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MEMORANDUM

TO: **Interested Parties**
FROM: **Penn Hill Group**
DATE: **February 8, 2013**
SUBJECT: **Summary of Senate HELP Committee Hearing – No Child Left Behind: Early Lessons from State Flexibility Waivers**

Senate Committee on Health Education, Labor, & Pensions **“No Child Left Behind: Early Lessons from State Flexibility Waivers”**

Overview:

The hearing focused on ESEA State Flexibility Waivers. Senators had the opportunity to discuss the issue with U.S. Department of Education Secretary Duncan as well as state commissioners, academics, and advocates.

[The webcast of the hearing can be found here.](#)

Panel 1 Witness:

- **The Honorable Arne Duncan**, Secretary of Education, Washington, District of Columbia

Panel 2 Witnesses:

- **Terry K. Holliday, Ph.D.**, Kentucky Commissioner of Education, Lexington, Kentucky
- **John B. King, Jr., Ed.D.**, New York Commissioner of Education, Slingerlands, New York
- **Andrew R. Smarick, M.P.M.**, Partner, Bellwether Education Partners, Lawrenceville, New Jersey
- **Kati Haycock, M.A.**, President, The Education Trust, Washington, District of Columbia

Opening Statements for the First Panel:

Chairman Tom Harkin (D-IA) began by offering a brief background of the timeline and purpose of ESEA legislation, which has been reauthorized seven times since 1965, NCLB being the most recent. He noted that in October of 2011, the Senate passed a reauthorization bill, but it was never debated in the full Senate. Likewise, the House passed partisan bills out of committee, but they were never debated in the full House. In the absence of ESEA reauthorization, Chairman Harkin explained, the Obama administration began offering waivers to eligible states so they could avoid penalties for falling short of NCLB requirements and also gain some flexibility in spending federal dollars. Thirty-four states and the District of Columbia have been approved for waivers. Harkin stated that some states are now five months into implementation of waiver plans and it is important for the committee to understand which approved state plans, programs, and activities are effective. It's also important to consider what is happening to states who have not received waivers.

Ranking Member Lamar Alexander (R-TN) said that while ESEA has expired, it continues to be implemented as it was last reauthorized. He believes ESEA reauthorization is long overdue, and that Congress has a responsibility to get it done. He then discussed the waiver provision that was introduced into the ESEA legislation in 1994. He said that the intent of the provision was to allow states to apply to the Secretary for certain things they wanted to do outside of the strict parameters of the law. The Secretary could then decide, on a case-by-case basis, if a waiver would be granted. He said that Secretary Duncan changed the intent by making waivers conditional on certain requirements from the federal government, such as requiring teacher evaluations. Senator Alexander said that the Secretary has more authority than he should under this interpretation.

Alexander offered examples of states losing out in this process. He said Iowa's waiver application—a state with its own existing teacher evaluation system—was deemed inadequate by Sec. Duncan, yielding a waiver request denial (Secretary Duncan later corrected this statement saying that Iowa's waiver request was not denied, the Department is continuing to work with them). In addition, Alexander spoke about California which he stated has a law that prevents any teacher evaluation system from being implemented and therefore was denied a waiver. He asked that Sec. Duncan show restraint in insisting on a one-size-fits-all approach. He also called on Congress to act, asking for a lean ESEA reauthorization bill. He noted the new Senate rule changes that make it easier to go to conference on bill proposals, and said the HELP committee should use that to its advantage in bringing forth an ESEA reauthorization bill.

Before handing the floor over to Sec. Duncan, **Chairman Harkin** said that he, too, would have rejected his own state's flexibility waiver request if he were the Secretary of Education, noting that it, "just wasn't good."

Panel 1 Testimony:

Sec. Arne Duncan said waivers are first meant to benefit students—to boost commitment and capacity to improve academic achievement. He believes it should be left to states to determine how they will reach the bar set by federal education laws and mandates. He called NCLB a barrier to reform, causing states to lower their standards and 'teach to the test.' He said that he and his staff met with Congress repeatedly, but reauthorization has yet to be passed, so he used his authority under section 9401 of ESEA to create the new waiver program. He explained that this was always the administration's plan B, and that they are ready, willing, and able to help with reauthorization, which would override the waivers.

Sec. Duncan said NCLB caused states to lower standards, focus on test scores, and create labels (e.g., 'failing' schools) without providing any supports. He noted that under NCLB, about 50% of schools are labeled failures. He also noted the legislation's emphasis on teacher quality which looked at qualifications on paper and failed to connect to what actually happens in the classroom. He also cited its being dictated heavily by Washington as a major flaw. Secretary Duncan said that 19 states 'dummied down' standards under NCLB. He said that multiple measures of growth and gain under the waivers offered a more comprehensive view of schools. The Secretary focused a good amount of time on the problem with large "n" sizes that were set by states. Students in some subgroups were left "invisible" because of "n" size determinations. For example, if a state had an "n" size of 50 for a subgroup and a school only had 45 students in that subgroup it would not be counted for accountability purposes.

The Secretary then spoke about raising the bar, listing goals such as closing achievement gaps, implementing college- and career-readiness (CCR) standards, and taking strong, clear action when schools aren't working. He spoke about a Massachusetts school that was labeled a failure under NCLB but was making real progress and should have been supported. He said waivers recognize and reward such progress. He said the waivers free up \$2.8 billion in existing federal education funding for states to implement support systems for schools like these, as well as a number of other programs, like improving teacher/principal effectiveness. He spoke specifically about Tennessee and how they had developed a teacher evaluation system that was succeeding even in non-tested subject areas such as music and art. Secretary Duncan acknowledged that mistakes will be made with waivers, but he hopes parties involved will learn and make corrections quickly, as well as share what they learn along the way.

[Sec. Arne Duncan's full written testimony can be found here.](#)

Question and Answer for Panel 1 (Secretary Duncan):

Chairman Harkin (D-IA) said he thought Sec. Duncan acted with courage and forthrightness to set up a system that was fair, set the bar, gave states a flexible role in governing, and fully included and challenged students. He then asked the Secretary if the waivers helped to expand the narrow focus of NCLB.

Sec. Duncan responded that reading and math remain fundamental, but states are now considering more subject areas and looking at indicators beyond testing.

Harkin asked Sec. Duncan to offer his thoughts on the new super subgroups many states have created with their approved waiver requests.

Duncan said an 'n' size of one would be ideal, but that is not possible due to, among other reasons, privacy concerns for students. He said super subgroups brighten the focus on subgroups and catch more students who were previously "invisible" because of "n" size. He also said states must still report separately on all subgroups.

Ranking Member Alexander (R-TN) asked the Secretary if he has any intention of offering district-level waivers.

Duncan replied that he has a strong preference to work with states that have until the end of the month to apply for waivers. He said he is not sure if district-level waivers will happen. He said the entire focus has been on states so far, and they will cross that bridge when they come to it.

Alexander asked what happens to waivers if ESEA is reauthorized.

Duncan said that waivers go away if the law is reauthorized.

Alexander questioned Sec. Duncan on the prescriptiveness of teacher evaluation systems under the waivers and what happens if states don't meet all of the criteria.

Duncan said that it's still early on, but they are working in partnership with states—they are building on the good work of the states.

Alexander asked for advice from the Secretary on working together in Congress in reauthorizing the law.

Duncan acknowledged the dysfunctional, inflexible state of Congress, and said that there is no better area than education to find compromise.

Sen. Al Franken (D-MN) asked what the correct measurement for growth should be.

Duncan explained that growth is not an incentive under ESEA. He said there is no perfect way to measure growth, but that states are working on it. He said reauthorization should pull from the best ideas in the best states.

Franken asked about computer adaptive tests, and stated that current tests can't be used to inform instruction. He wondered about out-of-grade level testing.

Duncan said technology can and should change how students are taught. He said the goal of teachers is to help students learn, and differentiated learning plays an important role.

Sen. Johnny Isakson (R-GA) asked how NCLB made students with disabilities invisible.

Duncan explained that the high 'n' sizes needed to require that schools count subgroups like students with disabilities in accountability systems kept many of them from being a part of the accountability systems.

Isakson asked about alternative certification and how that can be dealt with in an ESEA reauthorization.

Duncan said that NCLB looked 100 percent at a teacher's qualifications on paper. The Secretary said he was less interested in that than whether or not teachers are making an impact. He also stated that alternative certification helped bring diversity to the teaching profession because schools of ed lack creativity and fail to bring diversity.

Sen. Bernard Sanders (I-VT) said he was disappointed in competitive grants like RTTT, noting that only 11 states and the District of Columbia received RTTT money, and that rural states were left out.

Duncan replied that half of states received some money from these competitive grants. He said he did understand the need to focus on rural as well as urban communities.

Sen. Pat Roberts (R-KS) asked whether waivers are conditional on states adopting principal and teacher evaluation systems.

Sec. Duncan said yes, and that DOE works with states to create and implement these systems.

Sen. Rand Paul (R-KY) asked Sec. Duncan for his thoughts on attaching money to each child and school choice.

Duncan said that he supports school choice and competition within the public school system, but said he will not endorse private vouchers. He said 90% of students will attend public schools, and he sees providing high quality public school options for all children as the primary

concern for the Department at this time. He said there was a need to instead focus on the lack of access to early childhood education, AP courses, and crushing college costs.

Sen. Sheldon Whitehouse (D-RI) asked about support for gifted students.

Duncan said that growth and gain is a much better incentive structure. He listed dual enrollment for college credits, and AP and IB classes.

Panel 2 Testimony:

Commr. Terry Holliday said that only congressional reauthorization of ESEA gives long-term sustainability of efforts to help children and ensure accountability. He said NCLB lost something in transition to the details. He recalled the 2009 General Assembly in Kentucky, which passed legislation for higher standards, better assessments, and better accountability. He said his state was able to leverage the waivers in support of reforms the state was already starting to do. The state is now able to use a single accountability system under the waivers instead of a state system and a federal system. He noted the increase in graduation rates and the increase in CCR proficiency from 34 percent in 2010, to 47 percent in 2012.

[Commr. Terry Holliday's full written testimony can be found here.](#)

Commr. John King, Jr., also spoke about the 2009 reform agenda: standards, curriculum, data systems, and assessments. He noted, too, the expansive work on CCR standards. He said his state is leveraging the waivers to push forward their existing reform agenda. He discussed how waivers helped the state create an evaluation system based on multiple measures, including student outcomes and teacher practice, and how the waivers helped strengthen and refine their accountability system. He closed by emphasizing the importance of supporting early learning opportunities in a reauthorization bill, saying that Congress needs to be conscious of how it allocates funds and how those funds are spent—particularly on professional development.

[Commr. John King, Jr.'s, full written testimony can be found here.](#)

Mr. Andrew Smarick said it's important to return power to states while also ensuring that student achievement increases and gaps close. He believes Congress should table ESEA reauthorization for the time being. He acknowledged that the waiver process is not ideal, but it did bring more flexibility to the states, which bolstered accountability and interventions. He said waivers brought variance and great promise across the states. However, he noted that few states have the capacity to do what they say they will. He thinks a combination would be best: ESEA reauthorization that draws on lessons learned from waivers and course correction.

[Mr. Andrew Smarick's full written testimony can be found here.](#)

Ms. Kati Haycock said the NCLB standards that hold all children to the same state standards came in response to decades of hiding student performance information. She noted that with performance targets states had two specific options and could also choose their own. The good news is that states adopted stretch goals, but the bad news is that in building accountability systems these performance targets don't always count. She then discussed the super subgroups used by many states in their flexibility waivers. She said the 'n' size issue is a positive, but also noted that there are risks associated with it. She said some states do not use the super subgroups in an effective way in their accountability systems. She voiced her support for the requirements waivers placed around priority schools and offering real supports for those

schools. She said the government took a step backwards in its message to the other 85% of schools not included in the priority and focus areas. The Department invited this difference in the waivers and unfortunately, ideas on how to weaken accountability systems spread among states and best practices fail to go viral.

[Ms. Kati Haycock's full written testimony can be found here.](#)

Question and Answer for Panel 2:

Chairman Harkin (D-IA) opened by asking Mr. Smarick if he thought the disaggregation required under NCLB was a good thing.

Mr. Smarick said he did think disaggregation was a good thing.

Harkin asked what role graduation rates play in their accountability systems.

Commr. King said New York has maintained graduation rates as a component in its overall accountability system, with a particular focus on priority schools with chronically low graduation rates (below 60%). New York is leveraging school improvement grants to make these schools either redesign with a new school focus or restructure how they evaluate school employees.

Commr. Holliday said Kentucky school districts are held responsible for graduation rates. He said they also do an in-depth needs assessment for priority schools at the state level and also place coaches for literacy, math, and the principals in each of those buildings.

Ranking Member Alexander (R-TN) said Congress skipped a generation on reauthorization, which has meant the last five years have been some of the most interesting to see what the states have been able to do. He then asked, assuming reauthorization does pass soon, how much instruction will states want from Washington?

Holliday said looking at the CCSSO principles for reauthorization is a good place to start. He said states currently have little flexibility to develop teacher evaluations with teachers rather than for teachers. He said it was important for states to have comparability and to move forward with college and career ready standards.

Sen. Bennet (D-CO) asked the two commissioners about the education continuum from pre-k through college and college completion. He wanted to know what should be thought about differently in terms of creating new supportive legislation.

King said K-12 and higher education systems need to be on the same page with CCR standards creation and implementation. This would help in cutting down on remedial courses paid for by college students. With early education, he said children and families need universal access to high quality programs that are connected to K-12 curriculum goals.

Holliday agreed with the New York commissioner's recommendations. He added a recommendation to provide clear parameters at the national level for Title II teacher preparation and teacher professional development spending.

Harkin asked the commissioners what sequestration would do to schools in their states.

Holliday said he sends information outlining potential sequestration effects once a week. He said about 9% of Title I schools would be impacted negatively, over 100,000 students would lose services, and over 3,000 educators would lose their jobs.

King said New York would have to make similarly drastic cuts. He also mentioned that CCSSO has a state-by-state analysis of what those sequestration cuts would look like.

Harkin asked Ms. Haycock whether low graduation rates—particularly among at-risk student subgroups—can be masked in the super subgroups.

Ms. Haycock said the problem remains that some waiver states have no plan of looking at graduation rates by key subgroups.

Harkin asked the commissioners how they created measures for career-readiness.

Holliday explained that career-readiness in Kentucky has two aspects: academic skills needed to enter the workplace and nationally recognized technical skills certification programs. To craft academic criteria for career-ready standards, they gathered input from business leaders, community colleges, the Association of Manufacturing, etc.

King said New York went about this in a similar way as Kentucky --New York tried to build into its waiver a requirement for technical secondary education institutes to establish a partnership with the business community as well as with a higher education institution (including community colleges). King said he has seen that New York's high poverty, high needs students tend to perform at higher levels when they're enrolled in career and technical education programs than demographically similar students not enrolled in those programs.

Alexander asked King how intrusive he thinks federal laws should be in the teacher evaluation process.

King said he thinks what would be most helpful would be to include a few clear parameters with the flexibility for states to adapt those parameters to their particular contexts. Examples of parameters he gave were: inclusion of student performance; use of evaluations in employment decision-making (i.e., tenure, promotion, salary decisions); and real transparency about the evaluation data. He said it's important that states align professional development investments with their teacher evaluations, explaining that in order for professional development to be meaningful, it needs to relate back to how the teachers are assessed.

Alexander asked why states need Congress to tell them to implement teacher evaluation systems.

King replied that he believes the federal level is the right floor for backing teacher evaluations to empower them across the country.

Smarick offered an example from New Jersey where the state legislature was working on a bill to reform teacher tenure to implement a teacher evaluation system, while also implementing a pilot teacher evaluation program, when the waiver stipulations came out that provided new timelines for teacher evaluation program implementation. He felt the federal government was not informed well enough at the state level to be able to establish the most effective timeline. He said he didn't think ED was aware of what was happening on the ground in New Jersey.