



Council of the Great City Schools®

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Comments on NPRM for ESEA, as amended by ESSA – Accountability and State Plans

July 28, 2016

Attention: Meredith Miller

U.S. Department of Education
Office of Elementary and Secondary Education
400 Maryland Avenue SW - room 3C106
Washington D.C. 20202-2800

The Council of the Great City Schools, the nation's primary coalition of the large central city school districts that enroll over one-quarter of the nation's English Learners, takes the unusual step of the submitting this initial set of comments specifically on English Learner (EL) issues in the proposed ESSA accountability and state-plan regulations. The organization will later submit comments on other issues in the May 31, 2016 Notice of Proposed Rulemaking (NPRM). These separate EL comments are provided to underscore the Council's concern over the harmful effects on students and instructional programs that will result from these ill-advised federal regulatory directives. In addition, the proposed EL regulations establish requirements that conflict with the actual language of ESSA and ignore legislative intent.

In these regulations, the U.S. Department of Education seeks to impose its own judgement on which students can be served, which students can no longer receive services, how these instructional decisions will be made, and what factors may and may not be considered. This proposal flies in the face of other indicators that state and local education officials have used successfully over the years to address the instructional needs of English learners. The Council can find no analogous set of educational rules governing any federal program that restricts educator judgements for providing services to any other group of students that is as comparatively overreaching as the proposed EL accountability and state-plan provisions being offered for public comment.

These proposed federal requirements will affect state law, eligibility for school-level services, selection of instructional strategies, distribution of federal -- if not state and local -- funds, and possibly Department of Justice and Office of Civil Rights determinations. The premature exiting of English learners from specially-designed EL services resulting from these proposed regulations, for example, could deprive ELs of essential English-development instruction they need to acquire academic English skills essential to succeed in core subject areas. These regulations could also prevent teachers from making fully-informed instructional decisions using multiple measures of performance, include content performance assessments. The narrow regulatory interpretation of the English proficiency timelines and progress indicators could also compel schools to focus on instructional strategies and models designed to maximize scores on the state's English Language Proficiency Assessment (ELPA) and divert energy away from developing well-rounded academic content skills – in contradiction to the Department of Education's new rhetorical attention to the importance of a well-rounded education. Dual language programs and late-exit bilingual education or transitional bilingual programs could readily fall out of favor in order to meet the federal regulatory strictures of the proposed rules. In short, decisions based on the needs of students will likely be compromised by states and school districts attempting to comply with these restrictive and excessive federal regulations.

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Already, a few states have established similarly simplistic approaches to exiting students that have resulted in the withdrawal of needed services for some ELs. For instance, a state requirement to exit students scoring at a level 4 on a six-level ELPA – a practice that unfortunately has been adopted in a few states -- fails to take into account the collaborative, personalized instructional decision-making that is regularly used by school personnel to ensure tailored services under current law. The Council’s 2016 ELL Identification and Exit Survey found that:

- In more than half of the responding urban districts, the Bilingual/ESL Teacher (70 percent of responding districts), the Classroom Teacher (63 percent), and parents (53 percent) participate in the collaborative process to determine whether or not to exit an EL from EL status.
- Over one-third of the districts listed a number of additional individuals who are involved in the exiting process: Bilingual/ESOL staff (48 percent), principal (45 percent), and Language Proficiency Assessment Committees (40 percent).

Moreover, a reliance on a single-measure--the ELPA score—disavows the second obligation under *Lau*, which is to ensure that ELs have equal access to content instruction, and goes against practices in a majority of districts designed to ensure ELs are academically successful in the content areas. The Council’s 2016 ELL Survey also found that:

- 59 percent of district do not use the ELPA as the single determinant for exiting ELs, and
- 73 percent of districts also consider performance on state content assessments in making the determination whether to exit a student from the EL subgroup.

The Council is extremely concerned that the combination of federally-proposed EL rules on timelines for attaining proficiency along with standardized statewide criteria will result in the lowest common statewide denominator for removing students prematurely from specialized services. Unfortunately, the proposed EL regulations are crystal clear that local educator decision-making on these key EL instructional determinations is prohibited by design (see page 34586 of the May 31, 2016 Federal Register).

The Council accepts that Congress provided the flexibility and authority to states to make key decisions about ELs or to provide school districts with some options within statewide procedures. However, the proposed regulations restrict the state-level decision options far more severely than the language of the Act or congressional intent.

The Council’s comments on specific areas of the proposed English Learner regulations are divided into three general categories: proposed regulations that the Council supports; proposed regulations needing further clarifications; and proposed regulations that require substantial revision.

English Learner Proposed Regulations Supported by the Council

The Council supports the proposed regulations allowing states to customize their ELP goals and interim measures for specific EL student characteristics. The proposed Department regulations allow states to take into account “student characteristics” (i.e., time in program, grade level, age, native language proficiency, interrupted formal education) in establishing long-term goals and interim benchmarks for the ELP Indicator in the state accountability system.

The Council supports sec. 200.13(c)(2)(ii) and sec. 200.14(b)(4)(i) of the proposed regulations.

The Council supports the inclusion of former ELs in the EL subgroup for up to four years. The proposed regulations operationalize the ESSA state option to include ELs for up to four year after exiting a program for the purposes of determining performance on the Academic Achievement Indicator. The Council requests that the Department avoid discouraging the use of this “former EL” statutory authority like was done on page 34551 of the May 31, 2016 Federal Register preamble to this Notice of Proposed Rulemaking.

The Council supports the basic concept of sec. 200.16(b)(1)(i) regarding including four-year former ELs in the EL subgroup accountability determinations. Note: The Council also will recommend – later in these comments – that the regulations include four-year former ELs language in the Graduation Rate Indicator, the Other Academic Indicator, the School Quality Indicator, and the 95% Participation Rate factor -- but not the ELP Indicator.

English Learner Proposed Regulations Needing Clarification

Clarify that ELs attaining English language proficiency remain in the EL subgroup when determining the ELP Indicator in the year in which English proficiency is attained. The proposed regulation is unclear about whether a student is immediately reclassified as a former EL in the year that the student attains English proficiency. This would preclude schools from getting credit for the performance of these students on the ELP Indicator in the year the student attains proficiency. The regulations should clarify that these students become “former ELs” in the school year following attainment of English language proficiency.

The Council recommends striking sec. 200.16(b)(1)(ii) and inserting a new subparagraph (1)(ii) as follows: “(ii) A State shall retain an English learner achieving English language proficiency in the English learner subgroup for the school year in which English proficiency is attained for purposes of the state accountability system and for the purposes of reporting information on State and LEA report cards under section 1111(h) of the Act.”

Clarify that states have the option to allow “banking” English language proficiency results for particular domains. Title III interpretations issued under NCLB prohibited “banking” of English language proficiency results for a particular domain (i.e., listening and speaking) from one year to the next. However, banking of proficiency results in each domain could prevent re-testing a student year after year, even after proficiency in a particular domain has been attained. Testing of oral language skills, in particular, is often very labor-intensive, time consuming, and costly. The practice also contributes to over-testing in domains where students have already demonstrated proficiency. The Council recommends an explicit provision allowing for banking of domain proficiency results if: 1) it is included in the State plan; 2) capable of differentiating between domains on the state’s ELPA; and 3) it is exercised as an option by the LEA. School districts would retain the authority and flexibility to re-test proficient domains based on professional judgement until such time that overall English proficiency is determined.

The Council recommends inserting a new paragraph (3) in subsection 200.16(b) as follows: “(3) With respect to an English learner who has achieved proficiency on any of the domains of English language acquisition, the SEA and the applicable LEA may retain the individual domain proficiency results in subsequent years until the English learner achieves proficiency in all domains, provided that the SEA includes retention of domain proficiency results in the State Plan and assures that individual domain proficiency can be determined using the state’s English Language Proficiency Assessment”; and renumber proposed paragraphs (3) and (4) as paragraphs (4) and (5).

English Learner Proposed Regulations Requiring Substantial Revision

Ensure in final regulations that English language development and/or bilingual education services are **not** denied to English Learners who may be exited prematurely from ESEA Title III programs and potentially other programs. Once a student has been “exited” from English learner status under proposed regulations, services under Title III apparently would be withdrawn according to the proposed regulations, since the student would no longer be an English learner. This premature exit determination, however, may affect programs, services, funding or federal compliance beyond ESSA accountability. More importantly, a “proficiency” score on the state’s English Language Proficiency Assessment (ELPA) may not necessarily correlate with success in mastering academic content on college and career-ready standards. ELs that are exited based solely on an ELPA score often will not have the academic English skills needed to meet state content standards. Such premature exiting of students without continuing to support English language development could impede the content achievement of

these students. The EL entrance, exit, and timeline provisions of ESSA, originally developed under the Senate’s Every Child Achieves Act (S. 1177), were adopted in the ESSA Conference Report (see Title III – English Learner Note #35 of House Report 114-354). The intent of that Senate statutory language is reflected in Senate Committee Report 114-231 on page 40, stating that: “The committee also recognizes that LEAs may exercise discretion in continuing to provide services to students who are no longer classified as English learners, particularly when it comes to students in dual language immersion programs or students who may continue to need language support.” The final regulations should reflect the intent of these EL provisions, as well as ensure that students are not removed from services prematurely and unnecessarily.

The Council recommends including an additional subparagraph (v) in sec. 299.19(c)(3) to reflect the intent of Congress as follows: “and (v) allow for local educational agencies to exercise discretion in continuing to provide services to students who are no longer classified as English learners but who may continue to need language support in order to succeed in content area coursework and meet state academic standards.” Note: Other recommended revisions in the entrance and exit requirements of the proposed regulations are enumerated in the next Council comment.

Revise rigid proposed regulations that will short circuit instructional decision-making on ELs, and restrict the measures, indicators, and judgements of educators in determining eligibility and services for ELs.

The proposed regulations will likely result in rigid statewide “one-size-fits-all” approaches to the identification and exiting of ELs, damaging the academic potential of many students with widely diverse backgrounds and skills. The current collaborative and personalized nature of identification and exiting decisions across most of the Great City Schools -- as cited in the Council’s 2016 ELL Survey above -- will be reversed by the Department’s proposed regulations. Individualized instructional decision-making will be inhibited by federal prohibitions and constraints on the use of multiple measures and indicators of student skills not included in the statute. Instead of providing flexibility in state and local instructional procedures, the proposed regulations impose a new federal requirement prescribing statewide “criteria” for entrance and exit decisions for ELs and apply them to every school district in a state. Under the proposed regulations, the state must set not only the statewide “procedures” (as required by the Act), but also statewide “criteria” (not required by the Act) with no local options on the exiting students from program services (see page 34586 of the May 31, 2016 Federal Register). Moreover, the proposed regulations mandate only “objective” criteria, apparently designed to remove any professional judgement from the process. In fact, the proposed regulations also preclude using any academic content assessments in the process of determining whether an EL should be exited from English Learner status – discounting any practical demonstration of a student’s ability to handle core curricular content in English. Instead of considering multiple measures and indicators of English language skills along with the best collaborative judgement of teachers, assessment experts, and support services staff, the proposed regulations seek to impose rigid one-size-fits-all criteria across each state for this widely diverse group of students. While state exit procedures under ESSA should be anchored by a proficient or higher score on the state’s ELPA, other measures and indicators should be used to ensure that academic-level English skills have also been developed. If not, the result of this proposed regulation may be that ELs are permanently condemned to not meeting college and career-ready standards. Performance data from the Great City Schools has consistently demonstrated that when English learners develop real academic English language skills their academic performance typically exceeds the achievement of their non-EL peers. The Council, therefore, is deeply concerned that these proposed regulations constitute a step backwards in the achievement of English learners. This approach to providing instructional services to English learners is not required under the Act and warrants substantial revision.

The Council recommends revising sec. 299.19(c)(3) as follows:

- 1) in the material preceding subparagraph (i) strike “These procedures must include valid and reliable, objective criteria that are applied consistently across the State. At a minimum, the standardized exit criteria must --” and insert “These procedures must be applied consistently across the State and must --”;
- 2) strike subparagraph (ii);
- 3) strike subparagraph (iii);
- 4) renumber subparagraph (iv) as subparagraph (ii); and

- 5) add a new subparagraph (iii) to read “and (iii) allow for local educational agencies to exercise discretion in continuing to provide services to students who are no longer classified as English learners but who may continue to need language support in order to succeed in content area coursework and meet state academic standards.”

Revise the proposed department regulations to reinstate the statutory-specific, progress-based accountability indicator for English language proficiency with an appropriate timeline.

The long-term goals and measures of interim progress required for the English Language Proficiency Indicator under the proposed regulations include both “progress” and “attainment” factors (similar to the repealed Title III AMAO 1 and AMAO 2 requirements under NCLB). The ESSA statutory language, however, requires only “increases in the percentage of students making progress in achieving English language proficiency, as defined by the State and measured by the state English Language Proficiency Assessment” (ELPA) within a state-determined timeline. The authority of the states to set these required ELP goals and interim measures based solely on ELP progress under the actual language of the Act would apparently be restricted under proposed Department regulations. Since a progress-based (AMAO 1-type) indicator appropriately would capture students moving from below-proficient levels to proficient or above-proficient levels, there is little necessity to impose an attainment-based (AMAO 2-type) measure. ESSA requires that States establish a timeline for progressing to proficiency, which could be a specified number of years (e.g. five years). Yet more appropriately, the timeline could also be a range of years (e.g. five to seven years), as reflected in most English language development studies. The final regulations should not specify the state-determined timeline or federally-set maximum number of years – ESSA left those decisions to states with local consultation.

The Council recommends revising sec. sec. 200.13(c), and sec. 200.14(b)(4) to more appropriately reflect ESSA language as follows:

- 1) in sec. 200.13(c)(1) strike “English learners toward attaining” and insert “increasing the percentage of English learners making progress in achieving”;
- 2) in sec. 200.13(c)(2)(i)(B) strike “Attain English language proficiency within a period of time” and insert “Progress toward English language proficiency within a state-determined period of time, which may include a range of years.”
- 3) In sec. 200.14(b)(4), strike “objective and” in subparagraph (ii); and in subparagraph (iii) strike “attaining” and insert “making progress in achieving”.

Allow states to include four-year former ELs in the Graduation Rate Indicator, the Other Academic Indicator, the School Quality Indicator, and the 95% Participation Rate Factor, in addition to the Academic Achievement Indicator. The proposed regulatory prohibition on including former ELs in the EL subgroup for the purposes of determining and reporting on the Graduation Rate, Other Academic Indicator, the School Quality Indicator, and the 95% Assessment Participation Rate factor would deny school districts and states the ability to get credit for the overall progress of students who had been identified as English learners. Without taking into account former ELs, the remaining EL subgroup would be -- by definition -- non-proficient in the English language, which would restrict their likelihood to demonstrate knowledge of core subject-matter on tests in English, despite accommodations. Including former ELs in the Academic Achievement Indicator would provide a more complete picture of school-level student performance on this accountability indicator, while school-level EL performance on the other accountability indicators would be inappropriately suppressed without former EL performance results. The Council, however, agrees that the ELP Indicator should not include former ELs in any subsequent school year after attaining English proficiency.

The Council recommends amending sec. 200.16(b) as follows:

- 1) in subparagraph (1)(i) strike “for the purposes of calculating the Academic Achievement indicator” and insert “for the purposes of calculating and reporting accountability indicators, with the exception of the English Language Proficiency Indicator.”; and
- 2) in current paragraph (1), strike subparagraph (ii), and renumber accordingly.

The Council strongly recommends that the Department make substantial changes to its proposed regulations. Revisions would allow better instructional decision-making and more appropriate student eligibility, exit, and service delivery determinations than what is proposed in the NPRM. These regulations would actually harm students.

If there are question or clarifications needed based on these comments, please feel free to contact me at mcasserly@cgcs.org, Jeff Simering at jsimering@cgcs.org or Gabriela Uro at guro@cgcs.org.

Sincerely,

A handwritten signature in black ink that reads "Michael D. Casserly". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael Casserly
Executive Director