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United States Department of Education
Room 3C106
400 Maryland Avenue SW
Washington, DC 20202-2800

*Public Comments of the Iowa Department of Education
Notice of Proposed Rulemaking, 81 Federal Register 34540 (May 31, 2016)
Docket ID ED-2016-OESE-0032*

Dear Ms. Miller:

Thank you for considering these comments from the Iowa Department of Education ("Iowa") on proposed regulations to implement the accountability and state plan provisions of the Every Student Succeeds Act ("ESSA"). While Iowa appreciates the opportunity to comment on these proposed regulations, which focus on meaningful accountability and evidence-based flexibility, we are concerned that portions of the proposed regulations lack the flexibility intended by the passage of ESSA. While there are many positive aspects of the proposed rules, there are several components that deeply concern state of Iowa leaders - particularly those that erode true flexibility, impose unfunded mandates on the state, and are contrary to congressional intent. In these comments, Iowa highlights the areas in which the proposed regulations published by the United States Department of Education ("Department") raise concerns regarding effective ESSA implementation.

- I. Iowa objects to proposed section 200.19(d)(2), which would require 2016-2017 data to be used to identify schools for comprehensive and targeted support and improvement*

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and which would require states to make those identifications by the beginning of each school year.

Proposed section 200.19(d)(2) creates two concerns. First, the requirement that states make determinations under section 1111(d) using data from 2016-2017 exceeds the scope of the Department's regulatory authority. Second, the requirement that determinations be made at the beginning of each school year is not contained in statute and impermissibly strays into state decision-making.

ESSA's section 1111, subsections (c) and (d), requires states to establish a statewide accountability system and use that system to annually identify schools for "comprehensive support and improvement." Both subsections (c) and (d) are effective on July 1, 2017 (ESSA, § 5(e)), with the first identifications for comprehensive support and improvement being made "beginning with school year 2017-2018." *Id.* § 1111(c)(4)(D)(i). The Department goes beyond the requirement in statute when it would require these determinations to be made at the start of the 2017-2018 school year based on 2016-2017 data.

By requiring states to use 2016-2017 data to make determinations under Section 1111(c), the Department errs in three ways. First, the data gathered during the 2016-2017 school year will address only the assessment data required by Section 1111(b)(2), which is the only portion of the statute effective during the 2016-2017 school year. Assessment data are only one portion of the data required by Section 1111(c)(4), which includes additional elements, such as graduation rate and additional measures of school quality and student growth. If states were required to make determinations under Section 1111(c)(4)(D) based on 2016-2017 data, those determinations will not be made with all of the data required by Section 1111(c)(4)(C). Second, the Department's proposed rule would require implementation of the system required by Section 1111(c)(4) in the 2016-2017 school year to ensure a complete set of data are used to make determinations for the 2017-2018 school year. If so, that would violate ESSA's express terms, which state that the effective date for Section 1111(c) is the 2017-2018 school year. Third, the Department's proposed rule would require determinations for the 2017-2018 school year to be made before necessary data are gathered. This would result in states being required to make a determination of which schools need "comprehensive and targeted support and improvement" without having the required data.

The Department must not interpret ESSA in a way that is irrational or unreasonable, contrary to statutory language, or in excess of statutory authority. *See, e.g., Michigan v. E.P.A.*, 135 S.Ct. 2699 (2015). ESSA requires "comprehensive and targeted support and improvement" determinations "beginning" with the 2017-2018 school year, not "during" the 2017-2018 school year. A sensible reading of "beginning" would require

determinations for the 2017-2018 school year once that year's complete data are available. Iowa requests that the final regulations be amended accordingly to remove references to using 2016-2017 data to make Section 1111(c)(4) determinations.

Regarding the proposed requirement that determinations be made at the beginning of each school year, Iowa believes the requirement is that these determinations be made annually, not at the beginning of each year. The Department confuses and conflates "beginning with" with "at the beginning of." The Department's proposed rule does not account for the complexity of gathering data, which may not be complete and validated at the beginning of each school year, as well as the complex process for planning state support to those schools. Iowa requests that the Department remove any reference to determinations being made by the beginning of each school year.

- II. *Iowa objects to proposed section 200.19(a)(2), which would require identification of schools for comprehensive and targeted support and improvement based on low graduation rate to be determined on an adjusted cohort rate only.*

ESSA requires states to identify schools for "comprehensive support and improvement" that fail "to graduate one-third or more of their students." ESSA, § 1111(c)(4)(D)(i)(II). That clause does not define how graduation rate is calculated or which rate is used. ESSA defines a four-year adjusted cohort rate for graduation, *see id.* § 8101(25), and requires its use in the determination process, *see id.* § 1111(c)(4)(B)(iii)(I). Notably, ESSA also defines an extended-year adjusted cohort rate, *see id.* § 8101(23), and gives states the option to use it when making determinations, *see id.* § 1111(c)(4)(B)(iii)(II). These provisions must be read together. *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). No single provision may be read in isolation.

If determinations are mandatory for schools with low graduation rates, and if the statute does not specify the particular method by which those rates are calculated, and if the states have discretion to use an extended cohort rate, it would be contrary to ESSA, when it is read as a whole, to restrict the means by which these high schools are identified. By ESSA's plain language, either method of identifying schools with low graduation rates is acceptable. The Department cannot take away by regulation the discretion that states have by statute. *Michigan*, 135 S.Ct. at 2708 (forbidding "interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not").

Moreover, the proposed regulation is unwise public policy. The permissible use of an extended cohort rate is congressional recognition that states may determine that some high schools may be more accurately measured based on an extended cohort rate. Some high schools do extraordinary work in accelerating student learning and closing

credit gaps and achievement gaps beyond four years. A high school that meets the optional extended cohort rate, but not the four-year cohort rate is, by the plain language of ESSA, not the type of high school that Congress would have states identify for comprehensive support and improvement, absent other reasons to do so.

For these reasons, Iowa requests that proposed section 200.19(a)(2) be amended to require identification of high schools for comprehensive support and improvement that failed to graduate one-third or more of their students, when measured both by the four-year adjusted cohort rate and the optional extended adjusted cohort rate.

III. Iowa objects to proposed regulations on the consolidated state plan, which does not meet the promise and intent of ESSA and adds additional and burdensome requirements.

The proposed regulations on the consolidated state plan, sections 299.13 through 299.19, add requirements beyond ESSA's text that Iowa believes exceeds the statutory requirement to gather only information that is "absolutely necessary" to implement ESSA. 20 U.S.C. § 7842(b)(3). Iowa offers the following illustrative examples.

First, the proposed requirement for a "performance management" system (Proposed section 299.14(c)) creates a requirement that ESSA does not contain and seems contrary to ESSA's clear restrictions on Department rulemaking. ESSA, § 1111(e)(1). Nowhere in ESSA does the phrase "performance management" appear. Second, assuming such a system is a valid requirement, to separately state two hundred and forty different descriptors as proposed regulations seems to again exceed the authority granted in ESSA. Iowa asserts that a global performance management system that is agile enough to account for all of the purportedly required elements would suffice, assuming one is required at all.

Second, the proposed regulations on equitable access to effective educators (Proposed section 299.18(c)) appear to add requirements that conflict with the annual report card requirements on this topic (Proposed section 200.37) and are not supported by ESSA. Specifically, the requirement to engage in a "root cause analysis" regarding disproportionality in access to effective teachers by low-income and minority children is beyond ESSA's statute, which requires each plan to include "measures the State will use to evaluate and publicly report" its progress on reducing disproportionality. ESSA, § 1111(g)(1)(B). A root cause analysis is a specific tool with a specific methodology. Requiring states to use a specific methodology to identify and address disproportionate access to effective educators is contrary to including only what is "absolutely necessary" in the state plan.

Third, proposed section 299.16(b)(3) would purport to require each state to describe how it is providing access to advanced mathematics coursework in middle school. Nowhere in ESSA is this required. The Department has taken an option to states available from the ESSA section on accountability and converted it into a state-level mandate. Iowa believes this policy judgment should be left to the states or Congress to make and that Congress did, in fact, opine on the matter. Far from gathering “absolutely necessary” information about ESSA, this violates ESSA’s prohibition on the Department inappropriately expanding its authority and ESSA’s requirements through the rulemaking process. ESSA, § 1111(e)(1).

Iowa respectfully requests that the Department withdraw proposed sections 299.13 through 299.19 from this rulemaking and commence a supplemental rulemaking on the consolidated state plan that complies with ESSA’s plain language.

IV. Iowa objects to the minimum grant size in proposed section 200.24.

Proposed section 200.24(c)(2)(ii), which would set a minimum grant award of “\$500,000 per year for each school identified for comprehensive support and improvement to be served and a minimum award of \$50,000 per year for each school identified for targeted support and improvement to be served” unless the district demonstrates otherwise, is a requirement that the statute does not contain. ESSA provides that each state is responsible for determining that allocations “are of sufficient size to enable the local educational agency (LEA) to effectively implement selected strategies,” 20 U.S.C. § 6303(b)(2)(A)(ii), not the Department. The Department’s attempt to specify minimum grant sizes inappropriately encroaches into areas of local governance and reduces the flexibility for states and their local school districts to develop an accountability system that works in the state’s context. ESSA’s clear intent was to move away from this sort of micromanagement from Washington, DC.

Furthermore, proposed section 200.24(c)(2)(ii) is poor public policy, as it would eliminate the ability of states to be meaningful and efficient in awarding grants under this proposed rule. It does not account for each state’s differing economic circumstances, including the different buying power of a dollar between and within states. It would encourage districts to artificially inflate grant applications to reach these arbitrary thresholds. It would disadvantage rural and low enrollment schools. This proposed “one-size-fits-all” requirement belies common sense discretion for the states.

Iowa requests that the minimum award sizes in proposed section 200.24(c)(2)(ii) be stricken.

- V. *ESSA regulations should not retain the current allowance for children who are no longer eligible for special education to be included in the "children with disabilities" subgroup.*

The Notice of Proposed Rulemaking contained a request for comment on particular issues. Iowa offers the following comment in response to one of those issues.

Iowa asserts that the current allowance for children who are no longer eligible for special education to remain in the "children with disabilities" subgroup, for accountability purposes only, cannot be maintained. This is because ESSA makes no provision for it, as it does for children who were previously identified as an English language learner. Regardless of the soundness of the current allowance, which is questionable, ESSA does not include it and the Department cannot exceed its authority through this action in rulemaking. *See, e.g., 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951)*

- VI. *Iowa objects to the requirement in Section 200.35 related to reporting of per pupil expenditures of Federal, State, and local funds for each LEA and for each school served by the LEA.*

ESSA contains a provision that states the federal government cannot mandate equalization of per-pupil funding at the state, district, or school level. Section 200.35 oversteps the authority granted the US Department of Education in ESSA. Iowa is no different than many other states in that financial information is collected at the LEA level, not at the school level. Because the responsibility for financial management lies at the LEA level, attempting to separate funding costs to differentiate between schools is unrealistic and runs contrary to the way LEAs manage funds. Since roughly 80 percent of expenditures of an LEA are staff, any attempt to equalize per pupil costs between buildings could require transfer of staff between buildings, something federal law cannot mandate and that is prohibited by either state law or local collective bargaining agreements.

Iowa believes the supplement, not supplant provisions in ESSA can be supported and documented without this additional regulation. Iowa requests that section 200.35 be stricken in its entirety.

VII. *Several of the proposed regulations raise constitutional concerns.*

Additionally, Iowa requests the Department closely scrutinize any portion of the proposed rulemaking that adds a requirement not expressly contained in the statute. Since ESSA is grounded in the Spending Clause (*see, e.g., ESSA § 1111(a)*), the rules are evaluated under Spending Clause jurisprudence. A statute passed under the Spending Clause (United States Constitution, article I, section 8) must provide "clear notice" to the states, and states are not bound by requirements of which they have no clear notice. *See, e.g., Arlington C. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006). Iowa asserts that, when reading the text of ESSA and deciding whether to accept federal financial assistance, it would have no "clear notice" of several items that these proposed rules would purport to demand. This includes the items referred to in these comments. Imposing such requirements without "clear notice" would be a coercive act contrary to Spending Clause jurisprudence.

VIII. *Conclusion*

Thank you in advance for your consideration of these comments to align the regulations with statutory language and true flexibility for the states. Feel free to contact me if you have any questions about these comments.

Sincerely,



Ryan M. Wise, Ed.L.D.
Director

cc: Jeff Berger, Deputy Director
David Tilly, Deputy Director