



Earl Pomeroy
Congress of the United States
North Dakota

MEMORANDUM

Date: January 19, 2005

To: **The Honorable Margaret Spellings**
Secretary Designate, U.S. Department of Education

The Honorable Raymond Simon
Assistant Secretary, U.S. Department of Education

Cc: **Janet Welk**
Executive Director, North Dakota Education Standards and Practices Board

Dr. Wayne Sanstead
State Superintendent, North Dakota Department of Public Instruction

Gloria Lokken
President, North Dakota Education Association

Dr. Jon Martinson
Executive Director, North Dakota School Boards Association

Dr. Larry A. Klundt
Executive Director, North Dakota Council of Educational Leaders

From: Congressman Earl Pomeroy

RE: ND's Definition of "Highly Qualified" Teacher under the No Child Left Behind Act

BRIEF BACKGROUND

Public Law 107-110, the No Child Left Behind Act of 2001 (NCLB), requires states to develop a consolidated state plan for implementing the law as a condition for the receipt of Federal Title I funding. The State of North Dakota, abiding by the statute and the Department of Education's (DoE) guidance, promulgated a state plan in compliance with DoE's phased in time requirements.

Under NCLB, included in this state plan are the specific steps "the State educational agency will take to ensure . . . instruction by highly qualified instructional staff." 20 U.S.C. § 6311 (b) (8) (C) (*see Appendix A*). DoE is mandated to "approve [this] State plan within 120 days of its submission unless the plan does not meet the requirements." *Id.* (e) (1) (C). Should the plan not meet the statute's requirements, DoE is required to immediately notify the state, offer the state an opportunity to revise the state plan, provide technical assistance, and provide a hearing. *Id.* (e) (1) (D), (E). These compliance assistance and due process requirements are fundamental to the statutory plan, which could entail significant punitive consequences for a non-complying state.

On September 1, 2003, the North Dakota Education Standards and Practices Board (ESPB) submitted its definition of “highly qualified” as part of the final submission of North Dakota’s consolidated state application package. Previous phased in submissions had been made to DoE on June 12, 2002; January 31, 2003; June 8, 2003; July 27, 2003; and May 1, 2003.

On December 1, 2004, DoE verbally informed DPI of its determination that North Dakota’s definition of “highly qualified” does not meet the requirements of NCLB for veteran elementary school teachers. In short, only in December 2004, 15 months after submission of the final component of North Dakota’s consolidated state plan, was North Dakota informed that this component was not approved by DoE. Although the propriety of the substance of this verbal ruling is also in dispute, this memorandum examines the timeliness of the actions of DoE and its fulfillment of its obligations to ESPB.

QUESTION PRESENTED

Is the Department of Education’s December 2004 verbal ruling that North Dakota’s highly qualified teacher definition is now not approved by DoE permissible under the statutory language of NCLB?

BRIEF ANSWER

No. Section 6311 (e)(1) specifically requires that the Secretary act on approval of NCLB’s state plan within 120 days of submission, and, if a plan is not acceptable to the Secretary, then the statute specifically requires the Secretary immediately assist the state to ensure timely compliance and, if necessary, provide a hearing consistent with due process.

STATEMENT OF FACTS

1. On February 12, 2003, ESPB, which has jurisdiction over teacher licensure in North Dakota, held a conference call with DoE to discuss their draft definition of “highly qualified.” DoE reviewed the NCLB definition, provided feedback, and ESPB adjusted the definition accordingly. The major concern at this point was the semester hour requirements for middle school teachers. ESPB raised the requirement beginning in 2006 to 24 semester hours.
2. On May 5, 2003, ESPB finalized and adopted a system of licensure in North Dakota to meet the highly qualified teacher requirements of NCLB. Under this definition, North Dakota elementary teachers can satisfy the statute’s “high objective uniform State standard of evaluation” of teacher competence by having attained a major in elementary education, a degree which requires graduates to complete between 40 to 68 semester hours of combined credit in reading, social studies, mathematics and science. See 34 CFR § 200.56 (c) (2) (ii).
3. On June 10, 2003, DoE approved the basic elements of North Dakota's state accountability plan under Title I of NCLB, not including the highly qualified teacher definition.

4. On September 1, 2003, ESPB submitted its definition of "highly qualified" as part of the final submission of North Dakota's consolidated application package to DoE.
5. On November 12, 2003, Acting U.S. Deputy Secretary of Education Eugene Hickok met with representatives from the North Dakota education community to discuss the implementation of NCLB in the state. During this meeting, which took place during the 120 day DoE approval window, ESPB Executive Director Janet Welk requested DoE's feedback on the state's highly qualified teacher definition.
6. In December 2003, DoE Congressional Affairs informally indicated to North Dakota Congressional delegation staff members that DoE would not be approving or disapproving states' teacher quality plans.
7. On February 11, 2004, the Department of Education's Teacher Assistance Corps visited ESPB to support implementation of and answer policy questions regarding the highly qualified teacher provisions of NCLB. During the meeting, the Corps indicated that ESPB was on track and had met the Department's requirements.
8. On December 1, 2004, DoE's monitoring team visited with DPI and ESPB to monitor implementation of Title II, Part A under NCLB. After the meeting, ESPB was verbally informed that North Dakota's definition of "highly qualified" does not meet NCLB and that veteran elementary teachers must satisfy the statute's "high objective uniform State standard of evaluation" of teacher competence by taking a content based test and teaching skills test in elementary education. ESPB is yet to receive this determination in writing.

DISCUSSION

- A. Under NCLB, the 120 day deadline for the Department of Education to act on a state plan is mandatory.

Under NCLB, states are required to submit a consolidated application to the Department of Education outlining their proposed accountability plan for improving the academic achievement of Title I disadvantaged students. This application is required to include not only the state's plan for implementing Adequate Yearly Progress (AYP), but also "the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff" 20 U.S.C. § 6311 (b) (8) (C) (see *Appendix A*).

DoE is then required to approve or disapprove the consolidated state application, which includes the teacher quality plan, within 120 days of its submission. 20 U.S.C. § 6311 (e) (1) (C) (see *Appendix B*). If the Department determines within this timeframe that the state plan does not meet the statute's requirements, it still cannot decline the plan before "(i) offering the State an opportunity to revise its plan; (ii) providing technical assistance to assist the State...; (iii) and providing a hearing. *Id.* (e) (1) (D), (E).

Although the statute does not explicitly instruct the state to submit its definition of “highly qualified” to DoE, the state plan’s obligations incorporate this definition. It was therefore incumbent on DoE to provide constructive feedback within 120 days of receiving the plan about whether North Dakota’s method for evaluating teacher qualifications comported with the statute. Not only was North Dakota led to believe by DoE that its plan was in accordance with DoE’s interpretation of NCLB, but it also failed to receive an opportunity to revise its plan, technical assistance, or a hearing.

B. The Department of Education unnecessarily delayed informative guidance to ESPB to the detriment of the State of North Dakota.

Rather than having states submit a single consolidated application, DoE required that the various components of the state plan be submitted in phases. As DoE requested, ESPB submitted its teacher quality plan, which was finalized and adopted in May 2003, as part of the state’s September 2003 submission.

While DoE thoroughly examined North Dakota’s plan for implementing Adequate Yearly Progress, making clear the steps required, timelines and review schedules for final approval, it was vague and obscure about the approval process, or lack thereof, for the highly qualified component of the state plan. Foreshadowing the Department’s intention to neglect this piece, the Department issued a press release nearly three months before the teacher quality plan was due, on June 10, 2003, “celebrate[ing the] approval of every state accountability plan under No Child Left Behind” (*see Appendix C*).

This failure to provide timely or informative feedback on North Dakota’s teacher quality plan occurred despite requests made by ESPB and the Congressional delegation that DoE advise the state of any problems. The Department indicated that it would not be “approving” the teacher quality plan and provided no signal in the months following submission that North Dakota’s plan in this regard was not in compliance with the law.

Although North Dakota never received written approval for the teacher quality plan component of the state plan, it understood that it had DoE’s approval after the 120 day feedback period had lapsed. It was not until December 2004, over 15 months after the plan was submitted to DoE and 19 months after it was adopted by the state, that ESPB received any indication that the teacher quality component did not meet DoE’s requirements.

C. The Department of Education was aware of this impending problem due to a report conducted by the U.S. General Accounting Office that indicted the Department in July 2003 for its lack of useful guidance.

In response to a request made by Senators Edward Kennedy (D-MA) and Jeff Bingaman (D-NM), the U.S. General Accounting Office (GAO) published a report in July 2003, two months before the teacher quality plan was due to DoE, entitled “No Child Left Behind: More Information Would Help States Determine which Teachers are Highly Qualified.” This report evaluated what states were doing to have their teachers meet the highly qualified teacher requirements, as well as the conditions hindering states’ and districts’ ability to meet these requirements. In its Recommendation for Executive Action, the GAO concluded that DoE was not providing adequate guidance to states regarding the methods they could use to evaluate the subject area knowledge of current teachers. GAO-03-631 (see Appendix E):

“In order to assist states’ efforts to determine the number of highly qualified teachers they have and the actions they need to take to meet the requirement for highly qualified teachers by the end of the 2005-06 school year, we recommend that the Secretary of Education provide more information to states. Specifically, information is needed about methods to evaluate subject area knowledge of current teachers.”

Ironically, in the Department’s response to the report, Education Under Secretary Eugene Hickok cited the Act’s emphasis on flexibility and local control, suggesting that the methods that states choose for evaluating subject area knowledge of current teachers are an issue of state and local policy. GAO-03-631 (see Appendix E):

“The U.S. Department of Education recognizes that States, districts and schools face many implementation issues as they strive to meet the teacher qualification standards created in the Child Left Behind Act of 2001. The law sets forth basic requirements for teachers, but provides considerable flexibility in such areas as determining what constitutes full State certification and what is a “high objective uniform State standards of evaluation” of teacher competence. We recognize it is important to provide timely and informative guidance, while respecting each State’s ability to develop its own systems for implementing the law.”

By disapproving North Dakota’s criteria for determining subject area knowledge 15 months after the plan was submitted, DoE not only changed midstream its philosophy on state and local control, but also failed to act in a timely manner on the GAO’s recommendation intended to prevent the current situation.

CONCLUSION

The Department of Education had a statutory obligation under the No Child Left Behind Act to approve or disapprove North Dakota’s state plan within 120 days of its submission to DoE. According to the statutory language, North Dakota’s definition of “highly qualified” was approved when the DOE failed to take any action 120 days after its submission.

Appendix A

Public Law 107-110
No Child Left Behind Act of 2001
(20 U.S.C. § 6311(b)(8)(c))

TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

SEC. 1111. STATE PLANS.

(b) ACADEMIC STANDARDS, ACADEMIC ASSESSMENTS, AND
ACCOUNTABILITY-

(8) REQUIREMENT- Each State plan shall describe—

(C) the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 1114(b)(1)(C) and 1115(c)(1)(E), including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps.

Appendix B

Public Law 107-110
No Child Left Behind Act of 2001
(20 U.S.C. § 6311 (e)(1))

TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

SEC. 1119. QUALIFICATIONS FOR TEACHERS AND PARAPROFESSIONALS.

(e) PEER REVIEW AND SECRETARIAL APPROVAL-

(1) SECRETARIAL DUTIES- The Secretary shall--

- (A) establish a peer-review process to assist in the review of State plans;
- (B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;
- (C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;
- (D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c), immediately notify the State of such determination and the reasons for such determination;
- (E) not decline to approve a State's plan before--
 - (i) offering the State an opportunity to revise its plan;
 - (ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c); and
 - (iii) providing a hearing; and
- (F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

Appendix C

U.S. Department of Education Press Release

President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan Under No Child Left Behind

Major milestone in meeting goals of historic law

FOR RELEASE:

June 10, 2003

In an historic milestone of education reform, President Bush today announced that every state, Puerto Rico and the District of Columbia now have in place new accountability plans outlining how they will achieve the bold goal of making sure no child in America is left behind. U.S. Education Secretary Rod Paige joined the president for the announcement in the White House Rose Garden.

This morning, Secretary Paige approved the following state plans, in addition to the 35 plans already approved: Alabama, Alaska, Arizona, California, Connecticut, Idaho, Illinois, Kentucky, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Virginia and Utah.

When the president took office, only 11 states were in compliance with the Elementary and Secondary Education Act of 1994.

"The era of low expectations is ending; a time of great hopes and proven results is arriving," President Bush said. "And together, we are keeping a pledge: Every child in America will learn, and no child will be left behind.

"The development of these plans involved a lot of hard work. Governors stepped up to the line, along with their education chiefs. I also want to thank the principals and teachers and parents on the frontlines who are working so hard to improve our public schools. Instead of throwing up your hands in despair, you decided to challenge the status quo and to help each child. On behalf of the nation, I want to thank all who are involved in America's public schools, all who demand excellence, for your service to our country."

The president hosted principals, students, teachers and state education chiefs for today's announcement. A complete list of the states represented at today's announcement follows at the end of this release.

"Never before has a president of the United States invested so much in the education of our children," Secretary Paige said. "And never before has our nation responded with such enthusiasm. Just as we as a nation have always pulled together to ensure our freedom, we are now pulling together to ensure our children are educated. Americans have heard President Bush's call for meaningful education reform so that no child is left behind, and they are joining forces with him to see that the mission is accomplished.

"But this is not the end -- it is the beginning," Paige added. "The extraordinary efforts of the states have laid the foundation for education improvement and accountability. The reforms of No Child Left Behind mean that, for the first time in history, every child in every school in every state in this country will have an education accountability plan for them -- and accountability means results."

No Child Left Behind is the landmark education reform law designed to change the culture of America's schools by closing the achievement gap, offering more flexibility, giving parents more options and teaching students based on what works.

Under the act's strong accountability provisions, states must describe how they will close the achievement gap and make sure all students, including those who are disadvantaged, achieve academic proficiency. In addition, they must produce annual state and school district report cards that inform parents and communities about state and school progress. Schools that do not make progress must provide supplemental services, such as free tutoring or after-school assistance; take corrective actions; and, if still not making adequate yearly progress after five years, make dramatic changes to the way the school is run.

All states submitted draft accountability plans to the U.S. Department of Education by the Jan. 31 deadline. Following an initial review and technical assistance, if needed, the next step was onsite peer reviews of each state's proposed accountability plan. Teams of three peer reviewers -- independent, nonfederal education policy, reform or statistical experts -- conducted each peer review. Following a review of the team's consensus report, the department provided feedback to the state and worked to resolve any outstanding issues. Ultimately, Paige approved all the state plans.

State accountability plans will be posted online at www.ed.gov/offices/OESE/CFP/csas/index.html.

For more information about the No Child Left Behind Act, go to www.nochildleftbehind.gov.

Appendix D

United States General Accounting Office
Report to Congressional Requesters

“No Child Left Behind Act:

More Information Would Help States Determine Which Teachers are Highly Qualified”

July 2003

CONCLUSION

Education officials have had to interpret and help states implement many new requirements established by the NCLBA, including the highly qualified teacher requirement. During this first year of implementation, state officials were still determining how they could assess whether their teachers met all the criteria and identifying steps they needed to take to meet the new requirement. Generally, state and district officials continued to be challenged by many longstanding hindrances and they continued to fund activities from previous years.

Education issued regulations and draft guidance to help states begin to implement the requirement for highly qualified teachers and has plans to help states with some of their challenges. However, state officials need more assistance from Education, especially about methods to evaluate current teachers' subject area knowledge. Without this information state officials are unsure how to assess whether their current teachers meet the highly qualified requirement. This would also help them accurately determine the number of teachers who are highly qualified and take appropriate steps, such as deciding on which activities to spend Title II funds and targeting Title II funds to schools with the highest numbers of teachers who are not highly qualified. It is important that states have the information they need as soon as possible in order to take all necessary actions to ensure that all teachers are highly qualified by the 2005-06 deadline.

**RECOMMENDATION
FOR EXECUTIVE
ACTION**

In order to assist states' efforts to determine the number of highly qualified teachers they have and the actions they need to take to meet the requirement for highly qualified teachers by the end of the 2005-06 school year, we recommend that the Secretary of Education provide more information to states. Specifically, information is needed about methods to evaluate subject area knowledge of current teachers.

**AGENCY
COMMENTS AND
OUR EVALUATION**

In order to assist states' efforts to determine the number of highly qualified teachers they have and the actions they need to take to meet the requirement for highly qualified teachers by the end of the 2005-06 school year, we recommend that the Secretary of Education provide more information to states. Specifically, information is needed about methods to evaluate subject area knowledge of current teachers.

Appendix E

United States General Accounting Office
Report to Congressional Requesters

“No Child Left Behind Act:

More Information Would Help States Determine Which Teachers are Highly Qualified”
July 2003



UNITED STATES DEPARTMENT OF EDUCATION

THE UNDER SECRETARY

July 3, 2003

Ms. Marnie Shaul
Director
Education, Workforce, and
Income Security Issues
United States General Accounting Office
Washington, D.C. 20548

Dear Ms. Shaul:

This is in response to your draft report entitled “No Child Left Behind Act: Complete Guidance and More Information Would Help States Determine How Many Teachers are Highly Qualified” (GAO-03-631). We have carefully reviewed the document and appreciate the opportunity to provide comments.

The U.S. Department of Education recognizes that States, districts, and schools face many implementation issues as they strive to meet the teacher qualification standards created in the *No Child Left Behind Act of 2001*. The law sets forth basic requirements for teachers, but provides States considerable flexibility in such areas as determining what constitutes full State certification and what is a “high objective uniform State standard of evaluation” of teacher competence. We recognize it is important to provide timely and informative guidance, while respecting each State’s ability to develop its own systems for implementing the law.

The report recommends that the Secretary provide complete guidance and more information to the States. We have been working with States to provide accurate and timely assistance, recognizing that in these early stages of implementation, issues take time and attention. The Department released, on December 2, 2002, Title I Regulations and, on December 19, 2002, Title II – A Non-Regulatory Guidance. In response to requests for clarification about how the “highly qualified” requirements apply to special education and limited English proficient (LEP) teachers, guidance included in the Appendix of the Title I Final Regulations clarifies that both special education and LEP teachers “who are providing instruction in core academic content areas must meet the highly qualified requirements of ESEA.” This guidance further clarifies that “special educators who do not directly instruct students on any core academic subject or who provide only consultation to highly qualified teachers of core academic subjects on behavioral supports and interventions and selecting appropriate accommodations do not need to meet the same “highly qualified” subject-matter competency requirements that apply under NCLB to teachers of core academic subjects.”

We continue to work with the Council of Chief State School Officers’ INTASC (Interstate New Teachers Assessment and Support Coalition) to discuss teacher quality issues at several national meetings. The Department convened all State Title II Directors to discuss teacher quality issues at a national meeting on June 12, 2003. We are in the process of sending out teacher quality

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