



RICK SCOTT
GOVERNOR

October 17, 2014

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

Re: Request to Designate Jurisdiction to the Office of Administrative Law Judges

Dear Secretary Duncan:

The State of Florida requests that you designate jurisdiction to the Office of Administrative Law Judges (OALJ) in the United States Department of Education (ED) to conduct a hearing under 34 C.F.R. § 81.3(b) regarding the ED's denial of Florida's proposed amendment to its Elementary and Secondary Education Act (ESEA) flexibility waiver and accountability plan. As I have previously informed you, this amendment is essential for Florida to continue its strong track record of success in educating the more than 265,000 English Learner (EL) students in our schools.

In a letter dated August 14, 2014, to Pam Stewart, Commissioner of the Florida Department of Education, ED denied Florida's proposed ESEA flexibility amendment to include achievement results for EL students in our school grades model only after attending school in the United States for two years. The letter conditions ED's decision regarding renewal of our ESEA flexibility waiver after the 2014-2015 school year on whether all students in tested grades are assessed this year and their results are included in accountability determinations. Commissioner Stewart and I responded on September 5, 2014, requesting that the ED abandon this "one size fits all" approach as it fails to recognize the unique needs of Florida's students. The federal mandate blatantly ignores the remarkable results Florida has had under its own policy. I had hoped that ED would have been willing to work with Florida on such an important issue. But as of this date, Florida's pleas on behalf of its EL students have been ignored. We continue to maintain that our proposed flexibility amendment and statewide accountability system is consistent with the law and most importantly, designed to meet the needs of our diverse student population.

Local decision-making and control should always supersede the wisdom of federal bureaucrats when determining the best way to educate our children. This is especially true in Florida where long-standing state policy is producing tremendous student success. "... [E]ducation is primarily the responsibility of States," asserted

Congress in the House Report for the General Education Provisions Act (GEPA), and “Congress has enacted measures to stimulate and encourage the development of programs to improve achievement of students in targeted areas of particular national concern . . . nothing in any of these statutes should be construed to discourage coordination of State and Federal programs.” H.R. Rep. No. 95-1137, at 142 (1978). Accordingly, we request that you designate jurisdiction over this matter to the independent OALJ and allow Florida the opportunity to fulfill its responsibility for educating its students.

A. Academic and Scientific Data on Second-Language Acquisition Timelines Support the Proposed ESEA Flexibility Amendment

Florida’s concern is not simply with maintaining an earlier, established policy. Florida objects to the waiver denial – and to the regulations on which the federal requirement is based – because it does not allow the State to properly meet the needs of our culturally diverse student population. This year, the Florida Legislature passed and I signed Senate Bill 1642 (ch. 2014-23, L.O.F.) which put Florida’s policy into law. Initial assessment scores of ELs simply do not reflect their content knowledge, the quality of instruction (either in subject matter or in English language), or the quality of the schools they attend. Including these scores in accountability determinations presents an incorrect and misleading picture of Florida’s success in educating these students. The facts show that our ELs have increased grade level performance by 154 percent from 2001 to 2010. The federal government should not interfere with this success. Florida parents, teachers, and administrators are best situated to know how to educate Florida students.

Florida’s remarkably diverse EL population speaks approximately 300 different languages. Providing instruction and assessments in English is the most fair, equitable, and instructionally-sound practice for this student population. Therefore, Florida assesses reading and language arts for all students in the language of instruction. Testing in languages other than English can delay the transition to full inclusion of ELs in Florida’s classrooms.

Florida’s position is supported by research that raises serious doubts about using these tests for accountability too soon. Researcher Jamal Abedi stated in *Standardized Achievement Tests and English Language Learners: Psychometric Issues* (2002), “. . . test item responses by ELL students, particularly ELL students at the lower end of English proficiency spectrum, suffered from low reliability. That is, the language background of students may add another dimension to the assessment outcome that may be a source of measurement error in the assessment for English language learners.” The American Education Research Association (AERA) recommends that, “unless a primary purpose

of a test is to evaluate language proficiency, it should not be used with students who cannot understand the instructions or the language of the test.” (AERA, 2000).

Florida’s assessment and accountability systems reflect the best balance of appropriate assessment for results-oriented decision-making. Given the evidence that English language acquisition is a longer-term process for most EL students, it is essential to measure student progress early in the learning process. However, it is inappropriate for schools and districts to be evaluated and suffer adverse consequences based on EL’s English-language achievement within the first two years of those students’ attending school in the United States. While a more extended timetable would be more consistent with the above research, Florida recognizes the importance of accountability for the improvement of EL students. To measure that progress, since 2005, Florida has included the learning gains of all EL students in our school grades model, regardless of how long the students have been attending school in the United States. For the achievement components of school grades, inclusion of EL scores after two years of English-language instruction – rather than the one year mandated under the federal regulations – represents a reasonable compromise that reflects students’ content knowledge and progress in learning English while promoting early accountability and recognizing the importance of state authority in addressing the needs of its students. Florida simply believes, and the research supports, that two years rather than one gives ELs the necessary time to learn the language skills they need to demonstrate sufficient knowledge on assessments.

B. Florida’s Right to Due Process

Under the GEPA regulations, the Secretary may designate jurisdiction over this matter to the OALJ. *See* 34 C.F.R. § 81.3. Due process mandates that aggrieved parties have a forum to channel disputes over agency action. In the past, ED has indicated that the GEPA process is the most appropriate process to handle disputes such as this. *Mem. Law in Support of Def’s Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(6)*, at 19-21, *Conn. v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006) (3:05-CV-01330(MRK)). *See* H.R. Rep. No. 95-1137, at 141 (1978) (establishing an education appeal board that would “provide a due process hearing procedure for adverse actions taken against recipients by the Office of Education under most major federal education programs”). “The GEPA is designed to channel disputes over the Secretary’s interpretation of the statutes [he] administers to the USDE for review, followed by appeal to the Court of Appeals. The legislative history of GEPA [as well as cases interpreting it] confirms that Congress sought to create ‘a comprehensive system for enforcement by the [Secretary] of the requirements related to educational programs.’” *Ariz. State Dep’t of Educ. v. U.S. Dep’t of Educ.*, 2007 WL 433581 (D. Ariz. 2007) (citing *Conn. v. Spellings*, 453 F. Supp. 2d 459, 484

(D. Conn 2006) (*quoting* H.R. Rep. No. 95-1137, at 141 (1978)). This comprehensive system – including the opportunity for review – should be extended to decisions made under the waiver authority offered by Section 9401 of the ESEA, including the decision to deny Florida’s waiver request for EL students.

C. Open Government Policy Favors Designating OALJ Jurisdiction

I also urge ED to consider the policy of opening up such decisions to review by OALJ. The entire agency has been harshly criticized by lawmakers for the unprecedented breadth of these waivers, the perceived lack of transparency in the waiver process, and the substitution of administrative action for legislative action. As described below, these actions have been characterized as well beyond the scope of agency authority in creating this conditional waiver system. To open up this process to some form of third-party review would address this characterization and would demonstrate that ED is not intending to usurp the Constitutional prerogatives of the Legislature, but rather, is proceeding in an open and transparent manner.

In August of 2014, House Education and the Workforce Committee Chairman John Kline (R-MN) and Senator Lamar Alexander (R-TN), the ranking Republican on the Senate Health, Education, Labor, and Pensions Committee, wrote to Comptroller General Gene Dodaro asking for a Government Accountability Office (GAO) investigation into the waiver policies. In their letter, Kline and Alexander stated that “Congress has little information about how the department utilizes the data required of these and other states to grant, deny, renew, or revoke a state waiver.” Letter from Kline and Alexander to Gene Dodaro, Comptroller General (Aug. 12, 2014), *available at*: http://edworkforce.house.gov/uploadedfiles/kline_alexander_gao_esea_waivers_8_12_14.pdf.

Kline and Alexander also noted that ED has recently altered various requirements for certain States regarding implementation timelines for teacher and principal evaluation systems. At the same time, other States have had their waivers put on ‘high risk’ status, and Washington recently had its waiver revoked over issues related to teacher and principal evaluation systems. The lawmakers argue that ED has provided “no justifications for these seemingly contradictory decisions.” *Id.* The Supreme Court has found that unexplained agency “inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). *See also Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (“Whatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court

may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *United Transportation Union v. Lewis*, 711 F.2d 233, 242 (D.C. Cir 1983) ("A statutory construction to which an agency has not consistently adhered is owed no deference.") (Citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976)).

In a law review article published earlier this fall, University of South Carolina Law Professor Derek Black opined that the waivers essentially represent a usurpation of legislative power by the agency. Black asserted that "spending clause doctrine restricts agencies' ability to use conditional waiver power to change the rules of the game in unexpected ways – which is what Secretary Duncan did." See Derek Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. (forthcoming 2015). Black found the implementation of the waiver package analogous to the Medicaid expansion that was partially struck down by the U.S. Supreme Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius* (132 S. Ct. 2566 (2012)) as unduly coercive and a "shift in kind, not merely in degree." Further, Black asserted, "rather than an escape clause for [S]tates, waivers became a mechanism for achieving the administration's affirmative policy objectives that could not be achieved elsewhere. In short, the waiver process substituted for the legislative process." *Id.*

Even the non-partisan Congressional Research Service (CRS) questioned whether the Secretary has the authority to offer conditional waivers. In a memorandum sent to House Committee staff in 2011, CRS analysts stated that ED has the general authority to offer waivers within the statutory guidelines set out by Congress. Memorandum from the Congressional Research Service to the House Committee on Education and the Workforce Majority Staff (June 28, 2011), available at http://edworkforce.house.gov/uploadedfiles/june_28_2011_crs_report.pdf. However, CRS noted, "individual waivers may face legal challenges and may even be struck down on occasion" where "the agency has relied on factors which Congress has not intended it to consider." *Id.* (citing *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994)).

In the face of such concern and serious constitutional questions raised by the implementation of this waiver system, submitting waiver decisions to review by the independent OALJ would show that ED takes the boundaries of its executive authority very seriously – and that it respects those boundaries and intends to act in a transparent and consistent manner.

Providing Florida with the opportunity to make the above policy arguments and appeal the waiver denial before the OALJ would afford the State its due process rights laid out in GEPA, and would improve the perceived lack of accountability and

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transparency in the waiver process. When considering this request, it is important to recognize that Florida continues to be fully committed to including ELs in the assessment and accountability systems. We believe that Florida's approach recognizes the great diversity of our student population and the importance of accurately measuring their successes. For these reasons, we respectfully urge you to designate jurisdiction to the OALJ to hear our appeal of the waiver denial. If you decide against designating jurisdiction to the OALJ or choose not to respond in a timely manner, we will review all legal options available to protect the futures of Florida students.

Thank you for your attention to this matter and prompt consideration of our request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rick Scott", with a large, stylized flourish at the beginning.

Rick Scott
Governor