

Council of the Great City Schools

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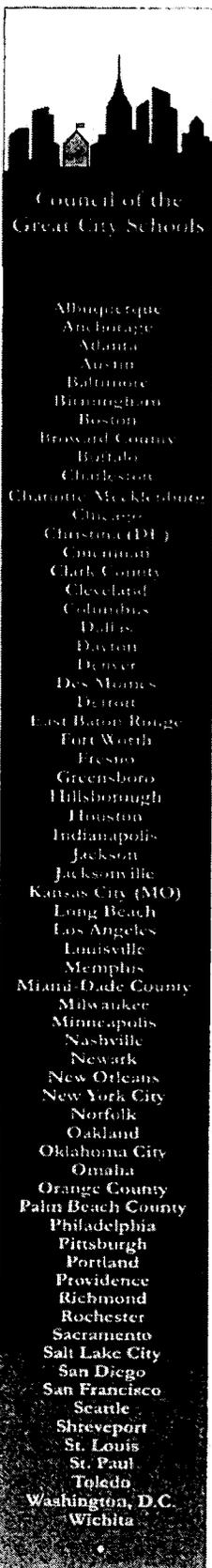
COMMENTS ON THE TITLE III NOTICE OF PROPOSED INTERPRETATIONS

Dear Mr. Smith:

The Council of the Great City Schools, the coalition of the nation's largest central city school districts, submits the following comments to the Notice of Proposed Interpretations of ESEA Title III published in the May 2, 2008 Federal Register.

While the Council commends the Department for seeking public comment on the proposed Title III interpretations, the extensive scope of these 10 proposed interpretations underscores the need for the codification of all Title III rules, rather than the more limited approach of issuing interpretative rules. Moreover, a number of the proposed interpretations are clearly inconsistent with the statutory language of the Act and will exacerbate the prospects of Title III implementation not following the intent of the authorization. For example, there is no ambiguity in Title III that program evaluative results are to be based on the "students served" by the program, and that the students' "time in program" is a required consideration in establishing annual objectives and evaluating outcomes. The proposed interpretations ignore these critical statutory strictures.

The Council agrees with the Department's acknowledgement that states and local educational agencies have been given inconsistent advice and direction by the Department regarding the implementation of ESEA Title III. The Council believes that this inconsistent and at times inaccurate direction has resulted in more diffused and less focused Title III activities, and in evaluation results of more limited utility than intended in the 2001 authorization. These problems were avoidable, if the Department had issued Title III program regulations from the outset.



SPECIFIC COMMENTS OF THE COUNCIL OF THE GREAT CITY SCHOOLS

Interpretation 1: Annual ELP Assessments of LEP Students

All LEP students must participate in the annual English Language Proficiency Assessments (ELPA) whether served under Title III, or in a Title I or a non-Title I school. In addition, the proposed interpretation prohibits “domain proficiency banking” currently allowed in a few states in which a child who demonstrates proficiency in the listening and speaking domains, for example, would no longer be assessed annually in those domains, but would be assessed in reading, writing and comprehension until proficiency was reached as well.

Comment 1

The Title III statutory focus on LEP students “served” or “participating” in a Title III funded program should not be misinterpreted in order to harmonize the Title III ELPA requirement [section 3113(b)(3)(D)] with ESEA section 1111(b)(7). The ELPA requirement in section 1111(b)(7) for all public schools in a State should stand alone.

Recommendation 1: The Department’s interpretation should be revised to state that: “Regardless of Title III, section 3113(b)(3)(D) requiring ELPAs for only children ‘participating’ in Title III funded programs, this narrow Title III requirement is subsumed in the broader ESEA section 1111(b)(7) requirement that all LEP students in all schools in the State are to be assessed annually for English proficiency.”

Comment 2

The proposed interpretation to prohibit LEAs and States from “domain proficiency banking” elicits differing opinions from educators of ELLs across the Great City Schools. Annual English language proficiency assessments in all domains clearly add to the testing load on ELLs. However, there is a split of opinion on the relative educational benefit of such annual domain testing versus domain banking.

The Department’s interpretation to not allow the “banking” of the proficiency scores of ELLs in a particular domain will result in ELLs in all states being tested each year in all domains -- including being tested repeatedly in a domain for which they have already demonstrated proficiency. While the pedagogical benefit is debatable, the administrative burden, especially for districts with large number of ELLs, is very high. Testing for Speaking and Listening domains is very labor intensive and time consuming, requiring a one-on-one testing setting for up to 45 minutes per student. For example, since ELLs typically reach proficiency in Speaking and Listening sooner than in reading and writing, some educators suggest that the time and staff devoted to repetitive testing could be better used for English language development instruction focused on improving reading and writing. On the other hand, other educators suggest that Speaking and Listening demands for academic English will increase as children progress through the intermediate and higher grade levels, thereby justifying frequent if not annual assessments.

Additionally, all districts or states do not have data systems that are capable of easily disaggregating the test results by domain, in order to “bank” the proficiency and separately administer the assessment in the remaining domains. However, the proposed interpretation will impede LEAs and states that have this capacity from exercising their best instructional judgment for their ELLs. With the Act being in its final GEPA extension year, the Council

finds little justification for limiting the flexibility that states and local districts have utilized in this area. Since the ELPAs across the states have varying proficiency standards without encumbering federal rules, the flexibility to “bank” domain proficiency scores arguably could be addressed with a similar lack of regulation.

Recommendation 2: *Based on the differing educational judgments of the efficacy of annual testing in domains in which proficiency already has been demonstrated, the Council recommends withdrawing this interpretation and allowing States and LEAs the flexibility to “bank” domain proficiency scores if they have the capacity to do so and feel there is an educational benefit for their students. In the alternative, the Council recommends allowing “domain proficiency banking” within a grade span, but requiring re-testing of “banked” domains at each transition level—from elementary to middle school and from middle to high school.*

Interpretation 2: Use of Annual ELP Assessment Scores for AMAOs #1 and #2

Title III Annual Measurable Achievement Objective #1 (AMAO #1). The proposed interpretation would allow “progress” toward English proficiency to be demonstrated by measuring each of the four domains separately or establishing a composite score. States can determine their AMAO # 1 targets based on progress in one or more of the language domains—not all four. The AMAO # 1 interpretation allows for the measure of progress towards English proficiency with the recognition that students do not develop evenly and consistently in each of the four language domains.

Title III Annual Measurable Achievement Objective #2 (AMAO #2).

States would also have the option to demonstrate the attainment of English proficiency by either measuring each of the four domains separately or establishing a composite score. Attainment, however, must be demonstrated by reaching proficiency in “each and every” domain whether measured separately or with a composite score.

Comment

The proposed interpretations for AMAO #1 and AMAO #2 appear consistent with the intent of the law and would have relatively minor impact on current practices in Council member districts.

AMAO #1--This interpretation provides more flexibility than the earlier guidance provided by the Department of Education. The Department’s proposal recognizes the nature of language acquisition in the revision to the progress interpretation for AMAO #1.

AMAO #2—Most Districts are currently addressing the AMAO #2 accountability requirements in compliance with this proposed interpretation, so we anticipate no major impact.

Interpretation 3: Students Included in Title III Accountability

Title III Annual Measurable Achievement Objective #1 & #2 (AMAO #1 & #2). The proposed interpretation allows States to calculate AMAOs #1 and #2 based on either the student “served” under Title III or “all” LEP students in the LEA.

Title III Annual Measurable Achievement Objective #3 (AMAO #3). The proposed interpretation of Sec. 3122 (a)(3)(A)(iii) would require States to include all ELLs (not just those “served” by Title III) in determining adequate yearly progress for AMAO #3. The Department interprets the reference to Title I requirements as requiring the entire ELL/ LEP Subgroup (all LEP students in LEA) to be included.

Comment 1

The interpretation for AMAO #1 and #2 generally is consistent with the statute requiring that all Title III-served LEP students be included in the accountability determination for both AMAO #1 and AMAO #2. However, the Department wrongly assumes State discretion to apply AMAO #1 and #2 to all LEP students, when no such discretion is provided in the statute.

Under Title III, it is the school districts that exercise their judgment regarding the number of LEP students to be served under the program. Such local decisions are based on the amount of funds allotted under Title III, the relative needs and concentrations of ELLs across the various schools in the jurisdiction, other supplemental resources from the state or locality, changes in student population, etc. Some districts decide to serve all LEP students with Title III funds, in which case all LEP students are “served” and accountable under the Title III AMAOs. Other districts concentrate the Title III funds on certain LEP students based on needs or high proportions of ELLs in certain schools, in which case the progress and proficiency of these “served” students provides the accountability benchmarks for AMAO purposes. The State has no authority to apply these AMAO determinations to “unserved” LEP students under Title III, despite the unsupported conclusion expressed in the Department’s explanation of proposed interpretation 3. To the contrary, Sec. 3122(a)(1) requires States to develop AMAOs solely for LEP children “served” in order to measure “such children’s development and attainment of English proficiency while meeting challenging State content and student academic achievement standards.”

Comment 2

The Department’s proposed interpretation of AMAO #3 expands the “students served” focus of Title III in a manner inconsistent with the overall statutory framework and purpose by requiring States to include all LEP students within the LEA in the Title III accountability determinations for AMAO # 3, whether or not the students receive Title III funded services .

The Title III AMAO language in Section 3122(a)(1) makes explicit reference to “limited English proficient children served under this part” for whom States must develop annual measurable achievement objectives. This statutory language regarding AMAOs for children “served” makes no distinction between AMAO #1, #2, or #3. The Department, however, ignores this clear language and inaccurately claims that Title III generally makes “no provision for excluding any LEP students from AMAO targets, calculations, and determinations”.

In addition to the specific AMAO section of the Act [section 3122(a)(1)], Title III consistently refers to “limited English proficient students served” or “limited English proficient students participating” rather than “all limited English proficient students.” The Council has serious concerns about this proposed interpretation since it includes all ELLs in an LEA in the Title III accountability determinations for AMAO # 3, whether or not they receive Title III funded

services, as well as allows State discretion to include “non-served” ELLs in AMAO #1 and # 2 determinations. The effectiveness of Title III funded services should be measured based on the students served, not on all the ELLs in an LEA. Including non-Title III LEP students in Title III AMAOs creates an inappropriate student universe from which to evaluate Title III. Since AYP determinations under Title I already include all LEP students in an LEA, it is unnecessary and arguably illogical to include yet again all LEP students in AMAO #3. In fact, the States that are creating a “LEP subgroup of Title III-served students” appear to be operating consistently with the overall Title III purpose and accountability focus on “students served.” It is the Department’s proposed interpretation and previous advice to States that has taken Title III accountability off track, and inexplicably expanded accountability to students not receiving Title III program services.

Recommendation: The Council recommends withdrawing this interpretation and developing a new interpretation that only Title III students “served” will be included under AMAO # 1 and # 2 and in determinations of Title III AYP under AMAO #3 (in effect an “LEP subgroup of only Title III students served” for AMAO # 3 purposes).

Interpretation 4: Exclusion of LEP Students “Without Two Data Points” From AMAO 1

The proposed interpretation would prohibit States from not including students in the Title III accountability system due to the lack of two data points on the ELPA (scores for two consecutive years). The new interpretation will require SEAs and LEAs to use additional criteria as an alternative measure for this progress determination.

Comment

The interpretation imposes a burdensome and unnecessary mandate on States and districts to use additional criteria, in order to resolve a temporary exclusion of students who lack two-data ELPA points in the AMAO # 1 determination.

The Department claims that one-fifth to one-third of ELLs being served by Title III are being excluded from AMAO #1 accountability because of the lack of two data points. These students, however, are likely to be included once they have their second data point (within approximately 1.5 years). A number of the Council districts indicate that the range of exclusion cited by the Department is overstated for their LEAs, and not due to exclusion by design. Moreover, many of the students without two data points are entry level students at the kindergarten or grade 1 levels for which year-to-year progress cannot yet be determined, or newly arrived ELLs. And, students moving between districts within the State will likely have two ELPA data points on the statewide ELPA. As a result of these considerations, the Council believes that this new interpretation provides an unnecessary mandate for a short-term problem. As the annual statewide ELPAs are institutionalized in upcoming years, in contrast to the uneven state implementation and federal enforcement to date, the scope of the perceived problem should diminish further.

On the other hand, many districts already use additional criteria (local assessments, checklists, portfolios, etc.) to make AMAO #1 determinations. But, imposing a new mandate for States to develop an alternative method of calculating AMAO #1 will be a heavy burden on those districts that do not use such additional criteria, and may lead to hastily adopted assessments that provide questionable information regarding ELL progress -- only to be used for one year in the student’s state assessment history.

The Council is concerned that a hurried effort to comply with this new interpretation may result in States inappropriately using *placement* tests as an additional measure/criteria of *progress*. Scores from a student's second placement test may likely reveal where the child is still not proficient, rather than revealing the progress made in acquiring English Language proficiency.

Allowing the states and LEAs the flexibility to use additional criteria without creating a new mandate is a preferable regulatory approach, than the proposed interpretation.

Recommendation: *The Council recommends withdrawing this interpretation and continuing to allow, but not require, additional criteria in the absence of two data points or to supplement the ELPA.*

*** Additional Recommendation for Regulatory Clarification:** *The Council recommends that the Department's interpretative rule not only clarify that additional criteria at the state and local level is allowable, but not required, for AMAO #1, but also clarify that additional criteria is allowable, but not required, for AMAO #2. It would be inconsistent for federal policy to support additional criteria to supplement the ELPA for determining progress and not also allow additional criteria for determining proficiency.*

Interpretation 5: *Attainment of English Language Proficiency and "Exiting" the LEP Subgroup*

The proposed interpretation requires the States to equate their definitions of English language proficiency used for determining AMAO #2 to the criteria States use to exit students from Title III services and the Title I LEP subgroup.

Comment

The Department goes beyond statutory language and improperly equates attainment of English proficiency (AMAO #2) with exit criteria from Title III services and with exiting the LEP subgroup under Title I. The Department's interpretation will result in an unauthorized and possibly harmful limitation on Title III services--the statute imposes no such exit criteria.

The Department's interpretation of AMAO #2 is correctly focused on attaining English language proficiency—one of the purposes of Title III. However, Title III statutory language does not require AMAO #2 to be linked to the criteria for exiting ELLs from Title III services or from the LEP subgroup under Title I.

The attainment of English proficiency is only part of the purpose of title III, which also aims to assist in meeting State content standards in other core subjects. Therefore, a student who has reached proficiency on a particular ELPA may still not have sufficient command of academic English to ensure progress toward proficiency in the language demands of other subject areas.

Sec 3102 stipulates the purposes of Title III and specifically includes purposes that go beyond merely attaining proficiency in English. Specifically, subparagraphs (1) and (2) make reference to meeting State academic standards and achieving at high levels in the core academic subjects:

“The purposes of this part are—

- (1) to help ensure that children who are limited English proficient.....**meet the same challenging State academic content an student academic achievement standards** as all children are expected to meet and
- (2)**to achieve at high levels in the core academic subject so that those children can meet the same challenging State academic content and student academic achievement standards** as all children are expected to meet...”

Further, statutory language in Sec. 3122 regarding Title III Achievement Objectives and Accountability makes specific reference to achieving in academic content areas:

“...(a)(1) In General.--...Each SEA....shall develop annual measurable achievement objectives for limited English proficient children served under this part that relate to such children’s development and attainment of English proficiency *while meeting challenging State academic content and student academic achievement standards* as required by section 1111(b)(1).”

Exiting Title III funded services, therefore, should not be determined solely on AMAO # 2 (and the ELPA), but also take into account ELLs’ acquired proficiency in the language demands required in core academic subjects. Removing ELLs from Title III services based solely on AMAO #2 or ELPA proficiency would often be too early with regard to ELLs’ academic language development in English. This potentially single criterion approach under interpretation 5 appears to preclude the consideration of additional criteria to demonstrate ELLs’ proficiency of language demands required to perform at high levels in all core content areas taught in English. The proposed interpretation also will result in major implementation problems in states that use multiple exit criteria and measures for ELLs under state law.

The issue of exit criteria is an important instructional decision, much like instructional methodology, and should not be dictated by the U.S. Department of Education via interpretational cross-references.

Recommendation: The Department withdrawing this interpretation and thereby decoupling AMAO #2 from exiting criteria that would limit ELLs from receiving Title III funded services or being included in the Title I LEP subgroup.

Interpretation 6: Use of Minimum Subgroup Sizes in Title III Accountability

The proposed interpretation allows for the use of an N size (and probably confidence intervals) for Title III, similar to Title I accountability.

Comment

The Department’s interpretation undermines statutory language as well as undermines the Department’s own proposed interpretations regarding the inclusion of all ELLs served in the AMAO #1 and AMAO #2 determinations.

Since LEAs may not necessarily serve all LEP students, it is incongruent to apply an additional minimum N size, creating a situation where there are “served” students excluded from AMAO calculations. Moreover, given that there is a \$10,000 grant eligibility minimum, approximately 100 LEP children already are needed to generate a minimum grant. In essence,

a minimum N-size already exists and the sample of students is certainly large enough for accountability purposes. The N size allowance under the proposed interpretation would provide small LEAs an opportunity to escape Title III accountability – an unacceptable outcome in the opinion of the Council.

Recommendation: The Council recommends withdrawing this unnecessary and exclusionary interpretation.

Interpretation 7: All LEP Students, Adequate Yearly Progress, and AMAO #3

All LEP students in an LEA must be counted for the purposes of meeting the AYP requirement for the LEP subgroup under title III (AMAO #3) and Title I.

Comment

See Council’s comment on Interpretation #3 regarding AMAO #3 for Title III students “served”, rather than “all” LEP students in the LEA.

Ironically, a district can meet the “progress” AMAO #1, and meet the “proficiency” AMAO #2 under Title III, but under the proposed interpretation fail to meet AYP due to LEPs who are not served under Title III in AMAO #3. It stretches the bounds of logic to suggest that Title III programs should be accountable for students that do not participate in the Title III program. Again, the decision regarding how many LEP students to serve with the Title III allocation is a school district determination based on a variety of instructional and budgetary factors at the local level. And by statute, the Title III accountability is based on the Title III students “served”.

Recommendation: See recommendation for Interpretation #3.

Interpretation 8: AMAOs and the Use of Cohorts

Allows State discretion to use a cohort of “time in program” to establish overall AMAO targets for English language acquisition for ELLs served by Title III. The interpretation also prohibits the use of any other cohort factors (i.e. proficiency levels, time in the U.S., etc), other than “time in program”.

Comment

The statute requires that AMAOs reflect the amount of “time in program”, and provides no flexibility for States to ignore this important factor.

Statutory language clearly imposes a requirement related to “time in program” for States developing the AMAOs as follows:

“ Section 3122(a) (2) Development of Objectives. Such annual measurable achievement objectives **shall** be developed in a manner that—
(A) reflects the amount of time an individual child has been enrolled in a language instruction educational program; ...”

The proposed interpretation ignores this statutory requirement and improperly allows States to ignore the importance of “time in program”. The Council does not disagree with the prohibition of other cohort factors that are not expressly stated in the Act.

Recommendation: *The Council recommends revision of this interpretation to require all States to include a “time in program” cohort for Title III AMAOs.*

Interpretation 9: Determining AMAOs for Consortia

Flexibility provided for AMAOs for LEAs in title III grant consortia.

Comment

Inapplicable to our large districts.

Interpretation 10: Implementation of Corrective Actions Under Title III

Requires communication to parents for any LEA that fails to meet Title III AMAOs -- from the state to the LEA and the LEA to the parents.

Comment

Apparently, some states have not informed their school districts whether or not the district failed or met the statewide Title III AMAOs – which trigger Title III school improvement plans and ultimately Title III corrective action. These State omissions are inconsistent with the Act, but could be corrected by compliance actions rather than an interpretative rule. The Council, however, is concerned that the States which have failed to inform LEAs regarding AMAO performance may rush to comply with these requirements and impose multi-year retroactive determinations. Therefore, the Council suggests that the Department implement compliance agreements with those States in active consultation with representatives of LEAs in those States. It is essential that LEAs are not deprived of their full opportunity to develop and implement an LEA improvement plan and receive the expected technical assistance under the statute, and are not accelerated retroactively into the more extensive accountability measures under sec. 3122(b)(4) due to the SEA’s noncompliance.

General Comment:

Transition Period for Implementation. Regardless of the final interpretations resulting from this Federal Register notice, school districts and States already have applied and budgeted for the upcoming Title III program year which begins on July 1, 2008. In order to avoid massive disruptions to services and additional costs, any new interpretations should allow for a one-year transition period. It is possible that some states may require a statutory change in state law in order to comply with some of these interpretative rules.

The Council encourages the Department to withdraw this entire interpretative rulemaking initiative, and instead issue comprehensive proposed rules for the Title III program in a notice and comment rulemaking process. Please feel free to contact Jeff Simering or Gabriela Uro at 202-393-2427 regarding any questions on these comments.

Sincerely,

Michael Casserly
Executive Director