

**LETTER TO HONORABLE SHIRLEY NEELEY IN RESPONSE TO
TEXAS'S REQUESTS FOLLOWING HURRICANE KATRINA**

September 21, 2005

Honorable Shirley Neeley
Commissioner of Education
Texas Education Agency
William B. Travis Building
1701 North Congress Avenue
Austin, Texas 78701

Dear Commissioner Neeley:

Thank you for your letter regarding Texas's educational challenges in the wake of Hurricane Katrina. During my time in Houston last week, I was moved by and proud of the remarkable generosity of the State of Texas in welcoming the thousands of evacuees who have left Louisiana and Mississippi and found safety and refuge in Houston, San Antonio, Dallas, and other Texas communities. Be assured that staff at the U.S. Department of Education (ED) and I stand with you during these difficult and challenging times.

We have reviewed the specific requests outlined in your September 8, 2005 letter and I am pleased to respond. First, with respect to additional funding, and in recognition of the additional expenses that Texas school districts and other districts around the country will incur in serving displaced children, the Administration is proposing up to \$1.9 billion in funding similar to the Impact Aid program to school districts, including charter schools, enrolling at least 10 displaced children. This funding would reimburse districts for the unexpected costs of educating these new children for the 2005-06 school year. This funding would be granted to districts based on the number of displaced students enrolled multiplied by up to 90 percent of the State's average per pupil expenditure for education, with a maximum payment of \$7,500 per child for the 2005-2006 school year. In addition, the Administration has also requested \$488 million in private-school reimbursements for the many families who have been displaced by the hurricane and have already chosen to enroll their children in private schools. I have enclosed a fact sheet (<http://www.hurricanehelpforschools.gov/0916-factsheet.html>) that provides further information on the proposal. We will notify you of further developments, including any congressional action that occurs.

Second, with respect to your waiver requests, I have grouped the Department's responses into five categories: (1) Waivers and Modifications To Be Granted; (2) State Flexibility Is Available: Federal Waivers Not Needed; (3) Current Exception in Federal Law Applies: Federal Waivers Not Needed; (4) No Current Legal Authority; and (5) Additional Information Needed.

WAIVERS AND MODIFICATIONS TO BE GRANTED

Individuals with Disabilities Education Act (IDEA)

Postponement of Office of Special Education Programs (OSEP) Data Verification Visit

You asked specifically for postponement of the OSEP Data Verification Visit scheduled for October 3-7, 2005. On September 13, 2005, Department staff notified your Executive Assistant, Ms. Patty Foster, that OSEP would postpone this visit and work with you to reschedule for a future time.

You also asked for an extension to submit your Annual Performance Report (APR) response to OSEP in conjunction with the submission of your State Performance Plan (SPP). You may submit your APR response along with your SPP, which is due on December 4, 2005.

Flexibility in No Child Left Behind (NCLB) timelines, reporting and monitoring

You requested an extension of timelines relating to State and local educational agency (LEA) reporting and postponement of all on-site monitoring of Texas until after January 31, 2006. I am open to extending timelines and to rescheduling on-site monitoring for the Texas Education Agency (TEA). To ensure this is a feasible and workable solution that can be managed efficiently, I have listed those timelines that the Department will extend and monitoring visits that we will reschedule. If any others are not mentioned below, please contact us and we will work with you to accommodate your request.

- The Title II (Highly Qualified Teachers) monitoring visit, scheduled for December 13-15, will be rescheduled for a later date.
- Data collection for the Education for Homeless Children and Youth is currently due October 1, 2005. If additional time is needed, please work with the program office (Gary Rutkin at (202) 260-4412) to determine when the data may be submitted.
- Data collection for the Migrant Child Count is currently due December 1, 2005. If additional time is needed, please work with the program office (Francisco Garcia at (202) 260-1127) to determine when the data may be submitted.
- Our Impact Aid program staff has scheduled visits to two Texas districts (Terlingua and San Vincente). It is our understanding that these visits should not interfere with Texas's response efforts, but if these visits need to be rescheduled please work with the program office (Catherine Schagh at (202) 260-3858) to reschedule. Please note that delays in these Impact Aid visits may result in delayed payments.

STATE FLEXIBILITY IS AVAILABLE: FEDERAL WAIVERS NOT NEEDED

Highly Qualified Teachers and Paraprofessionals

You have notified the Department of your intent to implement a statewide programmatic waiver under the State's Ed-Flex authority to waive Section 1119(a) and (c) of the Elementary and Secondary Education Act of 1965 (ESEA), relating to highly qualified teachers and paraprofessionals. The waiver would cover any teacher or paraprofessional hired from out of

state to respond to the increased enrollments caused by Hurricane Katrina for the 2005-06 school year.

The Department has determined that Texas has sufficient flexibility under its Ed-Flex agreement to waive these sections. Texas may implement its plan for hiring teachers and paraprofessionals and may consider these individuals highly qualified for the 2005-06 school year based on the criteria you established for this situation. No additional waiver from the Department is necessary.

IDEA

Flexibility for process timelines related to evaluation

You requested flexibility for evaluation timelines. The IDEA provides for two evaluation timelines: (1) one timeline that is from the time of the signed parental consent for evaluation to the time of determination of eligibility; and (2) another timeline that is from the time of the determination that a child needs special education and related services (i.e., is eligible) to the time of the Individualized Education Program (IEP) meeting. While the Department does not have current legal authority to waive either timeline, the law provides flexibility regarding the first timeline. That flexibility is found in a new provision of the IDEA, which provides for either a 60-day timeline, or another timeline established by the State for the period between parental consent for evaluation and the determination of eligibility. (Section 614(a)(1)(C)(I) of the IDEA.) Therefore, Texas has sufficient authority under current law to establish its own timeline in this area.

Under normal circumstances, the Department would expect that a State-established timeline would be the same throughout the State. However, under the extraordinary and unprecedented conditions faced by Texas in dealing with the aftermath of Hurricane Katrina, it would be reasonable for the TEA to establish a different timeline for completing evaluations of all children suspected of having a disability in districts enrolling a significant number of displaced students. The second timeline is discussed later in the letter (see "No Current Legal Authority," IDEA, Deadline extension for State Performance Plan at page 5).

CURRENT EXCEPTION IN FEDERAL LAW APPLIES: FEDERAL WAIVERS NOT NEEDED

Family Educational Rights and Privacy Act

You asked whether the Family Educational Rights and Privacy Act (FERPA) would permit the TEA and other State educational agencies (SEAs) to share students' education records in order to meet the needs of children displaced by Hurricane Katrina. As discussed below, the Department has determined that, under these extraordinary circumstances, two exceptions to FERPA's general consent rule would apply and permit these disclosures pursuant to the conditions described below.

One exception to FERPA's general consent rule permits the disclosure of education records to officials of another school or school system where the student seeks or intends to enroll. (34 CFR §§ 99.31(a)(2) and 99.34) Under this provision, school districts in affected areas may disclose students' education records to school districts in Texas where students will be or are now

attending. Additionally, the Louisiana Department of Education may, on behalf of its LEAs, disclose the students' education records it has received from Louisiana LEAs, to Texas LEAs or to the TEA, on behalf of its LEAs. In this situation, the receiving school district should provide the parental notice required under § 99.34 and should comply with other provision requirements. In circumstances where a large number of parents and/or eligible students, i.e., those age 18 or older, must be notified, the Department would find a general notice, either by school newsletter, local newspaper, or a school's website, to constitute "a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student." Please note that FERPA's record keeping requirements (§ 99.32) apply to disclosures made under § 99.31(a)(2) and § 99.34.

In addition, the health and safety emergency exception to FERPA's general consent rule allows disclosure of education records to appropriate parties in connection with an emergency, if the knowledge of such information is necessary to protect the health or safety of individuals. (34 CFR § 99.31(a)(10) and § 99.36) Under the health and safety exception, school officials may share relevant information with "appropriate parties," that is, those parties whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. (34 C.F.R. § 99.36(a)) Typically, law enforcement officials, public health officials, and trained medical personnel are "appropriate parties" for purposes of this exception. Under these extraordinary circumstances, the Department also will consider entities that provide housing and medical services to evacuees to be "appropriate parties," provided that disclosure of personally identifiable information from education records is limited to what is necessary to protect the health or safety of the students or other individuals. FERPA's record keeping requirements (§ 99.32) also apply to disclosures made pursuant to the health or safety exception.

Finally, with regard to distinguishing apparel provided by shelters or other service providers, the Department agrees with you that FERPA would not apply, as this is not information from students' "education records."

NO CURRENT LEGAL AUTHORITY

McKinney-Vento Homeless Assistance Act

You requested a waiver of the provisions of the McKinney-Vento Homeless Assistance Act (McKinney Act) so that you may serve students displaced by Hurricane Katrina at facilities where they are housed or in classrooms separate from the general population. The Department does not have current legal authority to waive the requirements of the McKinney Act.

As you are aware, the McKinney Act requires that State and local educational agencies adopt policies and practices to ensure that homeless children and youth are not stigmatized or segregated on the basis of their homeless status. The Department expects that those districts receiving students displaced by Hurricane Katrina will take steps necessary to enroll immediately these students in school and mainstream them into the regular school environment.

I know that many Texas school districts are facing tremendous increases in the number of homeless students displaced by the hurricane. These districts are working tirelessly to address the numerous logistical and practical concerns raised by the rapid and substantial increase in their

student enrollment. Due to Hurricane Katrina's extensive impact, some districts may need to provide educational services, temporarily, to homeless students in a separate setting. The Department understands that, in certain instances, it may take longer than one might otherwise expect for districts to provide educational services to homeless students in the regular school environment.

IDEA

Deadline extension for State Performance Plan

You requested a waiver of the IDEA State Performance Plan (SPP) submission deadline. The Department currently does not have legal authority to delay the deadline for the SPP. Section 616(b)(1)(A) of the IDEA requires States to have performance plans "in place" no later than December 4, 2005.

Flexibility for process timelines related to evaluation

You also requested flexibility for evaluation timelines. As mentioned earlier, the Department does not have current legal authority to waive the two evaluation timelines. However, as noted earlier, Texas has the authority under current law to establish its own timeline from signed parent consent to eligibility determination (see page 3). The other timeline, a 30-day process, from determination that a child needs special education and related services to the IEP meeting is specified by 34 CFR §300.343(b)(2). There is currently no legal authority to waive this timeline.

The Administration is proposing specific Hurricane Katrina-related waiver authority that would enable us to better meet the education needs of the Gulf Coast region and other affected areas. The limited waiver authorities we currently possess are unlikely to be sufficient for us to respond as fully as we would like in this extraordinary situation. Should Congress grant additional authority, we will contact you to discuss how that authority might be used to address your needs.

ADDITIONAL INFORMATION NEEDED

Flexibility in use of NCLB funds

You requested that the Department exempt the TEA and its LEAs from the statutorily prescribed uses of all NCLB program funds. Specifically, you have asked the Department, for the 2005-06 school year, to allow NCLB funds to be used for any justifiable supplemental expenditure the TEA or its LEAs determine is necessary to provide an education to the students affected by Hurricane Katrina. There is no general authority for Texas to commingle funds from various programs and then use them for "any justifiable supplemental expenditure to provide an education to the students affected by Hurricane Katrina." However, under Title VI, Part A, Subpart 2 of the ESEA, there is limited authority to transfer funds from one program to another. We would be pleased to discuss the specifics of your request further to ascertain a legal and workable solution.

IDEA

The 2004 IDEA includes opportunities for States to propose ideas addressing multi-year IEPs (i.e., developing comprehensive IEPs that include student goals not to exceed three years) and paperwork reduction (i.e., waiving or changing requirements that would lessen the paperwork requirements associated with special education). You expressed concern that Texas might be unable to apply for the multi-year IEP and paperwork reduction pilots authorized in the 2004 IDEA because of personnel commitments related to providing services for Katrina-affected students. The Department will provide States an opportunity to participate in these pilots through a competition. At this point, the timing of competitions for these pilots is not certain but also not immediate. By way of explanation, we are working to finalize notices of proposed priorities for these pilots for publication in the *Federal Register*. The notices of proposed priorities then will be subject to a 75-day public comment period, after which we will respond to public comment, publish final priorities, and announce competitions. It is our hope that, by the time the opportunity to apply for this pilot project arrives, Texas will be able to respond. However, once the timing for these pilots is more concrete, you may choose to renew your request at that time.

Participation in National Studies

Concerning participation in national studies and research projects, including data requests, we are still identifying the studies and data collections that might apply, but we will work with the TEA and affected LEAs on a case-by-case basis. In general –

- For research projects carried out under discretionary grants, where the State or an affected LEA is not the grantee, but is part of the study, there is no requirement that the State or LEA continue its participation in the study.
- For research projects where the State or an affected LEA is the grantee, it is possible that an extension of the project period could be granted to permit completion of the project.

For studies that are utilizing a nationally representative sample of schools, we are currently investigating the possibility and impact of delaying several of these studies. Other collections that gather data on every school or LEA in the State, such as the EDEN and Common Core of Data collections, already incorporate timelines that are long enough to accommodate your requests. Please understand that the ability to delay your submission until the latter part of these collection timelines does not waive TEA's responsibility to participate in the collection.

Student Assignment under NCLB

You have asked the Department to permit the TEA to determine, for the 2005-06 school year and on a case-by-case basis, whether a Title I School Improvement school must offer choice and/or supplemental educational services (SES) to displaced students enrolled at that school campus. You indicated you would implement this flexibility when the following three criteria are met: (1) the school can demonstrate a substantial influx of students; (2) school capacity does not allow further choice or SES; and (3) the school can demonstrate the ability to provide other supplemental services or activities to the students who remain at the School Improvement Campus.

With regard to offering choice, LEAs must make available to all students enrolled in a Title I school identified for improvement, corrective action, or restructuring the opportunity to transfer to another school in the district not identified for improvement. See section 1116(b)(1)(E)(i) of ESEA. LEAs have the discretion to close the transfer enrollment period after giving parents a reasonable amount of time to apply. An LEA may decide that any student, including a student displaced by Hurricane Katrina, who enrolls in an eligible school after the choice window has closed may not be eligible to transfer in the 2005-06 school year. I understand there may be some logistical and practical complications; however, if a displaced student enrolls before the LEA closes its choice window, that student would be eligible to transfer to a school not identified for improvement.

With regard to offering SES, I am concerned that students displaced by Hurricane Katrina may have a very great need for SES in order to help them achieve academically. Further, the funding we are working to secure for affected schools and children in Texas and other States may be used to provide SES to displaced students.

Adequate Yearly Progress (AYP) Calculations

You have notified the Department that Texas will identify amendments the State believes are necessary to educate displaced students, including amendments to the State's Accountability Plan Workbook, its pending compliance agreement relating to assessment and AYP, and its own policies.

As you know, AYP is the linchpin of the No Child Left Behind accountability system. I am reluctant to waive, even partially, AYP or approve broad changes even though all States, including Texas, may submit amendments to their Accountability Plans at any time. In offering any possible amendments, I encourage you to consider carefully these requests to ensure that the proposed actions would not adversely affect the following student groups: new students from Louisiana and Mississippi; students already enrolled in those schools that opened their doors to the displaced students; and the Texas students, schools, and districts that are largely untouched by Hurricane Katrina.

Since Texas's assessments upon which AYP determinations are made will not be administered until spring 2006, it is premature for us to consider your request at this time. We appreciate that you are not requesting a complete waiver of AYP and we will contact you in the coming days to discuss your specific proposals in more detail.

Timelines

The Department understands that collecting data and administering assessments to the large number of displaced students newly enrolled in Texas's schools could result in some unanticipated, logistical problems. I expect that Texas will meet the required statutory timelines for identifying schools for improvement next year. It is possible that Texas may encounter problems based on the State's 2005-2006 school year assessments due to the aftermath of Hurricane Katrina. If, as a result of such problems, Texas needs additional time to make AYP decisions based on data from the 2005-2006 school year test administration, and to identify Title

I schools for improvement, we may be prepared to provide additional time. Please be sure that the TEA provides updates to Deputy Secretary Ray Simon on the need for additional time.

Again, thank you for contacting me and sharing your requests and concerns. Please know that the Department stands behind you and that my staff remains available to work closely with you in the days ahead. I have designated Deputy Secretary Ray Simon at 202-401-8450 to serve as our liaison between the Department and your Agency for additional follow-up. Finally, please know of my personal commitment to you, as well as to the generous citizens and children of Texas.

Sincerely,

/s/
Margaret Spellings

Enclosure