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July 28, 2016

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

Docket ID: ED-2016-OESE-0032

Dear Secretary King:

On behalf of the National Conference of State Legislatures (NCSL), we are writing to comment on the proposed regulations contained in the docket listed above. NCSL had long advocated for a reauthorization of the Elementary and Secondary Education Act (ESEA) that recognized the need for state and local authority and flexibility in decision-making. We were pleased to see those principles outlined in many parts of the Every Student Succeeds Act (ESSA), and now we ask the department to uphold those values in its regulatory work.

NCSL appreciates that the proposed regulations support state flexibility by following congressional intent in allowing states to develop their own goals and measures of interim progress as part of their accountability systems and determine their own indicators for accountability. The regulations also adhere to the statute in allowing states to design their own school improvement strategies. We are pleased that the regulations emphasize statutory provisions that include state legislators in the development and revision of state plans.

NCSL applauds the attention given to ensuring that states and local educational agencies (LEAs) have information about the performance of children in foster care so they can better meet the educational needs of this vulnerable population. Therefore, NCSL supports disaggregating student achievement results by status as a child in foster care, as the statute requires and the regulation reiterates, and supports the mention of this population in provisions regarding well-rounded education and Title II programs. NCSL also supports a consistent definition of "child in foster care" that applies throughout programs reauthorized in ESSA and allows for state definitions, if broader, to apply for purposes of reporting.

Denver
7700 East First Place
Denver, Colorado 80230-7143
Phone 303.364.7700 Fax 303.364.7800

Washington
444 North Capitol Street, N.W. Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202.737.1069

Website www.ncsl.org
Email info@ncsl.org

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NCSL urges the department to make the following changes in order to ensure the regulations are consistent with the statute and the stated intent of ESSA to provide increased flexibility to state and local policymakers.

- NCSL believes that requiring states to submit evidence regarding the “challenging” nature of their academic standards is in conflict with the statute, which intentionally changed the law to simply require an assurance. Furthermore, the statute calls for the negotiated rulemaking process to be utilized for any rules on standards. The proposed regulatory provision should be removed, and the language of the statute, that a state “shall provide an assurance that the state has adopted challenging academic standards,” should be maintained and supported.
- Of great concern to NCSL is the provision in the Notice of Proposed Rulemaking (NPRM) that would require a state to give a single, summative score to each school based on that state’s accountability system. Under the statute, a summative score is only one of the methods a state may select to rate its schools. One of the strengths of ESSA is the movement away from a single metric (Adequate Yearly Progress) for measuring school performance. States should be able to use the information that best reflects the unique needs and characteristics of their school, as the statute intended, and regulations should reflect that.
- NCSL is concerned about the provision noting that a school with at least one subgroup that is “underperforming” (as defined by the state) for two years in a row would be designated as “consistently underperforming.” ESSA provides that such determinations and timelines should be set by the states. Additional requirements for the identification of schools for federally-required interventions under the Act’s accountability system could substantially expand the number of schools deemed in need of improvement and outstrip the capacity of states and local districts to handle the number of schools that get identified. Again, the department should adhere to the statute in regulating on this provision.
- NCSL notes the aggressive timeline for implementation, specifically for determining which schools need intervention. The regulations should specify that the first identification of schools is made based on school year 2017-2018 data, at the beginning of the 2018-2019 school year. This would be a more reasonable way of interpreting the statutory language that identification should begin with the 2017-2018 school year and allow for time for review of state plans (as the NPRM notes is an issue) and for the implementation of new, state-based accountability systems.
- The NPRM provides for three federally-designated options if assessment participation rates fall below the 95 percent threshold for all students or a subgroup of students, and for a state-determined action that is “equally rigorous” when compared to other options. States should be allowed to design multiple state-determined actions to intervene in and support schools falling below the 95 participation rate. In addition, as part of the state plan, the Secretary must approve such an option as part of the approval of the state plan. Requiring this approval limits state flexibility; the Secretary should not be permitted to disapprove a state plan on that basis.

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- In the proposed regulations, states would be required to ensure that each measure selected as an indicator of School Quality and Student Success is supported by research showing that performance or progress on the measure is likely to increase student achievement, or if used for a high school, to increase graduation rates. This proposal needlessly limits the number of indicators states can choose for their accountability system. It also has the effect of minimizing this important data point that allows states to look beyond assessment performance. States should have maximum flexibility in choosing non-academic indicators.
- NCSL appreciates the attention given in the regulations to ensuring educational stability for children in foster care. However, NCSL would support alternative language on transportation for children in foster care consistent with recent non-regulatory guidance (issued June 23, 2016) that more directly clarifies the joint obligations of both local education and child welfare agencies. We would also urge the department to add language that makes it clear that transportation to and from a foster child's school of origin has to be provided promptly and that disputes should be resolved per state policies and mechanisms for that purpose.

NCSL appreciates the opportunity to provide input on behalf of state legislators on the regulations governing this important federal law. If you have any questions or need further information, please contact Lee Posey, Federal Affairs Counsel, at 202-624-8196 or lee.posey@ncsl.org

Sincerely,



Representative Sharon Tomiko Santos
Washington House of Representatives
Co-Chair, NCSL Education Committee



Senator Howard Stephenson
Utah Senate
Co-Chair, NCSL Education Committee