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June 2, 2008

Richard L. Smith
Office of English Language Acquisition
U.S. Department of Education
400 Maryland Avenue, SW, Room 10087
Potomac Center Plaza
Washington, DC 20202-6132

Dear Mr. Smith:

Subject: Comments on the Title III Notice of Proposed Interpretations

Thank you for the opportunity to submit comments to the notice of proposed interpretations, Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB). Our comments are attached.

We are troubled by the dramatic changes contained in these interpretations and by the very short time period provided for public comment.

California educates 30 percent of the nation's kindergarten through twelfth grade English learner population, and the state is in the fifth year of implementing an established Title III accountability system. The major changes proposed by the Secretary suggest a completely new way of defining English language proficiency for Title III annual measurable objectives and would require California to redefine our Title III criteria and targets. The time and cost burdens that would be entailed by such changes have not been clearly justified. Please see the attached document for a more detailed discussion of our concerns.

If you or your staff has any questions regarding these comments, please contact Gavin Payne, Chief Deputy Superintendent of Public Instruction, Office of the State Superintendent of Public Instruction, at 916-319-0794 or by e-mail at gpayne@cde.ca.gov, or Debora Merle, Executive Director, State Board of Education, at 916-319-0826 or by e-mail at dmerle@cde.ca.gov.

Sincerely,

JACK O'CONNELL
State Superintendent of Public Instruction
California Department of Education

THEODORE R. MITCHELL
President
California State Board of Education

JO/TM:bs
Attachment

**Comments on the Title III Notice of Proposed Interpretations
Submitted on Behalf of California by
State Superintendent of Public Instruction Jack O'Connell and
State Board of Education President Theodore Mitchell**

These interpretations suggest a completely new way of defining the English language proficiency (ELP) annual measurable achievement objectives (AMAOs) (1 and 2) and conflict with guidance and interpretations that the U.S. Department of Education (ED) provided in the past. Some states, including California, which educates 30 percent of the nation's kindergarten through twelfth grade limited English-proficient (LEP) population are in the fifth year of implementing an established Title III accountability system. If the Secretary proposes such major changes to Title III accountability, it is important that they be technically sound and defensible. Moreover, such major changes should be done through the normal regulatory process. The 30-day comment period has severely limited our ability to gather input from the constituents affected by these Interpretations. The time and cost involved in implementing the proposed Interpretations have not yet been calculated. It is important that time and cost burdens are considered if the proposed interpretations become final, as these are likely to be substantial.

These interpretations, if they were to become final, would require California to redefine its AMAO 1 and 2 criteria as well as targets. Data analyses and modeling would need to be conducted and new target structures for AMAO 1 and AMAO 2 would also need to be established. The standardization of LEP reclassification criteria under AMAO 2 would require state legislative action to eliminate the use of teacher judgment and parent input. All proposed changes would need to be approved by the State Board of Education and incorporated into the Consolidated State Application. It is estimated that it would take California at least 18 months to make the proposed revisions if they are approved.

1. **Annual ELP Assessments of LEP Students**.

   California does not have comments on this interpretation.

2. **Use of Annual ELP Assessment Scores for AMAOs 1 and 2**.

   A LEP student must score proficient or above in each and every language domain required under Title III in order to be considered to have "attained English proficiency" on a State's ELP assessment [for the purposes of AMAO 2].

States should be allowed to operationally define the English proficient level on the state's ELP assessment provided they can justify the definition they choose through psychometric and empirical analyses. The state will need to consider the test design, item characteristics, scaling, reliability and validity evidence for the composite score as well as for each of the domain scores when determining the definition of English proficiency.

Composite scores for an ELP assessment are the most reliable and appropriate approximation of the student's English language proficiency since they are based on information from all four domains. The Secretary should not dictate that all domain scores must be at a given level in a state's definition of English language proficiency unless psychometric and empirical analyses of the state's ELP test indicate that it is appropriate to do so for that test.

3. **Students Included in Title III Accountability**

California does not have comments on this interpretation.

4. **Exclusion of LEP Students without Two Data Points from AMAO 1**

The Secretary proposes that all LEP students would have to be included in AMAO 1 regardless of whether they have participated in two consecutive and consistent administrations of the annual ELP assessment required under Title III. If the state does not have the requisite two years of data for some LEP students served by Title III, the state would be permitted to propose to the Department an alternative method of calculating AMAO 1.

Given that AMAO 1 measures progress, it is not possible to determine if a student has made progress unless there are two data points. The Interpretation requires states to propose an alternative method for calculating AMAO 1 and suggests that local assessments may be used. A myriad of local assessments are used in many states to monitor LEP progress during the school year. These include locally developed checklists, English-Language Development (ELD) progress profiles, ELD grades, curriculum embedded assessments, and benchmark tests.

It is not possible to incorporate such diverse local assessments into a consistent measure of growth that is sufficiently valid and reliable for use in accountability decisions. States should not be asked to compare diverse assessment results to those of the single statewide standards-based ELP assessment for the purpose of judging progress under AMAO 1.

5. **Attainment of English Language Proficiency and Exiting the LEP Subgroup**

Under the proposed interpretation, students would not be considered proficient for the purposes of AMAO 2 until they are also considered proficient by the State for the purposes of exiting the LEP subgroup.[1] The Secretary would continue to permit States and sub grantees to use criteria in addition to ELP assessment results to determine a student's LEP status, as long as those criteria are applied consistently across all sub grantees in a State.

Some states require multiple LEP exit criteria and allow districts local control in setting and using them in the reclassification decision-making process. California's Accountability Workbook for Title I acknowledges the role of locally defined criteria: "The exit criteria for English learners include not only California English Language Development Test (CELDT) results but also local indicators defined by individual school districts as well as parent consultation." (Page 39)

California Education Code Section 313(d) requires the use of multiple criteria in the reclassification of LEP students. The criteria must include: the CELDT, the student's score on the California Standards Test in English/language arts, teacher evaluation including a review of the pupil's curriculum mastery, and parent input and consultation.

Requiring the criteria for AMAO 2 attainment to include these multiple, locally defined criteria for LEP reclassification in addition to the standardized English language proficiency criterion used on the state ELP test will lead to a nonstandard definition of AMAO 2, and threaten the comparability and validity of decisions made in the Title III accountability system. With this interpretation, it appears that the Secretary wants states either to standardize these criteria for use in AMAO 2 or to eliminate them if they cannot be standardized sufficiently to ensure reliable and valid accountability decisions to be based on them. Since standardization of these local criteria is exceedingly difficult, this interpretation will in effect require states to eliminate them and thereby restrict the role of teachers and parents in making educationally important decisions regarding program placement and instructional services. As a result, the parents and teachers of 30 percent of the nation's LEP population will be disenfranchised from participating in these important educational decisions.

[1] The Secretary is referring to exiting the LEP subgroup. These Reclassified Fluent English Proficient (R-FEP) students will still be included the LEP subgroup for Adequate Yearly Progress (AYP) and AMAO 3 under the conditions specified in California's Accountability Workbook.

6. **Use of Minimum Subgroup Sizes in Title III Accountability**
   California does not have comments on this interpretation.

7. **All LEP Students, Adequate Yearly Progress, and AMAO 3**

   California does not have comments on this interpretation.

8. **AMAOs and the Use of Cohorts**

   States may, but are not required to, establish cohorts for AMAO targets, calculations and determinations; and States may set separate AMAO targets for separate groups or cohorts of LEP students served by Title III based **only** [emphasis added] on the amount of time such students have had access to language instruction educational programs. It would be inconsistent with this statutory language to set different expectations for different LEP students served by Title III based on their current language proficiency, time in the United States, or any other criteria other than time in a language instruction educational program. For a sub grantee to meet an AMAO overall, all cohorts for which the State has set separate targets would have to meet the AMAO targets.

   If enacted as currently proposed, this interpretation will likely bias Title III accountability systems against certain districts based on the characteristics of their LEP student populations. Specifically, this interpretation will likely generate bias on AMAO 2 against elementary school districts, and districts that receive a higher proportion of beginners and students with interrupted schooling. The AMAO 2 calculation will be distorted by including more recently arrived LEP students at the lowest levels of English proficiency. It will also divert attention from those LEP students that require it (e.g. those LEP students who are stuck at the Intermediate level) and will undermine the credibility and rigor of AMAO 2. By disallowing the inclusion of student characteristics other than time in language instruction program, this interpretation "un-levels the playing field" among districts, masks the performance of those LEP students that districts can reasonably be held accountable for, and effectively undermines the accountability system's validity, credibility, and fairness.

9. **Determining AMAOs for Consortia**

   California does not have comments on this interpretation.

10. **Implementation of Corrective Actions Under Title III**

    California does not have comments on this interpretation.