Docket ID ED-2016-OESE-0032

August 1, 2016

<u>Citizens for Effective Schools Comments on DOE's Proposed ESSA Regulations on "Accountability and State Plans"</u>

Introduction

In ESSA, Congress dramatically shifted legal authority for making many decisions on accountability policy from the federal government to the States. Moreover, it prohibited the Secretary of Education from relying on ESSA as authority for prescribing regulations requiring States to adopt in their State plans Secretarial policies on certain accountability subjects.

Yet, in the proposed regulations, in some instances the Secretary has disregarded these statutory constraints. The proposed regulatory provisions described below are contrary to Congressional intent, inconsistent with Title I and in excess of the Secretary's statutory authority.

1. **200.15(b)(2)(c)(1)(2): Interfering with Each State's Authority to "Factor" the 95% Test Participation Requirement "into" Its Own "Accountability System"**

   a. **Violation of ESSA, 1111(e)(1)(A)(i)(iii)**

When Congress enacted the ESSA requirement that each "statewide accountability system", 1111(c)(1)(4), pp. 79-80, "[a]nnually measure the achievement of not less than 95 percent of all students [,]" 1111(c)(4)(E)(i), pp. 87-88, it knew that there would be tension between a State's ability to meet that requirement and the right Congress created contemporaneously for States or localities to allow any parents to opt their children out of participating in such tests. 1111(b)(2)(K), p. 76; 1112(e)(2)(A), pp. 144-145. See "Ed. Dept. to States: Even Under ESSA, You Need a Plan for High Opt-out Rates," *Education Week blogs*, Alyson Klein (12/22/15). In New York State, for example, 20% of students opted out of the state tests in 2015. "20% of New York State Students Opted Out of Standardized Tests This Year," *New York Times* (8/12/15). In such situations it might be impossible for States or localities to induce as many as 95% of students to take the test, if only because of the high portion of lawful opt-outs, without even considering other constraints, such as chronic absences.

Since Congress was aware of this inherent statutory tension, to act responsibly, it needed to clarify who would have legal authority to resolve it. So Congress did just that. Congress delegated to each State the authority and responsibility to resolve this tension in its accountability system. In effect, Congress was saying to each State that it should decide how to maximize the number of students taking the test while concurrently honoring the parents' opt-out right in any State or locality that provided such a right.

Specifically, after establishing, in the first clause of subparagraph 1111(c)(4)(E), pp. 87-88, the 95% requirement quoted above, in the last clause Congress requires "(e)ach State", 1111(c)(1)(4), pp. 79-80, to: "Provide a clear and understandable explanation of *how the State will factor the [95% test participation] requirement … into the statewide accountability system."* (Emphasis added) 1111(c)(4)(E)(iii), p. 88.

That is, the Secretary has no authority to mandate States to impose any sanctions on schools that fail to satisfy the 95% requirement – whether lowering the schools' accountability rating, requiring them to implement an improvement plan, or otherwise under 200.15(b)(2) or 200.15(c)(1)(2), Notice of Proposed Rulemaking, "ESEA – Accountability and State Plans", OESE, Department of Education, May 31, 2016 (NPRM), pp. 129-130. Instead, Congress has delegated to each State the authority and responsibility to "factor" the 95% requirement "into the statewide accountability system." 1111(c)(4)(E)(iii), p. 88. What kind of incentives or sanctions, if any, to impose on schools if they fail to meet the 95% requirement – including because of greater than 5% lawful opt-outs – is exactly the kind of decision that Congress delegated exclusively to each State.

Since ESSA would shift the direction of federal education policy away from NCLB and Secretarial waivers, and reduce the Secretary of Education's policy-making authority in favor of States and localities, there was a risk that the Secretary might seek to preserve prior policies. To seek to ensure that the Secretary would adhere to ESSA's policies and the more limited Secretarial authority under ESSA, Congress enacted subsection 1111(e).

1111(e) provides, in part:

"(e) PROHIBITION – (1) IN GENERAL.- Nothing in this Act shall be construed to authorize or permit the Secretary – (A) when promulgating any rule or regulation, to promulgate any rule or regulation on the development or implementation of the statewide accountability system established under this section [1111] that would –(i) add new requirements that are inconsistent with or outside the scope of this part [Title I, Part A]; … or (iii) be in excess of statutory authority granted to the Secretary [.]" 1111(e)(1)(A)(i)(iii), pp. 100-101.

Proposed regulations 200.15(b)(2)(c)(1)(2), NPRM, pp. 129-130, encroach on the authority and responsibility Congress expressly gave to each State by 1111(c)(4)(E)(iii), p. 88, to "factor … into the statewide accountability system" how it will deal with issues involving the 95% requirement. Thus, the Secretary's proposed federal regulations to compel States to impose specific kinds of sanctions on any local schools that fail to meet the 95% target are inconsistent with Congress's statutory delegation of authority to each State to address the 95% issue and in excess of the Secretary's authority under ESSA.

Particularly, proposed regulations 200.15(b)(2)(c)(1)(2) are "inconsistent with … the scope of [Title I, Part A]", in violation of 1111(e)(1)(A)(i), p. 100; *See Sullivan* v. *Zebley*, 493 U.S. 521, 536 (1990) (agency regulation found "inconsistent with the statutory standard"). Likewise, 200.15(b)(2)(c)(1)(2) are "in excess of statutory authority granted to the Secretary", in violation of 1111(e)(1)(A)(iii), p. 101; *See Sullivan*, 493 U.S. at 541 (agency regulation held to "exceed [Secretary's] statutory authority"); *Dole* v. S*teelworkers*, 494 U.S. 26, 42-43 (1990) (agency action invalidated because it lacked statutory authority).

b. Violation of 1111(e)(1)(B)(iii)(XI)

Moreover, the proposed 200.15(b)(2) (c)(1)(2) regulations violate another provision of 1111(e). Section 1111(e) further provides:

"(e) PROHIBITION – (1) IN GENERAL.- Nothing in this Act shall be construed to authorize or permit the Secretary - … (B) as a condition of approval of the State plan … to – (iii) prescribe - … (XI) the way in which the State factors the requirement under subsection (c)(4)(E)(i) [the 95% requirement]

into the statewide accountability system under this section [1111].” 1111(e)(1)(B)(iii)(XI), p. 100-101, 104.

That is, 1111(e)(1)(B)(iii)(XI) explicitly prohibits the Secretary from relying on ESSA as the legal authority for promulgating regulations mandating what a State must include in its “State plan” as to the 95% test participation requirement. Yet, that is exactly what these proposed regulations would do.

The sole substantive legal authority the Secretary relies on for these regulations is ESSA: “20 U.S. C. 6311(b)-(c) [1111(b)-(c)] ” NPRM, p. 135. (While the Secretary also cites a statute that authorizes him to perform the function of issuing regulations, “20 U.S.C. 1221e-3,” NPRM, p. 131, that only permits the Secretary to issue regulations for which he has separate substantive legal authority.)

Further, each State would be required to include the Secretary’s sanctions scheme under 200.15(b)(2)(c)(1)(2), NPRM, pp. 129-130, in its “State plan”. This follows from the facts that: 1) the regulations require that scheme be a part of the “system of annual meaningful differentiation,” 200.15(b)(2), NPRM, p. 129; 2) 200.18(a), NPRM, p. 135, requires that the “system of annual meaningful differentiation” must be included “[i]n its State plan”; and 3) the entire “statewide accountability system,” 1111(c)(1), p. 79, of which the 95% testing requirement is a part, 1111(c)(4)(E), pp. 80, 87-88, must be included in the “State plan” under 1111(c)(1), p. 79; *Accord*, 200.12(a)(1), p. 124.

Since proposed regulations 200.15(b)(2)(c)(1)(2) are exactly Secretarial attempts to “prescribe … the way in which the State factors the [95%] requirement … into the statewide accountability system,” 1111(e)(1)(B)(iii)(XI), p. 104, the Secretary is prohibited by that provision from relying on ESSA as legal authority for them. Since the Secretary has cited no other substantive legal authority for these regulations, he has no legal authority to issue them.

Promulgating these proposed regulations as final regulations would be contrary to Congressional intent. Moreover, it would violate 1111(e)(1)(B)(iii)(XI), p. 104, be “inconsistent with the scope of [Title I, Part A],” 1111(e)(1)(A)(i), p. 100; *See Sullivan*, 493 U.S. at 536; and be “in excess of statutory authority granted to the Secretary.” 1111(e)(1)(A)(iii), p. 101; *See* Sullivan, 493 U.S. at 541; *Dole*, 494 U.S. at 42-43.

2. 200.18(a)(b)(2)(4) – Interfering with States’ Authority to Determine “Methodology to … Meaningfully Differentiate … Schools”

The proposed regulations would mandate States to include in their State plans’ systems for “meaningful differentiation” of schools “at least three distinct levels of school performance” and a “single summative rating” of each school’s performance. Specifically, 200.18 provides:

> (a) In its State plan under section 1111 of the Act each State must describe how its statewide accountability system under [Sec.] 200.12 establishes a system for annual meaningful differentiation for all public schools.
> (b) A State must define annual meaningful differentiation in a manner that - …
>
> > (2) Includes, for each indicator, at least three distinct levels of school performance [;]…
> > (4) Results in a single rating from among at least three distinct rating categories for each school … to describe a school’s summative performance as part of the description of the State’s system for annual meaningful differentiation [.]” NPRM, 200.18(a)(b)(2)(4), pp. 135-136.

That is, the regulations would mandate each State to use at least three categories to define how schools are performing and a single summative rating for each school as critical components of their differentiation and identification of schools. The minimum three-performance-levels requirement would apply to multiple other regulations, including 200.18(b)(3), NPRM, pp. 135-136,(d)(3), p. 137, (e)(1), p. 137 and 200.19(c)(3)(ii), NPRM, p. 138; the summative rating requirement would likewise apply to other regulations, including 200.18(c), NPRM, p. 136, (d)(3), p. 137, (e)(1), p. 137. Perhaps most significantly, the regulations would mandate States to use the summative rating as the crucial factor for identifying the lowest-achieving 5% of schools - the principal category of schools subject to "comprehensive support and improvement." 200.19(a)(1), NPRM, p. 137.

Thus, 200.18(a)(b)(2)(4), NPRM, pp. 135-136, are expressly intended to, and would, dictate to each State that it must use a specific methodology to differentiate among schools in its own State accountability system under Title I. The Secretary's "specific methodology" entails using a minimum of three performance levels and summative ratings to "differentiate or identify schools" under Title I.

Yet, 1111 prohibits the Secretary from relying on ESSA as authority for any regulations that "prescribe … the specific methodology used by States to meaningfully differentiate or identify schools under this part [Title I, Part A,]" 1111(e)(1)(B)(iii)(V), pp. 100-101, 103, where the regulations require States to adopt such prescriptions "as a condition of approval of the State plan [.]" 1111(e)(1)(B), pp. 100-101. The 200.18 regulations do cite ESSA, i.e., "20 U.S.C. 6311(c)(h)" [1111(c)(h)] as their sole substantive authority. NPRM, p. 137. And they explicitly require that "each State" adopt the Secretary's "specific methodology" for "annual meaningful differentiation … [i]n its State plan [.]" 200.18(a)(b)(2)(4), pp. 135-136.

In short, the Secretary's proposed 200.18(a)(b)(2)(4) regulations do exactly what 1111(e)(1)(B)(iii)(V), pp. 100-101, 103, prohibits. The Secretary relies solely on ESSA as legal authority for "prescrib[ing] … the specific methodology used by States to meaningfully differentiate or identify schools under [Title I, Part A]," and would require the States to adopt these regulatory mandates in their State plans. If adopted as final regulations, these proposed regulations would be not only contrary to Congressional intent, but "inconsistent with … the scope of [Title I, Part A,]" 1111(e)(1)(A)(i), p. 100; *See Sullivan*, 493 U.S. at 536, and "in excess of statutory authority granted to the Secretary." 1111(e)(1)(A)(iii), p. 101; *See Sullivan*, 493 U.S. at 541; *Dole*, 494 U.S. at 42-43.

3. 200.18(d)(e)(1) – Interfering with Each State's Authority to Determine the Weight of Its Indicators for Differentiating Schools

Proposed regulations 200.18(d) would mandate that States weight their "School Quality or Student Success" indicator(s) so that:

1)these indicators could "not be used to change": a) which schools would be identified for "comprehensive support and improvement", unless the schools otherwise so identified made "significant progress … on at least one of [three specified academic] indicators [,]" 200.18(d)(1), p. 136, or b) which schools would be identified for "targeted support and improvement", unless "each consistently underperforming or low-performing subgroup" in a school otherwise so identified made "significant progress … on at least one of [four specified academic] indicators [.]" 200.18(d)(2), NPRM, pp. 136-137, and

2)any “school performing in the lowest performance level … on any of the [academic] indicators … receives a different summative rating than a school performing in the highest performance level on all [academic and non-academic] indicators [.]” 200.18(d)(3), NPRM, p. 137.

That is, 200.18(d)(1)(2) would, in effect, dictate to States that they must reduce the weight that they might otherwise give to their School Quality or Student Success indicator(s). No matter how strongly positive a school’s School Quality or Student Success indicators were a State could not remove a school otherwise identified for “comprehensive support” from that designation, unless the school also showed significant improvement in an academic indicator. Nor could a State remove a school otherwise identified for “targeted support” from that designation, unless each sub-performing subgroup made significant improvement on an academic indicator.

200.18(d)(3) would, in effect, dictate to States that, regardless of how strong performances schools had on as many as three of four academic indicators and the School Quality or Student Success indicator(s), if the schools were in the lowest performance level on one academic indicator, no State could give such schools the same summative rating as a school that had the “highest performance levels on all indicators [.]”

Thus, 200.18(d)(1)(2)(3) would thrust the Secretary directly into the business of telling the States how much weight they could give to the indicators they would use to differentiate and identify schools as part of their own “statewide accountability systems.” But, in 1111(c), Congress provided that it was “the State [that] shall carry out … [e]stablish[ing] a system of meaningfully differentiating , on an annual basis, all public schools in the State [,]” 1111(c)(4)(C), pp. 80, 85-86, not the Secretary of Education. Further, Congress provided that it was to be “a State-determined methodology to identify … schools for comprehensive support and improvement [.]” 1111(c)(4)(D)(i), p. 87.

Moreover, 1111 expressly prohibits the Secretary from relying on ESSA as authority for “prescrib[ing] … the weight of any measure or indicator used to identify or meaningfully differentiate schools, under [Title I, Part A,]” 1111(e)(1)(B)(iii)(IV), pp. 100-102, when the Secretary requires that States adopt such prescription “as a condition of approval of the State plan [.]” 1111(e)(1)(B), pp. 100-101.

The regulations do require that each State must adopt the mandates of 200.18(d) in its State plan. 200.18(e)(1), NPRM, p. 137. And the Secretary cites solely ESSA, “20 U.S.C. 6311(c)(h)[1111(c)(h)]” as his substantive authority for promulgating the 200.18(d) regulations. NPRM, p. 137.

Since: 1111(e)(1)(B)(iii)(IV), pp. 100- 102, prohibits the Secretary from relying on ESSA as legal authority for “prescrib[ing] … the weight of any measure or indicator used to identify or meaningfully differentiate schools under [Title I, Part A]”; prescribing the weights of indicators is exactly what 200.18(b)(1)(2)(3) do; and the Secretary is relying solely on ESSA as substantive authority for these regulations, the Secretary is prohibited from promulgating these regulations. The proposed regulations are contrary to Congressional intent, “inconsistent with … the scope of [Title I, Part A],” 1111(e)(1)(A)(i), p. 100; *See Sullivan*, 483 U.S. at 536, and “in excess of statutory authority granted to the Secretary”, 1111(e)(1)(A)(iii), p. 101; *See Sullivan*, 493 U.S. at 451; *Dole*, 494 U.S. at 42-43.

Conclusion

For all these reasons, proposed regulations 200.15(b)(2)(c)(1)(2), 200.18(b)(2)(4) and 200.18(d)(e)(1), and all the other proposed regulatory provisions dependent on them, should be removed from the final regulations.

Respectfully submitted,

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