



**THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK**

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August 1, 2016

Ms. Meredith Miller  
U.S. Department of Education  
400 Maryland Avenue, SW, Room 3C106  
Washington, DC 20202-2800

Docket ID: ED-2016-OESE-0032

Dear Ms. Miller:

I am writing to provide the comments of the New York State Education Department (NYSED or “the Department”) on the United States Department of Education’s (USDE) Notice of Proposed Rulemaking (NPRM) on accountability, data reporting, and state plans under the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA).

The overarching theme of the Department’s comments are that the USDE should seek in its NPRM to adhere to the clear intent of Congress, which is to give state educational agencies (SEAs) flexibility to create their own Title I accountability systems in cooperation with stakeholders. We appreciate that in many instances USDE’s proposals are consistent with the objectives and provisions of ESSA and, in many cases, helpfully clarify terms and provisions that are unclear in the statute. However, there are instances where the draft rulemaking goes beyond the statutory language and imposes conditions on states that are overly prescriptive, onerous and/or, in a few instances, unworkable.

We request that the USDE give serious consideration to addressing the issues specified below:

I. Timeline for Implementation of New Accountability Systems

ESSA provides that the revised accountability requirements of Title I “shall take effect beginning with the 2017-18 school year.” Given the ambiguity in this provision, New York State strongly urges that USDE interpret the statement to mean “beginning with 2017-18 school year results,” rather than beginning with 2016-17 school year results, as proposed in the draft rulemaking.

Using 2016-17 school year results creates multiple challenges:

- It will require New York to prematurely sunset its current list of Priority and Focus Schools before schools and districts have had sufficient time to implement their plans. New York, as required by ESEA flexibility, created new lists of Priority and Focus Schools in February 2016. Requiring that new lists of Comprehensive Support and Improvement Schools and Targeted Support and Improvement Schools be created using 2016-17 school year results means New York would have to sunset its Priority and Focus Schools lists after these schools have had only one full academic year to implement their plans.
- Identifying schools using 2016-17 school year results will significantly circumscribe the accountability measures that New York will be able to use in its new identification system. Using 2016-17 school year results not only precludes New York from incorporating any measures not based on data currently available, but also means that any measures based on growth from a baseline would need to have already been in place for a number of years. This severely limits the ability of New York to reimagine its accountability system to better address the strong desire of stakeholders for a “multiple” measures system rather than one that makes determinations largely based upon English language arts and mathematics assessments and graduation rates.
- Given that USDE is unlikely to approve state plans until the spring or summer of 2017, schools will not know at the start of the 2016-17 school year with any degree of confidence the measures and indicators for which schools will be held accountable. A core principle of a good accountability system is that those who are held accountable should know in advance that for which they shall be held accountable.

Recommendation:

We recommend that the USDE allow states to identify schools in the 2018-19 school year under ESSA’s new accountability system, using data for 2017-18 and prior years, and continue ongoing efforts to improve schools identified under ESEA flexibility or prior law during the 2016-17 and 2017-18 school years. This is consistent with the ESSA statute and will allow for states to implement high-quality accountability systems in 2017-18 and use these systems to identify underperforming schools.

II. Requirement that Schools be Identified for Support and Improvement Prior to the Start of the School Year:

§200.19(d)(2) of the proposed rulemaking requires that a state identify schools for comprehensive support and improvement and targeted support and improvement by the beginning of each school year, using data from the immediate prior school year. In addition, adjusted graduation rate(s), which include summer graduates, is required to be used as part of the process for school identification. We believe that this time frame is both unrealistic and unnecessary, especially given that the year of identification may be used for

planning purposes, and implementation of plans is not required to occur until the year following identification.

Recommendation:

Each state after consultation with stakeholders should establish the timeline for identification of schools, and states may choose to use data that is lagged by one year, if the state determines that such a lag is necessary to ensure timely determinations are made.

III. Performance Levels for Indicators and Summative Ratings

ESSA requires that states develop accountability systems that meaningfully differentiate among schools. The proposed rulemaking is too specific in requiring that a state must assign each indicator to at least three performance levels and publicly report this information. The rulemaking is also too specific in requiring states to assign and report a comprehensive, summative rating for each school. New York has no objection if other states wish to adopt a system such as that specified in the proposed rulemaking. Indeed, it is possible following consultation with stakeholders that the Board of Regents could choose to adopt a system that would be consistent with the proposed rulemaking. However, New York objects to USDE imposing such a system upon states when such a requirement is not contained in statutory language.

Recommendation:

We recommend that the final regulations include clearer and more flexible language that would allow a variety of state systems, providing they comply with statutory provisions requiring clear distinctions among schools. The final regulation should be clear that it is at the discretion of the state to determine how best to provide this information to the public.

IV. High School Graduation Rate Used to Identify Schools for Comprehensive Support and Improvement

ESSA requires that SEAs identify for comprehensive support and improvement any public high school that fails to graduate at least 67 percent of its students.

This proposed requirement that all states use the four-year adjusted cohort rate would disproportionately impact high schools that enroll student populations such as recently arrived immigrants; under credited and overage students; and other groups that may need additional time to finish school. Under the proposal, these schools would likely be identified for Comprehensive Improvement, not because of their educational performance, but because of the student populations they serve. This is particularly distressing because previously states were allowed on a “case-by-case” basis to exclude such schools from identification if they were able to demonstrate that they were successfully serving their at-risk populations even if their completion rates were less than 60 percent.

## Recommendation:

We strongly recommend that states be allowed to use either the four-year adjusted cohort rate or an extended-year adjusted cohort rate in determining which schools must be identified for Comprehensive Support and Improvement based upon graduation rate.

### V. Funding to LEAs for School Improvement

ESSA requires that states utilize the 1003 Title I reservation for school improvement to provide funding to eligible LEAs and ensure that “allotments are of sufficient size to enable a local educational agency to effectively implement selected strategies.” The proposed regulation would define these allotments as at least \$500,000 for Comprehensive Support and Improvement Schools and at least \$50,000 for Targeted Support and Improvement Schools, unless a district agrees to accept less funding. In New York, these allocations would mean that while some Comprehensive Support and Improvement Schools would likely receive more funding than is necessary to implement their improvement plans, other schools so designated would receive no funding. In addition, there would appear to be insufficient funding under this formula for any Targeted Support and Improvement Schools to receive funding.

## Recommendation:

We recommend that USDE allow states after consultation with stakeholders to determine the size of allocations to be provided to identified schools. We further recommend that the draft rulemaking makes clear that states may choose to distribute a portion of their 1003 funding by allocation and a portion through a competitive process. The current rulemaking is ambiguous as to whether a state must pick one methodology or the other and may not employ both simultaneously.

### VI. Requirements Pertaining to Failure to Meet Participation Rate:

New York frames its remarks based on two strong beliefs that undergird New York’s current policy pertaining to participation rate:

- Just as NYS law requires that no school district shall make any student or promotion or placement decision based solely or primarily on student performance on the Grades 3-8 ELA and math examinations, there should be no consequences for any individual student based upon whether that student participates or does not participate in state assessments. For example, no student should be denied promotion to the next grade based on failure to participate in a state assessment.
- The State cannot judge a school to be high performing when large numbers of students fail to participate in State assessments. Consequently, it is appropriate for the State to forego identifying schools as Reward Schools or

Blue Ribbon Schools when schools are unable to meet participation rate requirements.

- Given this context, New York notes that § 200.15 of the proposed rulemaking requires a State to not only use 95 percent of the students in the grades assessed as the minimum denominator for making language arts/reading and mathematics accountability determinations regardless of the number of students who actually participate in state assessments, but also to take actions against schools that fail to meet participation as prescribed by the rulemaking, and to require these schools and LEAs to develop improvement plans to increase participation rates. We believe these requirements are inconsistent with the intent of the law to allow States to have broad discretion to determine the consequences when schools and LEAs are unable to meet participation rate requirements. We do not believe the law requires that States must at minimum take actions that are equally rigorous to those identified by the USDE, nor do we believe that an improvement plan must be required of schools and LEAs after a single failure to meet participation rate requirements. Finally, although we recognize that the statute contains the “95 percent denominator” provision, we are disappointed that USDE has not been creative in providing states with flexibility to address the potential unintended consequences of this provision of the law.

#### Recommendation:

The rulemaking should be limited to repeating the language of the statute and should only require states to provide a clear and understandable explanation of how the state will factor the participation requirement into the statewide accountability system. In addition, we recommend that the rulemaking provide flexibility to states so that schools need not be identified for Comprehensive Support and Improvement or Targeted Support and Improvement if there is compelling evidence that the school’s academic performance is not at the level that warrants such identification.

#### VII. Identification of Schools for Targeted Support and Improvement

We believe that the intent of the statute was to move away from the “quota system” that was part of the ESEA Flexibility Waiver system, under which states were required to identify a minimum of ten percent of the State’s Title I schools as Focus Schools. We believe the intent of the statute was to give states much more flexibility to determine the level of performance that should result in a school being identified for Targeted Support and Improvement. When the vast majority of schools are making progress, we believe that few schools should be identified for Targeted Support and Improvement. However, by linking the identification of Target Support and Improvement to the standards by which five percent of Title I schools in the state must be identified for Comprehensive Support and Improvement, the rulemaking makes it extremely likely that a very large number of schools will be identified for Targeted Support and Improvement, regardless of the degree to which schools statewide are improving outcomes for students. New York is extremely concerned that the requirements for identifying

schools either for consistently underperforming subgroups or low-performing subgroups receiving additional targeted support may result in New York either having to identify far more than ten percent of its schools for Targeted Support and Improvement or to devise a system that seeks to minimize the weight of academic achievement in creating a summative score for a school. For example, in New York in a significant majority of schools the percentage of students with disabilities who were proficient or partially proficient in language arts and mathematics is lower than the cut point we used most recently to identify schools as Priority. While we understand that the statutory language regarding this provision is extremely convoluted and that USDE's interpretation of the requirements of the statute is not unreasonable, we had hoped that given opaqueness of the statute, USDE could find a more creative interpretation than that contained in the draft rulemaking.

Recommendation:

We urge the USDE to reexamine the statute to determine if a more flexible alternative for identification of schools based on low-performing groups receiving additional targeted support is feasible.

VIII. Regulations pertaining to English Language Learners

Long term goals: § 200.13 specifies that the goals for English language learners may consider student-specific factors such as (1) time in language instruction educational programs, (2) grade level, (3) age, (4) native language proficiency level, and (5) limited or interrupted formal education.

Recommendation:

New York recommends that in this section and throughout the rulemaking the term "limited or interrupted formal education" be changed to "limited or interrupted/inconsistent formal education."

Timeline for students achieving English proficiency: USDE is seeking comment regarding whether to include a maximum timeline by which ELLs should become English proficient, and if so what should it be.

Recommendation:

New York recommends that states should have the flexibility to determine the timeline for ELL's to become proficient, taking into account individual characteristics (such as grade level, age, native language proficiency level, and limited or interrupted/inconsistent formal education) that impact how long it will take for students to attain proficiency in English. We see no benefit in establishing a single uniform national standard given the unique circumstances of each state.

IX. Standard for Including Children with Disabilities, English Learners, Children Who are Homeless, and Children Who are in Foster Care in their Corresponding Subgroups within the Adjusted Cohort Graduation Rate

- The USDE has stated it is interested in whether students should be included in each of these subgroups if they are identified at the time of enrollment or at any time during the cohort period (e.g., if someone is an ELL and becomes a former ELL during the cohort period).

Recommendation:

New York does not believe a national standard is necessary. States should have the flexibility to determine how best to incorporate these students into the adjusted cohort graduation rate. However, if the USDE chooses to issue rulemaking on this issue, then New York believes that students should be included in the group provided that they were members of the group at any time during high school.

X. Dynamic Weighting of Accountability Indicators

§200.18(c)(3) specifies that within each grade span states must afford the same relative weight to each indicator among all schools consistent with special rules that apply when there is an insufficient number of English learners to use their results as part of the weighting process. The draft rulemaking does not address circumstances where either an indicator may apply to only a limited number of students in a school or an indicator other than the one relating to acquisition of English proficiency has insufficient students to be used as part of the weighting process. Two examples:

- State A has a minimum n size of 30. School A has 600 students for which it is accountable for ELA and math performance and 30 students for which it is accountable for acquisition of English proficiency. School B also has 600 students for which it is accountable for ELA and math performance and 300 students for which it is accountable for acquisition of English proficiency. Should School A and B have the same weightings for the indicator based on acquisition of English proficiency?
- State A has a minimum n size of 30. School A is a Grade 8-12 school, in which 40 students are enrolled in Grade 8 and 1,000 are enrolled in Grades 9-12. Does Grade 8 ELA and math need to be weighted equally with ELA and math results for the high school level?

Recommendation:

The rulemaking should be clarified to: a) permit states to adjust weighting of indicators to reflect the number of students whose results are measured by the indicator and b) to allow weightings to be adjusted for any indicator, not just that for acquisition of English proficiency, for which there are insufficient results to use the measure to make accountability determinations.

## XI. Postsecondary Enrollment

§200.18 requires that, beginning with the report card prepared for 2017, rates of high school graduates who enroll in programs of public postsecondary education in the academic year immediately following graduation be reported. This section also stipulates that where practicable, rates for students enrolled in programs of private postsecondary education be reported. We believe the implementation requirement of 2017 is too ambitious. In addition, we are concerned with the associated burden on state resources, both in personnel and financial, that this requirement introduces. Data privacy legislation exists in New York that makes it difficult for the Department to share data with our public university systems, the State University of New York (SUNY) and the City University of New York (CUNY). The state legislation requires that we adhere to specific requirements and data protections, including the incorporation of a data security and privacy plan in all applicable contracts or agreements, the process for which is complicated and lengthy. SUNY and CUNY are considered third-party contractors in the legislation, not educational agencies, and as such must be subject to these data privacy provisions. Working with two separate entities with multiple institutions and campuses involved further increases burden. There is additional concern around the ability to turn the data around in time to be included in state report cards published in the academic year following high school graduation. An alternative method for obtaining postsecondary program enrollment data is to utilize the National Student Clearinghouse (NSC). This alternative would yield data from both the public and private sectors, capture students attending college out-of-state, and involve working with only one entity in establishing privacy protections. Required State personnel resources would be minimal compared to the SUNY/CUNY option. This alternative is monetarily costly to States, however. As a non-profit, NSC calculates their price based upon actual costs of matching and delivering data and charges on a per-record basis for the returned information. The per-record charge increases as the granularity of the data increases. For example, a state-level file would cost less than a state-level research with high-school level reports file. For a state the size of New York, the first-year annual cost is greater than \$200,000 for the state-level research with high-school level reports option. A five-year contract for this file would cost more than \$900,000. With both options, there will be students missed due to inaccurate matching algorithms.

The proposed rule also states that “By requiring States to define programs of postsecondary education using the definition in § 101(a) of the HEA, proposed § 200.36 would promote consistency in data reporting, which would allow users to compare outcomes across States, LEAs, and schools. Proposed § 200.36 would also help advance the Department's goals of raising awareness about the differences across States and LEAs in rates of enrollment in programs that are offered by accredited two-and four-year institutions by increasing the transparency of postsecondary outcomes.” We disagree that these metrics will allow valid comparisons across states as the postsecondary landscape in each state is different. Public university systems vary across states in size and

structure, as does the availability of private institutions of higher education. States with large populations of students who attend out-of-state postsecondary institutions could be adversely affected.

Recommendation:

Each state after consultation with stakeholders should establish the timeline for the reporting of postsecondary enrollment and states may choose to use data that is lagged by one year, if the state determines that such a lag is necessary to ensure accurate data is available. USED should also consider a funding mechanism for states to enable the use of NSC data for all states, ensuring that public, private, in-state and out-of-state students are captured.

XII. Exit Criteria for English Language Learners

§ 219.19(c)(3) of the draft rulemaking requires that SEAs describe their standardized entrance and exit procedures for ELL's. The rule making states that at a minimum, the standardized exit criteria must, among other conditions, "not include performance on an academic content assessment." USDE explains that the intent of this prohibition is to prevent "students being included in the English learner subgroup beyond the point when they are actually English learners, which may lead to negative academic outcomes for an individual student, and, if a student held in English learner status is denied the opportunity to meaningfully participate in the full curriculum, may constitute a civil rights violation. Thus, the proposed regulations would make it clear that scores on content assessments cannot be included as part of a State's exit criteria."

While the New York State Education Department agrees that students should not be prevented from exiting ELL status because of their performance in areas such as math or social studies, we are concerned that the rulemaking as written could have the unintended effect of preventing students from exiting ELL status who have demonstrated proficiency on state assessments administered in English in language arts or reading. It is the experience of New York State that there are students who may achieve proficiency in language arts or reading on a test in English but for a variety of reasons may not meet the exit criteria on the state's English language proficiency examination. These students should be exited from ELL status while being given transition support.

Recommendation:

Clarify the rulemaking to permit states to exit students who meet either the exit criteria on a state's English language proficiency examination or score at or above proficiency on the state's assessment in English of language arts or reading:

(iii) Not include performance on an academic content assessment, except that states may choose to exit students who score proficient on a state's language arts/reading assessment in English even if such students have not scored proficient on the state's English language proficiency examination.

### XIII. Use of State Assessments for English Language Learners and Students with Disabilities

The USDE has released draft negotiated rulemaking regarding assessments, with provisions related to the assessment of English Language Learners and Students with Disabilities. The New York State Education Department will be providing specific comments in a separate response regarding the assessment draft rulemaking, which are due to USDE in September, 2016. However, the New York State Education Department notes that the draft rulemaking regarding accountability and state plans requires the state to create long terms goals and progress targets for these subgroups based on assessments that do not give certain students in these groups an appropriate opportunity to demonstrate what they and are able to do.

Specifically, the New York State Education Department continues to believe that a test of language arts in English is not the most appropriate assessment to administer to certain newly arrived English language learners after they have been enrolled in a school in the United States for more than one year. Instead, we believe that a more appropriate assessment would be the State's test of acquisition of English proficiency when such assessment is fully aligned to the State's language arts learning standards.

In addition, the New York State Education Department continues to believe that there is a small group of students with significant cognitive disabilities who are ineligible for alternate assessments for whom an assessment at their instructional level rather than their chronological grade level would be appropriate. ESSA implicitly recognizes the need for different methods to assess such students by allowing off grade level items to be included in computer adaptive assessments. The New York State Education Department believes until such computer adaptive assessments are in place, states in very clearly defined and limited circumstances should be able to administer instructional level assessments to a small group of students with severe cognitive disabilities.

#### Recommendation:

USDE review its draft rulemaking on assessments to provide states with greater flexibility in the assessment of newly arrived English language learners and students with severe cognitive disabilities who are not eligible to participate in alternate assessments. If such additional flexibility cannot be made available through rulemaking, USDE should create and make public guidance by which states may successfully submit variance requests to provide such flexibility to states.

#### XIV. Reporting of Per Pupil Expenditures

New York agrees that a uniform procedure for calculating and reporting per pupil expenditures should be developed, and that the October membership count for LEAs should be used. However, the rulemaking should clarify the reporting of current LEA per-pupil expenditures not allocated to public schools in the State. This appears to address circumstances where LEAs expend funds for other entities, such as services and space for private and charter schools, which New York public school district LEAs are required to do under State law. While we agree that a uniform procedure would provide consistency and transparency, implementation beginning with 2017-18 school year results does not permit sufficient time to create an accurate and consistent methodology.

In addition to increased sharing of services with other governmental entities, New York State's LEAs are required to allocate funds and resources to serve entities other than public school districts in two major ways: support of charter school LEAs and support of nonpublic schools. At present, New York State and its public school district LEAs have limited means to differentiate some of these expenditures from others that they make for their own purposes, so the development of the uniform procedure must be linked to the development of underlying accounting systems with the capacity to differentiate and reallocate the costs. Depending on the mechanisms used, implementation may also require coordination with the Office of the State Comptroller, which is responsible for the collection of some of the related data items. This cannot be accomplished within the timeframe specified in the rulemaking.

#### Recommendation:

The provision contained in § 200.35 of the draft rule making that requires per pupil expenditure reporting by fund by school should be revised so that each state submits to USDE the timeline by which the state shall implement this provision and the rationale for the timeline.

#### XV. Annual Time for Dissemination of State and LEA Report Cards:

§ 200.31(e) of the proposed rulemaking requires that beginning with 2017-18 school year results the State and each LEA must disseminate school report cards no later than December 31 of each year. This timeline, which is not contained in statute, fails to take into account the many steps that are required for State and LEA's to collect and verify the data elements that are now required to be reported annually. In order to meet this December 31 deadline, States and LEA's would have to invest considerable new resources in data collection and verification. While, New York agrees on the benefit of timely reporting of data, these resources would be better spent on instructional support rather than meeting an arbitrary reporting deadline.

Recommendation:

The provision contained in § 200.31 of the proposed rulemaking should be revised so that states after consultation with stakeholders should only be required to inform USDE of the date a state has selected by which the state and LEAs shall annually disseminate report cards.

If I can be of any further assistance, please do not hesitate to contact me at (518) 474-5844 or [commissioner@nysed.gov](mailto:commissioner@nysed.gov).

Sincerely,

A handwritten signature in cursive script that reads "MaryEllen Elia".

MaryEllen Elia  
Commissioner