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August 1, 2016

Honorable John B. King, Jr.
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Via Electronic Portal

Re: Proposed accountability and state plan rules
Docket ID: ED-2016-OESE-0032

Dear Secretary King:

The National Education Association (NEA), representing three million educators, submits these comments on the Department of Education's (ED's) Notice of Proposed Rulemaking on accountability and state plans under the Every Student Succeeds Act (ESSA), 81 FR 34540 (May 31, 2016).

NEA appreciates ED's efforts to move forward quickly to implement ESSA through the proposed regulations ["the regulations"] and other actions, and recognizes the challenges the agency faces in implementing a major rewrite of the Elementary and Secondary Education Act. The effort to speed implementation must be accompanied with equal attention to the careful bipartisan compromise that led to passage of ESSA, a compromise designed to move away from No Child Left Behind's (NCLB's) failed, one-size-fits-all management of state and district school accountability systems, while maintaining guardrails for equity and opportunity. For the reasons described in the section-by-section analysis below, we believe that the regulations miss the mark in terms of fidelity to the spirit and letter of ESSA, and instead revive elements of NCLB's test, label, and punish system by adding the agency's own restrictions on goals, indicators, weights, labels, interventions, and state plans. Many of ED's restrictions are likely to promote the same counter-productive impacts of NCLB: a focus on testing over learning, narrowing of the curriculum for disadvantaged students, disincentives for states to set high standards and goals, over-identification of schools in need of interventions, and the imposition of draconian and ill-advised solutions, several of which ED lists in the proposal,¹ to those over-identified schools.

¹ Several of ED's proposed interventions in e.g. § 200.21(d)(3), such as closing schools and converting to charters, are reminiscent of the SIG program, a program that was not authorized by Congress in ESSA and has had ambiguous results. (See e.g., "New SIG Data Serve Up Same Old Conclusion: Mixed Results" (EdWeek, November 12, 2015, http://blogs.edweek.org/edweek/campaign-k-12/2015/11/new_sig_data_serves_up_same_ol.html).

Identification of schools and students that most need help is, of course, a key goal of any accountability system, but it is important to remember that NCLB in its later years was heading toward labeling all schools failures, which rendered its ability to distinguish between schools meaningless, spread state and LEA supports too thin, put in motion counter-productive interventions, and led to the NCLB waiver program. (See e.g., Memo from Vermont Agency of Education to Parents and Caregivers, August 6, 2014: “This year, every school whose students took the NECAP tests last year is now considered a ‘low performing’ school by the US Department of Education.”)² To correct the over-identification problem, ESSA targets comprehensive interventions toward the lowest 5 percent of schools (though states are free to target more), schools that graduate small percentages of students, and schools with certain very low-performing subgroups that do not improve after a state-determined number of years. The regulations undermine ESSA’s improvement over NCLB by adding elements that could unreasonably increase the number of schools identified as needing comprehensive and targeted supports, and suggesting disproportionate interventions in those schools.

The proposed regulations, taken as a whole, undermine the historic opportunity presented by ESSA to advance equity, opportunity, innovation, and school improvement.³ We urge ED to significantly rewrite these proposed regulations.

Long-term Goals and Measures of Interim Progress (§ 200.13)

ESSA states that statewide accountability systems should include long-term goals for, among other things, “academic achievement as measured by proficiency on the annual assessments” [ESSA 1111(c)(4)(A)(i)(I)]. The regulations narrow this broad concept of “proficiency on the annual assessments” to “grade level proficiency on the annual assessments” [§ 200.13(a)(1)] and are inconsistent with the intent of Congress to give states flexibility in setting goals. The regulations should instead track the statute and require state plans to include goals for academic achievement “as measured by proficiency on the annual assessments.”

ESSA gives states the flexibility to set long-term and interim goals and, in setting these goals, requires states to take into account the improvement necessary to close subgroup gaps [ESSA 1111(c)(4)(A)(i)(III)]. However, ESSA’s prohibition section also states that ED cannot prescribe numeric long-term goals or measures of interim progress, including “the progress expected from any subgroups of students in meeting such goals” [ESSA 1111(e)(1)(B)(iii)(I)(bb)]. The requirement in the regulations that states have higher rates of improvement for lower-achieving subgroups [§ 200.13(a)(2)(iv)] is an attempt to prescribe numeric goals and is inconsistent with the statute. Moreover, while every school should aim to close achievement gaps, the proposed regulation could hamper schools that want to take a comprehensive approach to subgroup improvement that, because of the scope of the change, might show smaller benefits at first than a “quick fix,” but larger benefits later.

² http://education.vermont.gov/documents/EDU-Letter_to_parents_and_caregivers_AOE_8_8_14.pdf.

³ We note that there are some proposals within the overall regulations that could produce positive education results, but nevertheless conflict with a statute that moves decision-making in those areas away from whoever is Secretary at a given time and closer to those who are largely responsible for and work with students. In almost all cases, states would still have the option to take the actions even if it is not required by the regulations.

Consistent with ESSA 1111(c)(4)(A), NEA supports interim state-designed measurements to monitor the progress and growth of English Language Learners (ELLs) toward attaining English language proficiency (ELP) as measured by the state's ELP assessments that set expectations for each ELL to make annual progress toward attaining ELP. By responsibly administering interim measures to ELL students, states will provide accurate measurements of student growth in the progress and attainment of ELP and, hopefully, will provide information to educators that will help inform instruction.⁴

Accountability Indicators (§ 200.14)

ESSA marked a profound shift from NCLB's test-based accountability system, allowing states an opportunity to use one or more indicators of school support and student success in their accountability systems. These broader measures mean that schools can be measured by the opportunities they provide to students, not by standardized tests alone. Moreover, these measures of opportunity can be used to drive change in schools, since they can be used as a dashboard to identify the reasons for shortcomings in student success, not just the shortcomings themselves. ESSA makes it clear that states have broad discretion to choose these indicators within two parameters: the indicators must (1) allow for meaningful differentiation in school performance; and (2) be valid, reliable, comparable, and statewide (with the same indicator or indicators used for each grade span, as such term is determined by the state) [ESSA 1111(c)(4)(B)(v)]. ESSA also provides five examples of indicators such as school climate and safety, adding that the state may use "*any other indicator* the state chooses that meets the requirements of this clause [covering school quality and success]" at 1111(c)(4)(B)(v)(VIII).

Although there is clear statutory language giving states the freedom to establish school quality indicators within well-specified parameters, the regulations add an additional research-based restriction related to test outcomes at § 200.14(d). This restriction, which implies that even Congress, in listing its five examples of possible quality indicators, did not adequately think through its research basis, undermines an area of statutory flexibility granted to the states. Moreover, the restriction sets a precedent for additional restrictions over indicators in the final rule, or in amendments to the accountability rules under future secretaries of education. Section 200.14(d) should be dropped as inconsistent with the statute.

The regulations also add a requirement that states must demonstrate varied results in the school quality indicator across all schools in the state [§ 200.14(e)]. While ESSA requires that the indicator allow for meaningful differentiation of schools, the requirement to demonstrate this impedes state flexibility to use innovative indicators and gives ED the power to disapprove indicators based on how much variation in the results it considers appropriate.

In addition to adding restrictions on the school quality indicator, the regulations constrain ESSA's requirement for a measure of public elementary and secondary schools that are not high schools, which by law can either be a measure of student growth or another valid and reliable statewide indicator that allows for meaningful differentiation in school performance [ESSA 1111(c)(4)(B)(ii)]. The regulation would limit the measurement of growth option to math and reading tests, removing states' flexibility to define their own measures of growth.

⁴ ESSA 1111(e) prohibits any federal numeric long-term or interim EL proficiency goals.

Participation in Assessments and Annual Measurement of Achievement (§ 200.15)

ESSA requires that states test 95 percent of students and that nonparticipation will negatively impact the calculation of average school test scores [ESSA 1111(c)(4)(E)(ii)]. Beyond that mathematical penalty, ESSA specifically leaves it to the state to determine the weight of test nonparticipation in the accountability system [ESSA 1111(c)(4)(E)(iii) and 1111(e)(1)(B)(iii)(XI)]. ESSA also has a provision on parents' rights which states: "Nothing in this paragraph [academic assessments] shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent's child participate in the academic assessments under this paragraph" [ESSA 1111(b)(2)(K)].

These different streams on test participation in the statute suggest a carefully constructed congressional compromise. Unfortunately, the regulations violate this compromise by not only requiring states to punish schools when parents choose not to have their children participate in tests, but by suggesting the possible punishments, e.g., giving the school the lowest performance level on the Academic Achievement indicator, and mandating remedies [§§ (200.15(b) and (c)]. The regulations should not include penalties and required actions for test nonparticipation, and should leave it to the states to decide the weight of nonparticipation in the indicator system, as required by ESSA.

Subgroups of Students (§ 200.16)

The regulations ask at the outset: "Whether we should retain, modify, or eliminate in the title I regulations the provision allowing a student who was previously identified as a child with a disability under section 602(3) of the Individuals with Disabilities Education Act (IDEA), but who no longer receives special education services, to be included in the children with disabilities subgroup for the limited purpose of calculating the Academic Achievement indicator, and, if so, whether such students should be permitted in the subgroup for up to two years consistent with current title I regulations, or for a shorter period of time."

NEA believes that the existing two-year provision should be retained or expanded to parallel the ELL provision. This would recognize that the student population changes over time and allow schools to be recognized for the progress they have made in supporting students previously identified with disabilities toward meeting the challenging state academic standards over time.

Disaggregation of Data (§ 200.17)

ESSA asks states to set a minimum number (or N size) for subgroups, describe how it is statistically sound, and describe how the number was determined with stakeholder involvement [ESSA 1111(c)(3)]. The regulations add a requirement that the number "must not exceed 30 students" unless the state provides justification for doing so in the state plan. This requirement is an arbitrary implied restriction on the flexibility granted to the states in the statute.

NEA is pleased that § 200.17(a)(3)(iii) requires each state to describe the strategies used to protect the privacy of individual students for each purpose for which disaggregated data is required. This regulation would be strengthened, however, if it also called on the states to describe their rules, policies and procedures regarding the collection, use, access to, sharing of, and security of student data, as well as the policy regarding notification of misuse of data or breach of data security, and recognized the privacy rights of educators as well as students.

NEA is also pleased that § 200.17(b)(1) prohibits states from reporting disaggregated data that would reveal personally identifiable information about a student, teacher, principal, or other school leader, and that proposed § 200.17(b)(4) calls upon states and LEAs to implement appropriate strategies to protect the privacy of individual students whose privacy might be compromised by virtue of disaggregated subgroup information. NEA recommends that the regulations be amended to also call for the creation of strategies to protect the privacy of teachers and other education employees.

Annual Meaningful Differentiation in School Performance (§ 200.18)

ESSA contains a short provision requiring states to differentiate between schools at 1111(c)(4)(C) and a provision prohibiting ED from prescribing the methodology for school differentiation at 1111(e)(1)(B)(iii)(V). In conflict with ESSA's efforts to let states create their own systems for differentiation between schools, the regulations mandate a single summative rating from among at least three distinct rating categories for each school along with a system of three levels of school performance on each indicator [§ 200.18(b)]. Both of these requirements are inconsistent with ESSA, which leaves it to the states to determine how they differentiate between schools.

In the explanatory section of the regulations, ED suggests consideration of an A-F system of grading schools. An A-F system, as an example, suffers from several flaws:

- (1) It reduces transparency by directing parent attention toward a single school grade instead of toward the performance of students and schools on the multiple indicators called for by ESSA.
- (2) It can hide weaknesses on individual indicators when there is a mix of strong and weak performance on several indicators. ED admits as much in requiring that a school that is performing at the lowest level on an individual indicator should not receive the highest summative school rating [§ 200.18(d)(3)], but this is only one mathematical variation of how low performance on a single indicator could be hidden by a summative score.
- (3) It obscures within-grade differences (e.g., not all B schools are the same).
- (4) It suggests large differences in school quality between grades, when the differences at the bottom of one grade and the top of the next may be small.

(5) It can exacerbate the unfair labeling of school performance that can take place in the absence of measurements of student growth.

The required three levels of achievement on individual indicators in § 200.18(b)(2) is inconsistent with the ESSA requirement that states make their own determination on how to differentiate between schools. The required three levels is also inconsistent with ESSA's report card requirement, which calls for the reporting of actual performance on indicators, not gross categories of performance.

Instead of superimposing its vision of how states should differentiate between schools, ED should simply let states, in consultation with stakeholders, differentiate between schools in a way that allows them to identify the three functional categories of ESSA: schools needing comprehensive supports; schools with students needing targeted support; and other schools. In this regard, it is important to note that even if it is assumed (and we do not) that a summative mathematical ranking system has to be used to identify the lowest 5 percent of schools, ESSA does not require that such a ranking system, beyond identifying that 5 percent of schools, has to be used to create a statewide summative grading system of all schools such as an A-F system. This is apparent in the information ESSA felt it important for parents to have in its 1111(h) report card section— information on the schools identified for comprehensive support, the schools implementing targeted support, and the achievement of students and subgroups of students on the indicators in the accountability system.

Proposed §§ 200.18(d)(1) and (2) also contains restrictions on the use of the indicators of school quality or student success in categorizing schools . These restrictions go beyond the criteria for school quality indicators in ESSA and conflict with ESSA's prohibition on ED determining the methodology used for differentiating between schools.

Identification of Schools (§200.19)

The regulations on identification of schools and subgroups needing support conflict with ESSA in several ways.

Consistently underperforming subgroups

ESSA clearly leaves it to the state to determine the definition of a consistently underperforming subgroup [ESSA 1111(c)(4)(C)(iii)]. Unfortunately, the regulations describe “consistently” as “two years” [§ 200.19(c)(1)] and also contain a list of proposed definitions for consistently underperforming. The former conflicts with the letter of ESSA, the latter with the spirit. Both should be dropped from the regulations.

Low-performing subgroups

The statute itself does not use the phrase “low-performing subgroup” but the regulations use this terminology to describe “any school in which one or more subgroups of students is performing at or below the summative level of performance of all students in any school identified under paragraph (a)(1) of this section [the lowest 5% of schools].” As such, “low performing

subgroups” appears to refer to ESSA 1111(d)(2)(C) which calls for additional targeted supports, including an examination of resources, for schools where “any subgroup of students, on its own, would lead to identification under subsection (c)(4)(D)(i)(I)” i.e., the lowest 5 percent of schools.

The regulations lack fidelity to this statutory language in two ways. First, the regulations ignore the fact that 1111(d)(2)(C) refers to a plan developed under 1111(d)(2)(B) covering schools with consistently underperforming students. Hence, what ED calls low-performing subgroups are a special *subset* of consistently underperforming subgroups. As such, the regulations should be revised to note that they are a subgroup of a larger category—the consistently underperforming subgroup as defined by the state.

Second, the statutory language describing any subgroup of students that on its own would lead to identification under subsection 1111(c)(4)(D)(i)(I), i.e. the lowest 5 percent of schools, does not refer to the “summative level of performance of all students” in the lowest 5 percent of schools. There is no plausible reason to compare the performance of a low-performing subgroup to the summative scores of *all students* in the lowest 5 percent of schools. A reading of the statute aligned with its overall purpose is that Congress, for equity reasons, wanted to pay special attention to subgroups that were performing at the same level as that *specific subgroup* at the lowest 5 percent of schools, and the regulations should be amended to reflect that.

Chronically underperforming subgroups

Section 200.19(a)(3) states that schools with chronically underperforming subgroups must be identified for comprehensive supports after their low-performing subgroups fail to improve for *three years*, which is in direct conflict with the statute’s requirement that they be identified for such supports after “*a state-determined number of years*” under ESSA 1111(d)(3)(A)(i)(II).⁵ The regulations should be modified to reflect that the state determines the number of years it will take before a school with chronically underperforming subgroups must receive comprehensive supports, though the state must publish a list of the schools that have met that limit every three years.

Low high-school graduation rate

According to the statute, states have the option of utilizing an extended-year graduation rate calculation, which the proposed regulations acknowledge. However, the regulations restrict this option as the introductory text explains: “the four-year adjusted cohort graduation rate is the only measure within the Graduation Rate indicator required for all schools.” The inclusion of extended-year graduation rates incentivizes activities that not only recapture high school dropouts, but also supports and recognizes efforts to graduate students who may face challenges

⁵ ESSA 1111(c)(4)(D)(i)(III) requires identification for comprehensive support the schools “described under subsection (d)(3)(A)(i)(II).” Subsection 1111(d)(3)(A)(i)(II) requires states to establish exit criteria for schools described in paragraph 2(C), which, if not satisfied within a *state-determined number of years*, shall result in identification by the state for comprehensive support and improvement under 1111(c)(4)(D)(i)(III). 2(C) refers to schools that have been identified for targeted support and a look at equity issues where “any subgroup of students, on its own, would lead to identification under subsection (c)(4)(D)(i)(I)” i.e. the lowest five percent of schools.

because they have severe cognitive disabilities, recently immigrated, or are foster and/or homeless youth. The regulation should be made consistent with the statute.

Timeline for implementation

ESSA's language on the implementation of comprehensive supports includes a call for new assessment systems [ESSA 1111(b)] to come into place as quickly as possible, and for statewide accountability systems [ESSA 1111(c)] and comprehensive supports [ESSA 1111(d)] to begin in SY 2017-2018 [ESSA Section 5]. ESSA 1111(c)((4)(D) also calls for identification of schools in SY 2017-2018. ESSA also gives ED the power to issue regulations facilitating the transition to ESSA.

The regulations require identification at the beginning of SY 2017-2018 based on 2016-2017 data, but many states will not be ready with new data on new indicators by the beginning of the 2017-2018 school year. This will mean that decisions about new interventions may end up being based on old NCLB-like data systems, and comprehensive supports will have to be put hastily in place. As a result, at least one state has said that school identification should take place at the end of SY 2017-2018.

NEA urges ED to put in place a flexible system that ensures that states meaningfully consult with stakeholders in developing new accountability systems, and that districts and schools meaningfully consult with stakeholders in developing new school supports. This flexible system should allow states, districts, and schools the time to develop credible and effective accountability systems, while avoiding unnecessary delay. This flexible system should not require universal identification of schools and instant solutions at the beginning of SY 2017, but should provide options depending on state readiness. The flexible system should allow states to move beyond NCLB and NCLB waiver interventions toward the ESSA school support system in SY 2017-2018 if prepared to do so.

Comprehensive Support and Improvement (§ 200.21)

As required by ESSA, the regulations mandate that a comprehensive support and improvement plan be developed in partnership with stakeholders (including, at a minimum, principals and other school leaders, teachers, and parents). We applaud the fact that the rules require LEAs to describe how early stakeholder input was solicited and taken into account in developing the plan, including the changes made as a result of such input and how stakeholders will participate in an ongoing manner in the plan's implementation. However, we believe that the concept of "partnership" goes beyond soliciting input and should involve an on-going formal dialogue that includes representatives of the described groups and others. We urge ED to make it clear through the regulations that a partnership is a formal relationship that includes representatives of school leaders, educators (teachers, paraeducators, specialized instructional support personnel, and/or librarians), parents, and other important stakeholders. The regulations should require that this partnership aim to seek a consensus and that the LEA offer an explanation if no consensus is reached.

ESSA very specifically describes the actions an LEA must take in developing a comprehensive support and improvement plan [ESSA 1111(d)(2)(B)], but the regulations, unfortunately, add several requirements in § 200.21 that intrude on LEA flexibility and, thus, conflict with the statute. These include:

- 1) Listing examples of draconian interventions with questionable results, such as closing schools, converting to a charter, changing school governance, and replacing school leadership, that districts should consider when a school is identified. We note again that the SIG program, which ED championed, had ambiguous results and was discontinued by Congress in ESSA. ED should not use the ESSA regulations to try to revive its top-down models of school reform. The regulations should simply leave it to the districts to develop appropriate interventions with stakeholders.
- 2) Adding to ESSA's evidence requirements by calling for an overlapping sample population, and the use of the strongest evidence when ESSA clearly envisions using strong, moderate, and promising evidence. [ESSA 8101(21)] The references to strongest evidence and overlapping populations should be deleted in deference to ESSA's restrictions on changing definitions [ESSA 1111(e)(2)].
- 3) Implying that interventions should be guided by state lists of possible interventions. ED should not try to limit flexibility given to districts and stakeholders in the statute.
- 4) Defining two specific elements as mandatory subjects of the review of resource inequity: (1) teacher distribution and (2) per-pupil expenditures [§ 200.21(d)(4)].⁶ When it comes to other indicators of inequity—namely the availability of advanced coursework, preschool programs, and instructional materials and technology—the proposed rule leaves their inclusion to the LEA's "discretion." NEA recommends that because the LEA is in the best position to assess what resource indicators are most representative, §§ 200.21(d)(4)(i) and (ii) on teacher distribution and per-pupil expenditure be combined under the heading "at the LEA's discretion."

ED also exceeds its authority in the area of exit criteria in the following ways:

- 1) ESSA calls on states to create exit criteria to "improve student academic achievement and school success," but does not specify how continued progress in academic achievement and school success will be measured [ESSA 1111(d)(3)]. ESSA also prohibits ED from mandating specific exit criteria as part of a state plan [ESSA 1111(e)(1)(B)(iii)(VII)]. Yet the regulations go beyond ESSA and sets exit requirements in § 200.21(f).

⁶ The regulation's statutory citations for mandating these requirements are unrelated to ESSA's system for designing comprehensive supports. The citation in § 200.21(d)(4)(i)(A) for the equitable distribution requirement are to ESSA 1111(g)(1)(B) and 1112(b)(2), which require states and LEAs to include equitable distribution in their formal overall state and LEA plans, not in LEA decisions about comprehensive school supports. Similarly the regulations at § 200.21(d)(4)(i)(B) reference an ESSA report card requirement for per-pupil expenditures [1111(h)(1)(C)(x)], also unrelated in terms of process to ESSA's comprehensive supports sections.

- 2) Establishing evidence-based criteria for state-determined interventions that conflict with the statute. The statute allows for strong, moderate, and promising evidence for school interventions, and ED eliminates promising evidence.

ED requires in § 200.21(h) that public school choice must be to a school that is not identified for comprehensive supports. It is important to note that this specific requirement was in NCLB 1116(b)(1)(E), but does not appear in ESSA 1111(d)(1)(D).

Targeted Support and Improvement (§ 200.22)

For the reasons outlined in the above discussion of comprehensive supports, the following changes should be made to align § 200.22 on targeted supports with ESSA: (1) requiring a true partnership in plan development and implementation; (2) removing additional requirements related to “evidence-based” such as “strongest evidence” and “overlapping sample”; (3) removing mandatory provisions that prescribe the areas that should be looked at in a review of school-level resources [§ 200.22(c)(7)]; and (4) removing provisions prescribing elements of exit criteria.

With regard to the special rule for low-performing schools, ED should ensure that this section is aligned with ESSA which requires that such schools are identified for comprehensive supports after a state-determined number of years, not three years [see discussion of § 200.19(a)(3) above].

State Responsibilities to Support Continued Improvement (§ 200.23)

ESSA 1111(d)(3) calls for continued state support for LEAs with a significant number of schools that have been identified for comprehensive supports and that are not meeting state exit criteria, and a significant number of schools implementing targeted support and improvement plans. ESSA further provides that the states *shall* periodically review resource allocations to support school improvement in those LEAs and provide technical assistance to those LEAs. It then provides that the state *may* take action to initiate additional improvement and establish alternative strategies that can be used by LEAs to assist schools.

The rules in § 200.23(a) expand on this requirement in conflict with the statute. Instead of requiring that states review resources and provide technical assistance, the regulations require states to both review and address teacher distribution issues. This is done by narrowly defining the “resources” states must address by incorporating the flawed requirements of § 200.21(d)(4) and § 200.22(c)(7) [discussed above in our comments on § 200.21(d)(4)]. The regulations should not define “resources.”

With regard to the ESSA language that states *may* take additional action in the above LEAs, the regulations unexpectedly use this provision to propose draconian solutions at both comprehensive and targeted support schools, such as replacing school leadership, converting to a charter school, and closing a school. While we do not think it is consistent with ESSA for ED to suggest specific school interventions, it is particularly unwise to do so in the case of schools receiving targeted supports. In doing so, ED has gone full circle by proposing a return to a

central flaw of NCLB: federally mandated, specific, draconian solutions in schools in LEAs where targeted subgroups miss goals for two years [§ 200.23(c)(1)].

It is our hope that § 200.23(c)(4), which offers a more measured approach to targeted support schools, is the governing language in this paragraph for targeted support schools. If so, we urge the department to make that clear by dropping references to targeted support schools elsewhere in § 200.23(c).

Resources to Support Continued Improvement (§ 200.24)

The regulations on the use of school improvement funds under ESSA § 1003 also include requirements that take away flexibility granted by ESSA to the state. For example, ESSA says that in awarding school improvement funds states should give priority to LEAs that: (1) have a high number of comprehensive and targeted support schools; (2) “demonstrate the greatest need for such funds, as determined by the State,” and (3) demonstrate the strongest commitment to using funds to help low-performing schools improve student achievement and student outcomes [ESSA § 1003(f)].

Though ESSA makes it clear that states determine which schools have the greatest need, the regulations conflict by requiring that the states base this decision in significant part on the distribution of teachers [§ 200.24(c)(4)(ii)(B), which cites § 200.23(a) which in turn cites flawed §§ 200.21(d)(4) and 200.22(c)(7) on teacher distribution].⁷

The regulations also inappropriately attempt to define what “demonstrate the strongest commitment” means. For example, the regulations define strongest commitment as “the strongest level of evidence available” [§ 200.24(c)(4)(iii)(A)] when the statute clearly allows strong, moderate, and promising evidence [ESSA 8101(21)].

ED also proposes that grants cannot be renewed each year unless progress is being made [§ 200.24(d)(1)(iv)(A)]. Given the difficulty facing schools that are in the lowest 5 percent of schools, as well as the known technical weaknesses in measures of student success, we question whether this requirement is practical. We urge ED to study the potential impact of this requirement using data from its SIG studies.

Annual State Report Card (§ 200.30)

Under § 200.30(f)(2), a state is “not required to report disaggregated data for information required on report cards under section 1111(h) of the Act if the number of students in the subgroup is insufficient to yield statistically sound and reliable information or the results would reveal personally identifiable information about an individual student, consistent with § 200.17.” NEA supports this proposal to protect the privacy of personally identifiable student data, as well as its reiteration in § 200.31(f), with regard to LEA report cards.

⁷ The issue here is not whether distribution of teachers is an important issue, states could look at this issue in determining greatest need, the problem is ED is defining what resources means when this was left to states.

Calculations for Reporting Student Achievement and Progress Toward Goals (§ 200.33)

The regulations require that when states report the percentage of students who are proficient, they must, in case of significant opt-outs, count students who have not taken the test as effectively having failed [§ 200.33(b)(2)]. While this may be allowed by ESSA's language on denominators [1111(c)(4)(E)(ii)], ED should require states in those cases to prominently notify parents that the percentage of students reported by states as passing is not calculated based on the actual number of students who took the test, and that nonparticipants are counted as having failed. ED should require this notification to ensure the transparency sought by ESSA.

Per-Pupil Expenditures [§ 200.35]

Section 200.35(a)(i)(B)(2) and § 200.35(b)(i)(B)(2) impose requirements that go beyond the statute for state report cards [ESSA 1111(h)(1)(C)(x)] and LEA report cards [ESSA 1111(h)(2)(C)] in specifically prohibiting state and LEA reporting of "funds received from private sources."

This is contrary to the purposes and spirit of transparency and thoroughness in data reporting reflected in the statute, aimed at making publicly available information that needs to be factored into assessments of performance and effectiveness in bringing about positive student outcomes and resource allocation decisions. Some charter school chain operators have been reported to spend 25-30 percent more per pupil, due to private philanthropic contributions, than nearby neighborhood traditional schools. Some traditional schools receive substantial private cash or in-kind services which, likewise, provide them with resources that are not available to others.

We believe it would be consistent with the intent and spirit of the statute to require state and LEA report card inclusion of private sources of funding as a separate item.

At minimum, the language precluding the reporting of funds received from private sources should be stricken, so as to leave such decisions to states and LEAs.

Educator Qualifications (§ 200.37)

The proposed regulations require uniform statewide definitions for certain terms. For the terms "high-poverty" and "low-poverty" schools, the regulation goes on to mandate their meaning, defining them as schools in the top and bottom quartiles for poverty in the state. This definition is arbitrary and should be left to the states.

The regulation requires that states "adopt" a definition of "inexperienced" teachers and teachers "not teaching in the subject or field for which the teacher is certified or qualified" [§ 200.37(b)(2)]. However, many state statutes already contain definitions of these or similar terms. A state should be permitted to utilize existing definitions rather than adopting through the legislative process entirely new definitions. NEA recommends that "adopt" be followed by "or select from existing state law" in § 200.37(b)(2).

Overview of State Plan Requirements (§ 299.13) Consultation and Coordination (§ 299.15)

NEA applauds ED's provisions on stakeholder consultation in the development of state plans, including the emphasis on timely consultation and an explanation of how input was taken into account in § 299.13(b), and the emphasis on including a wide range of stakeholders and their representatives in § 299.15(a). For consultation to be truly meaningful, § 299.13(b) should be strengthened by encouraging the formation of committees or other opportunities where the state and stakeholders can engage in two-way dialogue, answer questions, and seek consensus.

In addition, the concepts in § 299.13 should also be applied to other areas where consultation is required in the statute, including the development of LEA plans and schoolwide program plans.

The regulations should also emphasize the assurance required in the statute that the Committee of Practitioners has been involved in the development of the state plan [ESSA 1111(g)(2)(L)], as well as the other assurances required by 1111(g).

Proposed § 299.13(c)(ii) addresses transportation to school of origin for foster youth. ESSA ensures educational stability for youth in foster care by requiring LEAs and child welfare agencies to collaborate on the policies and practices that impact foster youth, specifically transportation procedures. The proposed rule is inconsistent with ESSA's statutory language insofar as it assigns responsibility of transportation and its related costs entirely to the LEA. NEA recommends that regulations be written in accordance with the joint guidance issued by ED and the Department of Health and Human Services.

Accountability, Support, and Improvement for Schools (§ 299.17)

NEA recommends that § 299.17 be amended to conform with ESSA as described in our discussion of the accountability sections of state plans, e.g., remove the requirement of a summative score.

Educator Equity (§ 299.18)

The regulation requires state plans to include definitions of "ineffective" teachers [§ 299.18(c)(2)(i)]. However, in many instances, LEAs have successfully negotiated over the terms for teacher evaluation systems and incorporated them into collective bargaining agreements.

Similarly, a number of states already have in existence tenure and dismissal statutes that define ineffective performance.

ED cannot, via this interpretation of ESSA, override state laws—as to bargaining, tenure, or teacher performance—already in place. Moreover, the secretary is specifically barred from promulgating regulations that intrude on teacher evaluation [ESSA 1111(e)(1)(B)(iii)(IX)].

NEA, therefore, recommends this regulation include a savings clause for collective bargaining agreements and state laws that already define these terms and that states be allowed to use district-level definitions of ineffective teachers to implement this section.

This regulation also requires that information on the placement of “ineffective,” “out-of-field,” and “inexperienced” teachers be accessible to the general public [§ 299.18(c)(2)(v)]. This requirement must not impinge on the individual privacy rights of teachers.

NEA recommends that the regulation state that publication of data must be consistent with state and federal privacy laws and principles, as well as employer or other policies regarding the confidentiality of personnel information. In short, the regulation should not permit publication of any data that could risk revealing the personal identifiable information of individual teachers.

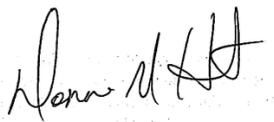
Conclusion

NEA submits the above comments for consideration with the hope that the final rule will be consistent with ESSA and promote learning, opportunity, and equity.

In short, the proposed regulations miss the mark and would strip away from states and local school districts the ability to move toward a more balanced approach that supports collaboratively developed, innovative solutions at the local and state levels to support student learning. NEA urges the U.S. Department of Education to listen to educators who are working with parents and community leaders to design and implement better solutions for the public schools our students deserve, regardless of zip code.

Please do not hesitate to contact Matthew Finucane at mfinucane@nea.org should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna M. Harris-Aikens". The signature is fluid and cursive, with the first name being the most prominent.

Donna M. Harris-Aikens
Director, Education Policy and Practice