comment on A-9: The Council strongly supports the open (no deadline) application process for Secretarial waivers.

Comment on A-11: If the ARRA fund obligation period is extended beyond September 30, 2011, the Guidance should acknowledge that the Secretary has the discretion to extend the waiver duration as well.

Recommendation: Add a new sentence at the end of the second paragraph of the A-11 as follows: "The Secretary has the discretionary authority to extend the waiver duration described in the previous sentence if the obligation period for ARRA funds is extended beyond September 30, 2011."

Comment on A-13: The Council strongly supports the flexibility to consider other waivers beyond those provisions/requirements addressed directly in this guidance.

Comment on A-14: Since Section A, Part I reflects general guidance on waivers, A-14 should not omit the fact that LEAs, tribes and schools through their LEA may submit waivers, in addition to SEAs, and should be equally recognized to submit consolidated requests for waivers of more than one provision. The Council strongly supports the efficiency of being able to request multiple waivers in a single request.

Recommendation: In Question A-14 and in the accompanying answer insert after "an SEA" in each instance: ", LEA, Indian tribe, or school through its LEA".

Comment on B-1: As stated in our General Recommendations above, the Council is extremely concerned that this section of the guidance is tailored solely for SEA waiver requests, when LEAs, Indian tribes and schools through their LEA are clearly allowed to request waivers. This clarification is essential, particular regarding the important issue of SES provider status for LEAs. Moreover, the new waiver invitation to count SES expenditures in the first improvement year against the "20% set-aside" is also of importance to local district officials. The draft guidance should be corrected to make this authority unambiguous.

To highlight the importance of the waiver of the SES provider status prohibition [34 CFR 200.47(b)(1)(iv)(A) and (B)] on LEAs , the Council underscores that this regulation has no basis in statute and is an expenditure and service restriction on the LEA, tribe, or school. Hence, the interest in waiving this provision is stronger at the local level than at the state level. After this regulatory provision is waived, the state has the obligation by statute to "develop and apply objective criteria" to all potential providers, and only then may exercise state authority to decide on whether applicants have a "demonstrated record of effectiveness" [ESEA section 1116(e)(4)(B)]. LEA, tribes, and schools have the statutory imprimatur to request an objective determination of their SES provider status, once this regulatory barrier is waived by the Secretary. Local officials have a similar interest in the expenditures and services that would be allowable under the new waiver invitation to count SES expenditures in the first year of school improvement. Failure to recognize LEA, tribe, and school access to a Secretarial waiver determination would constitute unequal treatment, and be contrary to section 9401.

Recommendation: The Council reiterates the above general recommendation that a distinct Question and Answer, similar to C-4, is included for each of the distinct waivers invited under Section B (the 14-day notice, the SES provider status for LEAs, and the new waiver to count SES expenditures in the first year of improvement status).

Further Comment on B-1 (Proposed New Waiver Invitation for Schoolwide Program Planning Period): The Council recommends clarification of the operation and exceptions to the one-year planning requirement for Title I Schoolwide Programs (SWP), as well as extending an invitation for waivers of those provisions [ESEA section 1114(b)(2)(B)(i) and 34 CFR 200.27(b)(i)]. Since the Title I stimulus funds provided a significant increase in FY09 Title I allocations for thousands of school districts, many

districts are interested in extending the additional funds to additional Title I-eligible schools that were unable to participate in the program in past years. However, the above planning provisions inhibit the ability to support additional Title I-eligible schools in the upcoming school year as schoolwide program schools. In short, a district may have to spend twice the amount of FY09 Title I funds in the same Title I schools, rather than serving additional students in other non-participating Title I-eligible schools. For many districts, targeted assistance approaches are unavailing since virtually all Title I schools in most of the largest urban districts are SWPs.

Recommendation: Insert a new paragraph at the end of B-1 as follows: "Additionally, the Secretary wants to encourage the use of the additional Title I funds provided under ARRA and the regular FY09 Title I appropriation to expand Title I services into additional Title I-eligible schools, especially eligible secondary schools. Since it has come to the attention of the Department that the one-year schoolwide program planning requirement [ESEA section 1114(b)(2)(B)(i) and 34 CFR 200.27(b)(i)] is viewed as a barrier to serving additional students, the Secretary highlights the provisions allowing consultation with school support teams and technical assistance providers [ESEA section 1117] as an alternative to the one-year planning period, and also invites statewide or local requests for waivers of these provisions as second alternative."

Comment on B-8: See the Council's General Recommendation and our comment on B-1 above, underscoring the Council's strong objections to any narrowing of the section 9401 authority allowing LEAs, not just SEAs, to apply for waivers of the LEA provider status prohibition in SES. Earlier this year, the Great City Schools formally requested Secretary Duncan to consider a regulatory revision to eliminate the LEA and school prohibition on provider status, and it was the Great City Schools that initiated discussions with Secretary Spellings resulting in the LEA Provider Pilot – all requests for regulatory flexibility arising from the local urban school districts.

Recommendation: The Council reiterates the above general recommendation that a distinct Question and Answer, similar to C-4, is included for each of the distinct waivers invited under Section B (the 14-day notice, the SES provider status for LEAs, and the new waiver to count SES expenditures in the first year of improvement status).

Comment on B-9: The last statement in the B-9 draft answer unnecessarily raises a controversial issue by stating "nor would it constitute a waiver of any State law or policy that prohibits all or certain identified schools or LEAs from serving as an SES provider". The Council recommends deleting this statement from the final guidance as unnecessary. Additionally, the Council disagrees with the substance of the statement. Since the inception of NCLB, the Department has claimed that market forces and parental choice would control the SES selection process, and that arbitrary limits on which entities could be providers would not be established beyond the objective demonstration of their record of effectiveness. The Department would never countenance a state law or policy limitation that prevented, for example, private sector providers from participation in SES. Similarly, the Department should not allow any state-established add-on limitations restricting other types of providers, including LEAs and schools. In fact, all states have accepted Title I funds and its accompanying grant requirements that mandate the

application of objective criteria in reviewing and approving all potential providers based on a demonstrated record of effectiveness [ESEA section 1116(e)(4)(B)]. To establish limitations that screen out any potential providers prior to the statutory review process would violate and fail to comply with the grant requirements to which the state has agreed in accepting the funds.

Recommendation: In B-9 strike "nor would it constitute a waiver of any State law or policy that prohibits all or certain identified schools or LEAs from serving as an SES provider."

Comment on B-10: The Council strongly supports the clarification that conditional approval of provider status may be granted by SEAs. Conditional approval would prevent further delays in Title I planning, budgeting and implementation while an "invited" waiver request is pending.

Comment on B-16: See the Council's General Recommendation and our comment on B-1 above, underscoring the Council's strong objections to any narrowing of the section 9401 authority allowing LEAs, not just SEAs, to apply for waivers. Many school districts view provision of the SES as a more viable instructional option than allowing students the transfer option to another school. Although an initial year of SES may be a better option than school transfers, the Council notes that virtually all SES evaluations suggest that the academic benefits of SES may be very limited at best, and nonexistent in many instances.

Recommendation: The Council reiterates the above general recommendation that a distinct Question and Answer, similar to C-4, is included for each of the distinct waivers invited under Section B (the 14-day notice, the SES provider status for LEAs, and the new waiver to count SES expenditures in the first year of improvement status).

Comment on B-22: As stated above, a number of urban LEAs have been participating in the LEA Provider Pilot Projects for a number of years. It may be an oversight that B-22 allows states participating in the SES/Choice "Flip" Pilots to apply for renewal of their waiver, while the draft guidance is silent on the renewal of the LEA Provider Pilot Projects. Both types of Pilot Projects should be available for renewal.

Recommendation: Add a sentence at the end of the answer to B-22 as follows: "An LEA that was granted flexibility through an SES Pilot to offer SES as provider despite being identified for LEA improvement may request to have this flexibility renewed for the 2009-2010 school year."

Comment on C-2: As explained in our General Recommendations, C-4 appears to resolve the Council concern regarding C-2 by expressly allowing individual LEAs, not just SEAs, to apply for the "set-aside" and "per-pupil amount" waivers.

Comment on C-3: The Council strongly supports C-3 which clearly states that SEAs receiving statewide waiver authority under Section C cannot deny their LEAs a subsequent local waiver if the LEA includes all the required information enumerated in this Guidance document. The Council, however, is extremely concerned with the inconsistent language in C-10, which appears to suggest that states may deny waiver permission to some LEAs.

Recommendation: C-10 should be modified to delete the use of the term "deny" which will be interpreted incorrectly by some SEAs. See C-10.

Comment on C-4: The Council finds that C-4 provides a model to replicate regarding the waivers in other sections of the Guidance, in order to clarify how LEAs, tribes, and schools through their LEAs may directly apply for waivers.

Comment on C-7: The Council is very concerned with the Department's note in C-7 that indicates that there is no expectation for an SEA to alter its usual process for approving LEA applications. On the contrary, it should be a major concern to the Department that many SEAs typically do not provide final approval of LEA Title I applications until late fall or even after the beginning of the next calendar year. Typical SEA Title I application processes will even further delay the implementation and expenditure of ARRA funds at the local level.

Recommendation: The Department should delete this entire paragraph in C-7, and replace the paragraph as follows: "Please note that the Department expects expeditious and non-burdensome handling of LEA waiver requests and any LEA Title I application modifications that follow the Department's approval of a statewide waiver. Congress and the Department are committed to prompt action to ensure efficient and quick implementation of ARRA funds."

Comment on C-10: The Council is extremely concerned with the inconsistent use of the words "denied permission" for LEAs to implement Section C waivers, when C-3 clearly prohibits such denials. In each of the three bulleted paragraphs in C-10, the denial terminology is repeated despite the "denial" prohibition in C-3. The Council is certain that some SEAs will view this "denial" language in C-10 as independent discretionary authority for the SEA to approve some LEA waivers and reject others. Revision of the inconsistent "denial" language in C-10 should prevent inconsistent interpretations of these two Q&As.

Recommendation: In each of the three bulleted paragraphs in C-10, strike "but was denied permission to implement the waiver" and insert "a waiver but did not file all of the required information necessary to implement the waiver."

Comment on C-22: The Council supports the guidance permitting an early waiver of the carryover limit in order to allow for effective planning and budgeting for the combination of the FY09 regular appropriation and the 2-year FY09 stimulus funds.

Comment on C-26: The Council recommends that the waiver of the carryover limit due to the increases in ARRA funds not be counted against the regular Title I carryover provision allowing a waiver once every three years.

Recommendation: Add a sentence at the end of the first paragraph in the C-22 guidance answer as follows: "Any waiver of the carryover limitations through FY2010 shall not be counted for the purposes of the regular Title I carryover provision of once every three years in ESEA section 1127(b)."

Comment on E-6: The Council is encouraged that the Department has recognized the multi-year financial reductions faced by local school districts and is indicating its receptivity to ongoing local ESEA maintenance of effort waivers.

Comment on E-9: E-9 suggests that waivers of Title I MoE requirements are to be addressed to Zollie Stevenson, Jr., the Director of SASA, while A-7 suggests that waivers of Title I, Part A requirements are to be addressed to the Assistant Secretary. Although the e-mail address of TitleIWaivers@ed.gov remains consistent, the guidance should also be consistent as to whether the waiver requests are addressed to the Assistant Secretary or the Director.