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MEMORANDUM

TO: **Interested Parties**
FROM: **Penn Hill Group**
DATE: **May 31, 2016**
SUBJECT: **Notice of Proposed Rulemaking on ESSA Accountability and State Plans**

Overview

On May 26, the U.S. Department of Education (ED) released proposed regulations on accountability and State plans under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA). This Notice of Proposed Rulemaking (NPRM) is published in today's Federal Register and can be accessed [here](#). Public comments on the proposal are due on August 1.

The purpose of this memo is to describe the major provisions included in the proposal. In each specific topic area, we first summarize the statutory requirements and then describe the significant clarifications and augmentations made in the proposed regulation.

Note that proposed regulations published in the Federal Register today are separate from the regulations on assessments and "supplement, not supplant" on which ED conducted negotiated rulemaking this spring. We expect ED to release those regulations as early as the coming month. We understand that ED is also developing regulations for the Innovative Assessment and Accountability Demonstration Authority under the new Act, which could be issued later this summer.

Our issue-by-issue of the analysis of the proposed regulations follows.

I. State Accountability Systems: Goals, Performance Measures, and Annual Indicators

Long-Term Goals and Interim Measures of Progress

Summary of the Statutory Language: Under ESEA, as amended by ESSA, each State must establish ambitious long-term goals (and interim measures of progress aligned with those goals) for all students and all student subgroups in, at a minimum, the following areas: (1) academic achievement based on proficiency on annual assessments and (2) high school graduation rate. The timeline set for achieving these goals must be the same for all students and all subgroups, and the goals and measures must take into account the improvement necessary for lower-performing subgroups to make significant progress in closing Statewide proficiency and graduation-rate gaps. In addition, the State must develop, for English learners (ELs), goals and interim measures for progress in achieving English language proficiency (ELP).

The proposed regulations would:

- Clarify that student proficiency goals and measures must be based on *grade-level proficiency*, and that a State must use the same definition of grade-level proficiency for all students;
- Specify that “taking account” of the improvement needed for lower-performing students to make significant progress means setting interim measures that require greater rates of improvement for those subgroups; and,
- Provide that ELP goals and measures must set expectations for both annual progress in achieving ELP and for attainment of ELP within a period of time after a student’s identification as an EL. Further, a State would have to set this period of time using a uniform procedure that is based on the student’s ELP level at the time of identification and may take into consideration other characteristics (such as time in instruction, grade level, age, native language proficiency level).

Question posed in the NPRM: ED specifically asks for input on whether the regulations should include a maximum State-determined timeline for ELs’ attainment of ELP and, if so, what that timeline should be and what research or data support such a timeline.

Accountability Indicators

Summary of the Statutory Language: The statute requires each State to establish and measure annual indicators, for all students and separately for each subgroup,¹ in: (1) academic proficiency in reading/language arts and math, based on State assessments, as well as, at State discretion, student academic growth for high school students in those subjects as measured through those assessments; (2) for elementary and secondary schools, student growth or another valid and reliable indicator that allows for meaningful differentiation in student performance; (3) for high schools, the graduation rate, based on the four-year adjusted cohort rate and, at State option, an extended-year adjusted cohort rate; (4) for ELs, progress in achieving ELP, based on the State’s ELP assessment, within a State-determined timeline; and (5) at least one indicator of “school quality or student success” that allows for meaningful differentiation of school performance and is valid, reliable, comparable, and Statewide (except that such an indicator may vary by grade span).

The proposed regulations would:

- Reiterate the statutory requirement that the accountability indicators, with the exception of the ELP indicator, measure performance for all students and separately for each subgroup (in other words, reiterate that “super-subgroups” may not be used);

¹ The requirement for the measurement of indicators separately for each subgroup does not apply to the ELP indicator, which will measure the performance only of ELs.

- Require that the academic proficiency indicator equally weight reading/language arts and math;
- Require that the ELP indicator, in addition to meeting the requirements described in the previous section, use objective and reliable measures of progress, such as student growth percentiles;
- Clarify that any school quality or student success indicators must be different from the other indicators a State uses;
- Require that school quality and student success indicators be supported by research that progress on the indicator is likely to increase student achievement or the high school graduation rate; and,
- Require that all academic proficiency indicators and school quality/student success indicators aid in the meaningful differentiation of schools.

Clarification: The NPRM also clarifies that States may add indicators over time, or make replacements, if some of the indicators they would like to include are not ready for use in 2017-2018 (such as if the data are not yet available).

Participation in Assessments and the Annual Measure of Achievement

Summary of the Statutory Language: The statute requires that States annually measure the achievement of not less than 95 percent of all public-school students (and all students in each subgroup). A State must calculate the student achievement indicator included as part of its accountability system by including, in the denominator for that calculation, 95 percent of students or the actual number of students taking the assessment, whichever is greater. States must also factor the 95 percent requirement into their accountability systems – and must provide a clear and understandable explanation of how they do so – but the statute does not specifically prescribe how this is to be done.

The proposed regulations would:

- Require a State to factor the 95 percent requirement into its system for differentiating school performance in such a manner that a school’s failure to assess 95 percent of students (as a whole or in any subgroup) results in:
 - The school receiving a lower summative performance rating (see below);
 - The school receiving the lowest performance level on the accountability system’s academic achievement indicator;
 - The school’s identification for targeted support and improvement; or

- Another, equally rigorous State-determined action that will result in a similar action for the school and will improve the school’s participation rate.
- Require that a school not meeting the 95 percent requirement implement an improvement plan that is developed with stakeholders, includes one or more strategies for improving the participation rate, and is approved and monitored by local educational agency (LEA).

Question posed in the NPRM: ED requests comment on whether it should include additional or different options to support States in addressing low assessment participation rates.

Student Subgroups

Summary of the Statutory Language: The reauthorized ESEA requires that States’ accountability systems separately track and hold schools accountable for the performance of economically disadvantaged students, students from major racial and ethnic groups, children with disabilities, and ELs.

Specifically with respect to ELs, the statute permits States to include, for up to four years, the results for students who have exited EL status when calculating the EL subgroup’s achievement in reading/language arts and math. The new law also gives States two options for the treatment of recently arrived ELs who have been in US schools for less than 12 months.

The proposed regulations would:

- Provide that the law’s reference to “students from major racial and ethnic groups” means students from *each of* those groups. That is, students from lower-performing racial and ethnic groups could not be combined into a single racial and ethnic “super-subgroup”;
- Permit a State to include, for up to four years, the results of former ELs within the EL subgroup only if it does so for all those students within the State and for the same period of time. If a state exercises this authority, it must include those students in the determination of whether a school’s population of EL students meets the State’s “n-size” (see below);
- Include in the ELP indicator, for EL students who have disabilities that preclude them being assessed under one or more of the domains of the State’s ELP assessments, those students’ results for the domains in which they can be assessed; and
- Permit a State either to adopt one of the two options for inclusion of recently arrived ELs in their accountability systems, and implement that option Statewide, or, alternatively, to develop procedures that take into account student characteristics in determining which option to use for a particular student and then implement those procedures Statewide.

Question posed in the NPRM: ED requests public comment on whether States should also be able to include, for a limited period of time, the scores of students who were formerly identified as having disabilities (but are no longer receiving special education services) as part of the students with disabilities subgroup.

Disaggregation of Data

Summary of the Statutory Language: The statute requires each State to determine, in consultation with stakeholders, the minimum number of students (the “n-size”) that it will use for accountability and reporting of the results for all students or a subgroup. The n-size must be statistically sound, the same for “all students” and all subgroups, and ensure the non-disclosure of personally identifiable information.

The proposed regulations would:

- Require that, for purpose of accountability, a State’s n-size may not be more than 30, unless the State submits a justification and is approved by ED to use a higher number. Such a justification would have to include data on the number of schools that would not be held accountable for results (for each subgroup) if the higher n-size was used, along with an explanation of how the higher number would promote sound, reliable accountability determinations; and,
- Clarify that a State could use a lower n-size for reporting than it uses for accountability.

II. Annual Differentiation of School Performance

Summary of the Statutory Language: The amended statute requires that a State, on an annual basis, meaningfully differentiate the performance of its schools using the annual indicators. In making these differentiations, a State must give “substantial weight” to each of the academic performance, high school graduation rate, student growth (or other measure of elementary and middle school performance), and ELP indicators and give those indicators, in the aggregate, “much greater weight” than it accords the State’s school quality and student success indicator(s).

The proposed regulation would require that State accountability systems:

- Include at least three levels of performance for each indicator;
- Result in a school receiving a single summative rating, from among at least three distinct rating categories;
- Weight the indicators in a manner that ensures that schools’ performance on the school quality or student success indicator(s): (1) does not change the identity of schools identified for Comprehensive Support and Improvement (see below), unless such a

school is making significant progress for the “all students” group on at least one of the indicators that is given substantial weight; and (2) does not change the identify of schools identified for Targeted Support and Improvement (see below), unless each consistently underperforming subgroup at such a school is making significant progress on at least one of the indicators given substantial weight;

- Further weight the indicators in a manner that ensures that a school scoring at the lowest performance level on any of the substantially weighted indicators could not receive the same summative rating as a school scoring at the highest level on any of those indicators;
- Clarify that a State is not required to give the same weight to each of the substantially weighted indicators; and,
- Provide that, for a school that does not have enough EL students to meet the n-size requirements (and thus could not be held accountable on the ELP indicator), the weights for remaining indicators would be adjusted proportionately.

III. Identification of Schools

Schools in Need of Comprehensive Support and Improvement

Summary of the Statutory Language: The statute requires that a State, using its system for differentiating school performance, identify a public school as in need of comprehensive support and improvement if the school:

- Is among the lowest-performing 5 percent of Title I schools in the State;
- Fails to graduate more than one-third of its students; or,
- Is a Title I school that has a subgroup that is performing as poorly as the “all students” group in the lowest-performing 5 percent and that has failed to improve after the school’s implementation of a Targeted Support and Improvement plan.

The State is required to start this new identification process with the 2017-2018 school year and make new identifications at least once every three years.

The proposed regulations would:

- Permit States to average data over a period of up to three years to identify schools in the lowest-performing 5 percent and schools with low graduation rates;
- Require that States use the four-year adjusted cohort graduation rate in identifying schools that fail to attain at least a 67 percent graduation rate; and,

- Require that States place schools in the third category (chronically low-performing subgroups) if the performance of a subgroup does not significantly improve over a period no longer than three years.

Schools in Need of Targeted Support and Improvement

Summary of the Statutory Language: The statute requires a State to identify a school as in need of Targeted Support and Improvement if it has one or more subgroups that are consistently underperforming, as determined by the State, based on the annual indicators.

The proposed regulations would:

- Require that a State identify for Targeted Support and Improvement any school with at least one “consistently underperforming” subgroup. This identification would be made by considering a school’s performance for each of its subgroups using no more than two years of data. States would use a uniform Statewide definition that looks at least one of the following factors:
 - Whether a subgroup is on track to meet the States’ long-term goals,
 - Whether a subgroup is performing at the lowest performance level on one of the State’s annual indicators;
 - Whether a subgroup is at or below a State-determined threshold (compared to the performance of all students);
 - Whether a subgroup is performing significantly below the State average for all students (or significantly below the level of the State’s highest-performing subgroup); or
 - Another factor determined by the State;
- Require that a State also identify any school that has at least one subgroup that is performing at level below the summative performance level of “all students” in any of the State’s lowest-performing 5 percent of Title I schools; and,
- As noted earlier, permit a State to identify a school that has failed to attain a 95 percent participation rate for “all students” or for any subgroup.

Question posed in the NPRM: ED asks for input on whether the proposed options for identification of a consistently underperforming subgroup would result in meaningful identification and be helpful to States, whether any other options should be considered, and whether any of the proposed options should be deleted or modified.

Timeline for Identification



Summary of the Statutory Language: As noted earlier, the statute requires States to begin identifying schools in the 2017-2018 school year and to do so at least once every three years.

The proposed regulations would:

- Require States to begin identifying schools in 2017-2018 (i.e., using data available in 2016-2017), except that schools identified for Comprehensive Support and Improvement based on the performance of chronically low-performing subgroups would not need to be identified until 2018-2019; and,
- Require States to make their identifications prior to the start of the school year; for example, a State would need to identify its schools for the 2017-2018 school year prior to the start of that school year.

IV. School Support and Improvement

Comprehensive Support and Improvement Schools

Summary of the Statutory Language: The statute requires that for each school identified as in need of Comprehensive Support and Improvement, the local educational agency (LEA) must develop and implement a plan that is informed by the indicators in the State's accountability system, draws on a needs assessment, includes evidence-based interventions, identifies resource inequities, and is approved by the State Educational Agency (SEA). As part of its plan, an LEA may elect to provide students in those schools the opportunity to transfer to another school within the district.

The SEA must develop Statewide exit criteria for Comprehensive Support and Improvement schools; a school's failure to meet those criteria within a State-determined period of time (not to exceed four years) must result in additional, more rigorous, State-determined actions.

The proposed regulations would:

- Require an LEA promptly to notify parents of a school's identification as in need of Comprehensive Support and Improvement;
- Require that the interventions a school implements be supported, to the extent practicable, by the strongest level of evidence that is available (including by research conducted on a sample population or setting that overlaps with the population or setting of the school to be served);
- Clarify that the evidence-based interventions may be selected from a State-approved list of interventions;
- Clarify that a school's implementation of its plan may include a planning year; and,

- Provide some additional specificity regarding the more rigorous actions to be taken if a school does not meet the exit criteria, including that new interventions be supported by a strong or moderate level of evidence.

Targeted Support and Improvement Schools

Summary of the Statutory Language: The statute requires that each school identified for Targeted Support and Improvement develop and implement a plan that is informed by the indicators in the State’s accountability system for each low-performing subgroup, draws on a needs assessment, includes evidence-based interventions, and is approved by the LEA. If the school has one or more subgroups whose performance, on its own, would lead to the school’s identification for Comprehensive Support and Improvement (also known as “a school requiring additional targeted support”), the plan must also identify resource inequities.

The SEA must develop Statewide exit criteria for Targeted Support and Improvement schools requiring additional targeted support. Such a school’s failure to meet those criteria within a State-determined period of time must result in its identification for Comprehensive Support and Improvement.

The proposed regulations would:

- Include several of the same provisions as the proposals for Comprehensive Support and Improvement (e.g., notification to parents, language on evidence-based interventions, availability of a planning year);
- Regarding the statutory requirement that the plans of schools in need of additional targeted support include identification of resource inequities, require that this identification look at cross-school (and, as appropriate, within-school) differences in employment of ineffective, out-of-field, and inexperienced teachers and differences in per-pupil expenditures;
- Require LEAs to establish exit criteria for Targeted Support and Improvement schools (except those requiring additional targeted support), including that each school no longer meet the entrance criteria, have successfully implemented its improvement plan, and have improved student outcomes for each low-performing subgroup. If a school does not meet the exit criteria within an LEA-determined number of years, it would be required to revise its plan and implement additional actions that address the reasons for its failure to do so; and,
- With regard to schools in need of additional targeted support, require that the State’s exit criteria call for such a school to have improved student outcomes for each low-performing subgroup and to no longer meet the criteria for identification as a Targeted Support and Improvement school.

Resources to Support School Improvement

Summary of the Statutory Language: The statute authorizes the SEA to reserve 7 percent of the State's Title I allocation to serve schools identified for Comprehensive or Targeted Support and Improvement. At least 95 percent of these funds must flow through to LEAs, unless the SEA and an LEA agree to have improvement activities carried out by the State or an outside provider. The statute provides other requirements regarding local applications and the targeting of these funds.

The proposed regulations would:

- Provide that the set-aside funds may not be used to serve schools identified for Targeted Support because of their low assessment rates;
- Require that the SEA, in allocating funds, provide at least \$50,000 for each Targeted Support and Improvement school and at least \$500,000 for each Comprehensive Support and Improvement school, unless the SEA can conclude (based on a demonstration by the LEA in its application) that a smaller amount would suffice; and,
- Give priority to an LEA applying to serve a Comprehensive Support and Improvement school over an LEA applying to serve a Targeted Support and Improvement school.

V. Report Cards

State Report Card

Summary of the Statutory Language: The statute requires that each State issue a report card that includes a long list of data items specified in the statute (e.g., information on the State's accountability system; student outcomes disaggregated in a variety of ways; a listing of schools identified for improvement and support; data on teacher qualifications, on student discipline, on preschool participation, and on enrollment in advanced courses). Certain data must be provided at the LEA or school level. The report card must be concise, presented in an understandable and uniform format, and made widely accessible to the public.

The proposed regulations would:

- Require that the State report card:
 - Begin with a clearly labeled overview section, developed with parental input, that includes certain specified data elements;
 - Include, in addition to the information called for in the statute, data for each authorized public chartering agency in the State: (1) comparing the percentage of students in each subgroup in each charter school authorized by the agency with the comparable percentage in the LEA(s) from which the school draws a significant



portion of its students (or, at State option, with the percentage for the geographic community within the LEA is located); and (2) comparing, in the same manner, the academic achievement for each charter school with the achievement in the local LEA(s) or local community; and

- Be disseminated no later than December 31 of each year; and,
- Permit a State to request a one-year delay in the inclusion of specific data items if the State will be unable to include those data in the initial report card, which would go out by December 31, 2019.

Additional Information: The NPRM states that ED will pursue options to help ensure the transparency, accessibility, and utility of State report cards, which may include providing links to those report cards on ED's Web site.

Local Report Card

Summary of the Statutory Language: The law also requires that each LEA participating in Title I produce and disseminate a report card, containing information for the LEA as a whole and for each of its schools. The information requirements for the LEA report card are largely the same as those applying to the State.

The proposed regulations would:

- Require that the local report card (for the LEA as a whole and for each school) begin with a clearly labeled and prominently displayed overview section, be developed with parental input, include certain information and be distributed to parents on a single sheet of paper;
- Require that the LEA disseminate the information in the overview section directly to parents through such means as regular mail or email, and in a timely manner; and,
- Apply to the LEA report card the same deadlines as would be applicable to States (see above).

Data Included in Report Cards

Summary of the Statutory Language: The statute requires that the State and local report cards include, among other things:

- Information on student achievement (as determined through State assessments) for all students and disaggregated by subgroups and certain other populations, as well as disaggregated information on the extent to which students are progressing toward the State's long-term goals;



- Disaggregated high school graduation rates, using the four-year adjusted cohort rate and, at State discretion, an extended-year adjusted cohort rate;
- Per-pupil expenditures of Federal, State, and local funds, including actual personnel and non-personnel expenditures, broken out by source, for each LEA and school;
- Information on the professional qualifications of educators, including information on the number and percentage of inexperienced teachers, principals, and other school leaders; teachers teaching with emergency or provisional credentials; and teachers who are not teaching in the subject or field which they have been certified or licensed; and,
- Where available, for each high school, the cohort rate (in the aggregate and disaggregated by subgroup) at which students enroll, in the first academic year after graduation, in programs of public postsecondary education in the State and, if the data are available and to the extent practicable, in private postsecondary education programs in the State and in out-of-State postsecondary education programs.

The proposed regulations would:

- Require that the student achievement data and the data on student progress be presented in two different ways: (1) as the percentage of students demonstrating proficiency (or making progress) with the denominator either 95 percent of students or the number of students actually assessed; and (2) as the percentage of students demonstrating proficiency (or making progress), with the denominator the number of students with a valid test score;
- Limit the length of an extended-year adjusted cohort graduation rate to seven years;
- Require each State to develop a single, Statewide procedure for calculating and reporting LEA-level expenditures, and a separate Statewide procedure for calculating and reporting school-level expenditures, and to provide (on State and local report cards) a Web address or link to a description of those procedures;
- Require each State to adopt Statewide definitions of “inexperienced” and “not teaching in the subject or field for which the teacher is certified or licensed”; and,
- Require that if data on postsecondary enrollment are not available for inclusion in a report card, the SEA or LEA include its report card the school year in which such information is expected to be available.

VI. State Plans

Summary of the Statutory Language: The statute requires the SEA to submit a separate State plan for each of the ESEA State formula grant programs. The authorizing language for each program provides the procedures for plan development and submission (e.g., consultation requirements), and the information that must be included in each plan.



Alternatively, however, a State may submit a consolidated State plan in lieu of individual, program-specific plans. The law gives ED the authority to establish requirements for the consolidated State plans, but requires that the Secretary collaborate with SEAs, LEAs, and other stakeholders in establishing those requirements and provides that “The Secretary shall require only descriptions, information, assurances..., and other materials that are absolutely necessary for the consideration” of the plan.

The proposed regulations would, among other things:

- Require that SEAs engage in timely and meaningful consultation with stakeholders during the design and development of consolidated State plans or individual program plans, prior to the submission of those plans to ED, and prior to the submission or any revisions or amendments;
- Require the SEA to review all components of, and as necessary revise, a consolidated or individual State plan at least once every four years;
- Require that consolidated State plans have five components ((1) Consultation and Coordination; (2) Challenging Academic Standards and Aligned Assessments; (3) Accountability, Support, and Improvement for Schools; (4) Supporting Excellent Educators; and (5) Supporting All Students, and include a description of the State’s “system of performance management” for each component except for the component on consultation and coordination;
- Require that, as part of the component on supporting excellent educators, a consolidated plan describe how the SEA will improve the skills of teachers, principals, or other school leaders in identifying students with specific learning needs and providing instruction based on the needs of such children, including strategies for teachers of, and principals and other school leaders in schools with, low-income students, lowest-achieving students, ELs, and 10 other categories of children;²
- Require that, as another element of the component on supporting excellent educators, a consolidated plan describe the steps the SEA will take to meet the statutory requirement for ensuring that low-income and minority students in Title I schools are not taught at disproportionate rates by ineffective, out-of-field, inexperienced teachers. Toward that end, the SEA would be required to put in place Statewide definitions of “ineffective teacher,” “out-of-field teacher,” “inexperienced teacher,” “low-income student,” and “minority student” and to calculate rates at which students in the two groups (and non-low-income and non-minority students) are taught by teachers in the three categories;
- Require that the SEA annually publish these rates and any identified disproportionalities. If it determines that low-income or minority students in Title I schools are being taught at disproportionate rates by ineffective, out-of-field, or

² It appears that 13 separate descriptions would be required, although the language is not clear.

inexperienced teachers, the SEA would complete a “root cause analysis” that identifies the factors contributing to the disproportionality and would describe (in the plan) its strategies for eliminating the disproportionality. The proposed regulations would also authorize an SEA to direct an LEA contributing to the disproportionality to use a portion of its Title II funds to provide low-income and minority students greater access to effective teachers and principals;

- Require that, as an element of the component on supporting all students, the consolidated plan describe the State’s strategies (and the rationale for those strategies, timelines, and uses of funds) for supporting: (1) the continuum of a child’s education from preschool through grade 12; (2) equitable access to a well-rounded education and rigorous coursework; (3) school conditions for learning; and (4) the effective use of technology. These strategies, rationales, timelines, and funding sources would be required to consider the needs of 11 specified subgroups of students;
- Require that, as another part of the component on supporting all students, the SEA describe how it will use Title IV, Part A and B (Student Support and Academic Enrichment Grants; 21st Century Community Learning Centers) funds and other Federal funds to support the State’s strategy for supporting all students, and other State-level strategies;
- Require that, under either type of plan, the SEA describe the process it will use in determining whether to waive the 40 percent poverty threshold for Title I schoolwide programs; and
- Require that, under either type of plan, the SEA describe its standardized entrance and exit criteria for ELs. The exit criteria must include a proficient score on the State’s ELP assessment.

The NPRM also notes that ED intends to establish two deadlines for the submission of initial consolidated or individual State plans under the new Act: March 6 and July 5, 2017. SEAs would have the option of submitting their plans by either deadline.