



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE INSPECTOR GENERAL

April 5, 2007

Memorandum

TO: Kerri L. Briggs, Ph.D.
Acting Assistant Secretary for Elementary and Secondary Education

FROM: Helen Lew /s/
Assistant Inspector General for Audit Services

SUBJECT: Final Inspection Report
Inspection of the Department's ESEA Secretarial Waiver Requirements
Control Number ED-OIG/I13H0003

This final inspection report presents the results of our inspection of the Department's Secretarial Waiver reporting and publication requirements defined in the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB). The objectives of our inspection were to determine whether the Department (1) provided the ESEA Secretarial Waiver reports to Congress as required by the statute, and (2) met the publication requirements for waivers in the statute.

INSPECTION RESULTS

FINDING – The Department Did Not Provide ESEA Secretarial Waiver Reports to Congress and Had Not Met All the Publication Requirements for Waivers in the Statute

The ESEA requires that the Department send an annual report to Congress summarizing Secretarial Waiver activities under NCLB. Section 9401(e)(4) of the ESEA states:

- REPORT TO CONGRESS – Beginning in fiscal year 2002 and for each subsequent year, the Secretary shall submit to the Committee on Education and the Workforce of the House of Representatives and Committee on Health, Education, Labor and Pensions of the Senate a report –
- (A) summarizing the uses of waivers by State educational agencies, local educational agencies, Indian tribes, and schools; and
 - (B) describing whether the waivers –

- (i) increased the quality of instruction to students; or
- (ii) improved the academic achievement of students.

In addition, the ESEA requires the Department to disseminate Secretarial Waiver activities to the public. Section 9401(g) of the ESEA states:

PUBLICATION – A notice of the Secretary’s decisions to grant each waiver... shall be published in the Federal Register and the Secretary shall provide for the dissemination of the notice to State educational agencies, interested parties, including educators, parents, students, advocacy and civil rights organizations, and the public.

Since 2002, the Department has granted 197 Secretarial Waivers under Section 9401. The following chart details the types of Secretarial Waivers the Department has granted:

Type of Waiver	2002	2003	2004	2005	2006	Total
Waivers Related to Hurricanes Katrina and Rita	0	0	0	5	13	18
Growth Model Pilots	0	0	0	0	5	5
Waivers Allowing Local Educational Agencies (LEAs) in the First Year of Improvement to Provide Supplemental Educational Services (SES) Rather Than Public School Choice	0	0	0	1	5	6
Waivers Allowing LEAs in Need of Improvement to Become SES Providers	0	0	0	2	4	6
General Programmatic Waivers	1	3	4	0	2	10
Waivers of the Obligation Period	0	17	4	3	0	24
Waivers of Administrative Cost Limitation in Indian Education	12	33	44	39	0	128
Total	13	53	52	50	29	197

Reports to Congress

The Department did not submit an annual report to Congress in each of the years since 2002. Department officials could not explain why the Department did not submit annual reports to Congress. Department officials stated that in the near future the Department would submit a report to Congress of all Secretarial Waiver activity since 2002.

Publication in the Federal Register

As of the start of our inspection on February 8, 2007, the Department had not published a notice of the Secretary’s decision to grant each waiver in the Federal Register. Department officials could not provide a definitive explanation for failing to publish a notice in the Federal Register. A Department official explained that staff members who might have been responsible for Secretarial Waiver reporting requirements are no longer with the Department. Another

Department official suggested the number of Secretarial Waivers issued had not been significant enough to warrant publication in the Federal Register.

On March 12, 2007, the Department published a list of Secretarial Waivers in the Federal Register. The notice stated that these were the waivers granted from the date of NCLB's enactment through December 31, 2006.

Dissemination to the Public

The Department uses its website as a primary means of disseminating waiver notices to the public. As of the start of our inspection on February 8, 2007, the Department provided general information for waivers on a page titled "Flexibility and Waivers." The section on Secretarial Waivers included only a link to the statute and archived waiver guidance and policy under Section 14401 of the Improving America's Schools Act of 1994, which is the corresponding waiver authority in the ESEA predecessor to NCLB. The page did not include links to information on any of the Secretarial Waivers granted since 2002.

The Department's website contained separate pages that provided information for waivers granted under (1) the Hurricane Katrina and Rita waivers, (2) the growth model pilots, and (3) the SES waivers.¹ This information was not available in a central location that directly linked to Secretarial Waivers under Section 9401. Additionally, the Department had not published information on its website for (1) its general programmatic waiver decisions, (2) its obligation period waiver decisions, and (3) its administrative cost limitation in Indian education waivers.

On February 26, 2007, the Department created a central location for Secretarial Waiver information on its website, titled "Waivers Granted Under No Child Left Behind," that includes a comprehensive listing of waivers granted under Section 9401 since 2002. The Department's "Flexibility and Waivers" page now includes a link to this page.

Recommendations

We recommend that the Assistant Secretary for Elementary and Secondary Education comply with the provisions of the NCLB waiver authority by:

- 1.1 Annually submitting to Congress a report summarizing the use of Secretarial Waivers by SEAs, LEAs, Indian tribes, and schools, and describing whether the waivers increased the quality of instruction to students or improved the academic achievement of students.
- 1.2 Regularly publishing a notice of the Secretary's decision to grant each Secretarial Waiver in the Federal Register.

¹ SES waivers allowed (1) LEAs in the first year of improvement to provide SES and (2) LEAs in need of improvement to become SES providers.

DEPARTMENT COMMENTS

On March 13, 2007, we provided the Department with a copy of our draft report for comment. We received the Department's comments to the report on March 27, 2007. We have summarized the Department's comments and included our response below. The Department's response, in its entirety, is attached.

The Department generally concurred with our finding and recommendations. The Department stated that it recently published in the Federal Register a notice of all waivers granted under Section 9401 and had updated its Internet site to include this waiver information. In addition, the Department stated that it would soon be submitting a report to Congress on waivers granted under Section 9401, and it intends to complete reporting, publication, and dissemination responsibilities in a more timely manner. The Department also stated that the requirement for publishing in the Federal Register does not include specific timelines.

We recognize that the Federal Register does not provide a specific timeline; however, the Department did not publish a notice of waivers granted under Section 9401 between 2002 and 2006 until March 2007.

BACKGROUND

Secretarial Waivers are authorized under Section 9401 of the ESEA, as amended by the NCLB. Section 9401 states, "the Secretary may waive statutory or regulatory requirements of this Act for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency" that receives funds under a program authorized by NCLB and requests a waiver.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objectives of our inspection were to determine whether the Department (1) provided the ESEA Secretarial Waiver reports to Congress as required by the statute, and (2) met the publication requirements for waivers in the statute.

We began our fieldwork on February 8, 2007, and we conducted an exit conference on March 12, 2007. We interviewed Department staff in the Office of Elementary and Secondary Education (OESE) and the Office of General Counsel (OGC). We reviewed waiver decision documentation between 2002 and 2006 provided by officials in these offices. To provide limited assurance for the completeness of the documentation, we conducted Internet searches of Secretarial Waiver activity and did not identify any Secretarial Waivers that had not been provided to us. We also reviewed information available on the Department's website.

Our inspection was performed in accordance with the *2005 President's Council on Integrity and Efficiency Quality Standards for Inspections* appropriate to the scope of the inspection described above.

ADMINISTRATIVE MATTERS

An electronic copy of this final inspection report has been provided to your Audit Liaison Officer. We received your comments, which generally concurred with our finding and recommendations.

Corrective actions proposed (resolution phase) and implemented (closure phase) by your offices will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System (AARTS). Department policy requires that you enter your final corrective action plan (CAP) for our review in the automated system within 30 days of the issuance of this report.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on the audits that remain unresolved after six months from the date of issuance.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

Electronic cc: Wendy Tada, Chief of Staff, ODS
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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

MEMORANDUM

TO: W. Christian Vierling
Director, Evaluation and Inspection Services
Office of Inspector General

FROM: Kerri L. Briggs, Ph.D.
Acting Assistant Secretary

SUBJECT: Draft Inspection Report: “*Inspection of the Department’s ESEA Secretarial Waiver Requirements*” (Control Number ED-OIG/I13H0003)--**RESPONSE**

We have reviewed the Office of Inspector General’s (OIG) draft Inspection Report entitled “*Inspection of the Department’s ESEA Secretarial Waiver Requirements*” (ED-OIG/I13H0003) and are pleased to have the opportunity to provide these comments on behalf of the Office of the Assistant Secretary for Elementary and Secondary Education and the Office of the General Counsel.

In its report, OIG found that the Department did not provide to Congress waiver reports summarizing Secretarial waiver activities under section 9401 of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act (NCLB). OIG also found that the Department had not met all of the statutory publication requirements for waivers. OIG recommended that we annually submit to Congress the required Secretarial waiver report and that we regularly publish in the *Federal Register* a notice on the section 9401 waivers that the Department has granted. We concur generally with OIG’s finding and recommendations.

It is noteworthy that during the early implementation of NCLB, as verified by the draft report, the Department granted very few substantive waivers. For example, during the period from 2002 through 2004, the Department granted a total of eight substantive programmatic waivers. These were not waivers of new NCLB requirements, but were waivers of long-standing ESEA requirements. The only other section 9401 waivers granted during this period were extensions of the period of time for obligating funds and waivers of the administrative cost limitation for Indian Education formula grant funds.

It is only recently that the Department granted waivers of new substantive requirements under NCLB. In 2006, for example, the Department used its waiver authority under section 9401 to allow four States that were meeting fundamental NCLB principles to use growth-based accountability models as part of the adequate yearly progress determination process. In 2005 and 2006, the Department also granted a limited number of waivers permitting local educational agencies to provide supplemental educational services (SES), rather than public school choice, to

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eligible students in Title I schools in the first year of improvement; and allowing local educational agencies in need of improvement to apply to their State educational agency to be SES providers. The Department also used the section 9401 waiver authority to help address the needs of States and local educational agencies affected by Hurricanes Katrina and Rita.

We note that the requirement for publishing in the *Federal Register* a notice of waivers granted does not include specific timelines. We did inform Members of Congress about particular waivers being granted to their respective states and local educational agencies. In addition, the information on many of the waivers that the Department granted was posted contemporaneously on the Department’s Internet site. The Department recently published in the *Federal Register* a notice of all waivers granted under section 9401 and has updated its Internet site to include this waiver information. In addition, the Department will soon be submitting a section 9401 waiver report to Congress. In the future, we intend to complete these reporting, publication, and dissemination responsibilities in a more timely manner.

We appreciate the work of the inspection team and their professionalism and courteousness throughout this review.