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COUNCIL OF THE GREAT CITY SCHOOLS
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Comments on NPRM for ESEA, as amended by ESSA – Accountability and State Plans

August 1, 2016

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The Council of the Great City Schools, the coalition of the nation's largest central city schools districts, submits this second set of comments on regulatory issues contained in the May 31, 2016 Notice of Proposed Rulemaking (NPRM) on ESSA Accountability and State Plans. Please note that the Council submitted earlier comments on English Learner issues on July 31.

The Every Student Succeeds Act (ESSA) passed in 2015 with overwhelming support, including support from state and local educational agencies that bear the primary responsibility for implementing its provisions. Some 15 years ago, the No Child Left Behind Act (NCLB) was enacted with narrower support that did not include state and local practitioners except for the support of the Council of the Great City Schools. Unfortunately, the flaws in the NCLB accountability framework and an overreaching set of regulatory requirements resulted in growing state and local opposition, the over-identification of "failing" schools, the exploitation of available loopholes to avoid accountability, and ultimately the need to waive its main accountability and school improvement provisions.

At the initial public hearing on ESSA regulations in January 2016 at the Department of Education, the Council encouraged the agency to exercise restraint in issuing rules on implementing the Act. The new Act establishes a substantial array of new responsibilities for states and school districts, including a new system of school differentiation and accountability, multiple new performance indicators, a new set of tiered improvement and interventions actions, and new reporting requirements.

As the ESSA conference committee agreement was being finalized, an unspoken expectation emerged that more schools would likely be identified for improvement measures than under the current NCLB waiver regime. However, the new draft regulations propose even more requirements than the conference agreement, which will not only complicate state and local implementation but may overwhelm state and local capacity to effectively manage the new system of tiered intervention. The proposed regulations, particularly in sections 200.14, 200.15, 200.18 and 200.19, in fact, may result in the over-identification of schools, and quickly erode support for the new reauthorization--unfortunately reminiscent of NCLB.

The Department has the opportunity to finalize regulations that will facilitate the effective implementation of the new Act and avoid unnecessary regulatory burdens that will not add to the quality of teaching and learning in our schools. In that context, the Council offers a pragmatic set of regulatory comments and recommendations designed to launch ESSA in an effective manner, maintaining the intended focus on improving academic achievement for disadvantaged students and providing flexibility for schools as they develop strategies to effectively meet student needs.

Comments and Recommendations

Retain the State Plan Requirement for Describing How Waivers of the 40 Percent Schoolwide Program Poverty Threshold, If Applicable, Would Be Reviewed and Approved by the SEA.
For states that decide to offer waivers of the 40 percent schoolwide-program poverty threshold, the proposed regulations [sec. 299.19(c)] properly require a description of the waiver process and the criteria used in the state plan along with a description of how the needs of targeted students under Title I will continue to be met. The Council suggests clarifying that state waivers are discretionary, and states not offering waivers would not be required to address this planning requirement.
Recommendation: In sec. 299.19(c), after "the Act" insert ", if applicable, and".

Retain the Subgroup N-Size Regulation for Accountability and Reporting.
The Council consistently has supported the broad inclusion of all students, including major subgroups of students, in accountability and reporting requirements. Various statistical manipulations have been used, primarily during implementation of NCLB, to exclude sizeable numbers of students from accountability and public reporting. Large subgroup N-sizes have been a traditional method of evading accountability by small and non-diverse schools, and should be prohibited in state plans. ESSA requires an explanation in the state plan of the necessity and statistical basis for the statewide N-size, including for subgroups and how personally-identifiable information will be protected. Congress also included a prohibition in ESSA on prescribing a federally-established N-size. The proposed Department regulation requires a statistically sound basis for a state-determined N-size, but also establishes a maximum N-size of 30 unless the state provides a justification for exceeding 30. Lower N-sizes are also allowable. The Council finds that distinctions between the statutory terms "description" and the regulatory "justification" are inconsequential. Strict scrutiny of N-sizes in excess of 30, based on operational necessity and statistical soundness, is reasonable and can be supported by the Council.
Recommendation: Retain the sec. 200.17(a)(2)(iii).

Substantially Revise and Clarify Regulatory and Compliance Responsibilities for the 95 Percent Assessment Participation Rate Requirement.
During ESSA deliberations, the Council supported maintaining the grade 3-8 and once in high school annual assessment regiment. The Council believes that all students in applicable grades should be tested, as well as provided appropriate accommodations as necessary. Nonetheless, the "opt-out" movement has complicated the concept of universal testing. And, ESSA allows state and local law to determine assessment "opt-out" options, as well as requiring LEAs to inform parents annually of the availability of information on such laws and policies. Although ESSA requires each state to annually assess 95 percent of all students and 95 percent of each subgroup, and to factor this requirement into each state's accountability system, ESSA does not specify how this factor will be included or weighted in the state accountability system. In contrast to the statutory requirements, the proposed Department regulations [sec. 200.15(b)(2)] require new sanctions for schools failing to meet the 95 percent mandate for all students or individual subgroups beyond merely losing "points" under the state accountability system, as follows:

- receiving a lower summative school rating;
- automatically assigned the lowest Academic Achievement performance level;
- identified for Targeted Support and Improvement; or
- other rigorous state action

The proposed Department regulation [sec. 200.15(c)] also creates new Participation Rate Improvement Plans for LEAs and schools failing to meet the requirement.

The Council does not support the "one of four" administratively-mandated regulatory sanctions/actions for failing to meet the 95 percent requirement. The statutory language is entirely sufficient in directing states to determine how to include the 95 percent requirement into the state accountability system. Moreover, the Council suggests a regulatory clarification that states have the flexibility to vary the manner and weight given to the 95 percent participation rate factor, if failure to meet the requirement results from "opt-out" students. The Council contends that sanctions for missing the 95 percent participation rate due to parental "opt-outs" should be less severe than accountability consequences for inadequate assessment rates. In any case, assessing 95 percent of applicable students remains an ESSA statutory requirement, as well as an accountability factor. On further examination, the "one of four" sanction/actions language under the proposed regulations is actually unnecessary and does not need to be included, since failing to meet the requirement – or any other ESEA requirement -- will be subject to state and/or federal compliance remedies, which may include a participation-rate improvement plan or other actions.

Recommendations:

1) *In sec. 200.15(b)(2) strike "system of annual meaningful differentiation" and all that follows in paragraph (2), and insert "system of accountability, and may consider the effect of students opting-out of assessments in accordance with state or local law and policy in how this requirement is factored into the state accountability system.".*
2) *In sec. 200.15(b) insert a new paragraph (3) as follows: "(3) Ensure that missing the 95 percent student participation requirement, for all students or for any subgroup of students in a school, results in a finding of noncompliance."*
3) *In sec. 200.15 strike subsection (c) and redesignate subsection (d) as subsection (c).*

Revise ESSA Regulatory Timelines for More Effective Implementation.

The submission of state plans by March 2017 or July 2017 with state assurances due in March 2017 will provide a short lead-time between the publication of final regulations and the federal review of state implementation plans. It is important, therefore, that federal regulatory timelines accommodate preliminary tasks such as information dissemination, stakeholder engagement, preparation, staffing, and planning that is necessary for school-level implementation of the new law. The Council supports the "planning year" option under sec. 200.21(d)(5) and 200.22(c)(5), and the recognition that federal review and approval of state plans in 2017 may not allow for local-level implementation in school year 2017-18. Unfortunately, there are so many differing timelines and exceptions affecting ESSA implementation that clarification in the final regulations or in fact sheets, FAQs, or guidelines will be sorely needed. For example, it would appear that Additional Targeted Support Schools are not required to be identified for school year 2017-18, and the three-year timeframe for school-level plan implementation prior to triggering Comprehensive Improvement status would begin in school year 2018-19 -- but the regulatory language in sec. 200.19(d)(1)(iii) is not entirely clear. A comprehensive U.S. Department of Education ESSA Implementation Table of Timelines would be immensely helpful.

The new performance indicators in the state accountability systems will likely require collection of school-level performance data that is not currently collected or available in many states. As a result, the proposed regulations requiring the identification of schools for Comprehensive Support and Improvement by school year 2017-18 without complete data on the new performance indicators has sparked widespread criticism [sec. 200.19(d)(1)(i)]. The proposed regulation [sec. 200.19(d)(2)] requiring the use of old NCLB performance data from school year 2016-17 for the new accountability system is rightly questionable. Yet, waiting for multiple years of data to be collected on the new ESSA performance indicators is also unacceptable and could unduly delay implementation of critical components of the new Act. A consensus has been forming to extend interventions in NCLB priority and focus schools for school year 2017-18, and initiate identification of Comprehensive and Targeted Support and Improvement Schools in school year 2018-2019. No consensus, however, has emerged to require identification of schools having Consistently Underperforming Subgroups of students with only two years of performance

data. Two years of inadequate performance data does not appear to meet a reasonable interpretation of "consistent" low performance, while a minimum of three year of inadequate results would provide a more rational basis for identification and intervention. States may still struggle with having complete ESSA indicator data beginning with school year 2017-18, while also using older, incomplete indicator data from prior years. But, starting the new ESSA accountability system in school year 2018-19 under the final regulations would be seem to be a reasonable way to proceed.

The Council is unconcerned that the new ESSA system may require multiple years to fully implement, and may not be fully launched during the four-year ESSA authorization period (e.g., Additional Targeted Support Schools being identified for Comprehensive Support and Improvement after implementation of a three-year plan). Since most ESEA reauthorization periods are extended for a number of years before rewritten by Congress, there is no need to accelerate implementation timelines as proposed in sec. 200.19(d)(1)(i).

Recommendations:

1) *Issue a comprehensive U.S. Department of Education ESSA Implementation Table of Timeline as soon as possible.*
2) *Retain the "planning year" option in sec. 200.21(d)(5) and 200.22(c)(5).*
3) *In sec. 200.19(d)(i) strike "2017-2018 school year, except" and insert "2018-2019 school year, and".*
4) *In sec. 200.19(d)(1)(iii) strike "2017-2018 school year" and insert "2018-2019 school year".*
5) *In sec. 200.19(d)(2) strike "2016-2017 school year" and insert "2018-2019 school year"; and strike "2017-2018 school year" and insert "2018-2019 school year".*
6) *In sec. 200.19(d) add a new paragraph (3) as follows: "(3) A state must use data on performance indicators under sec. 200.14 for any school year beginning after 2017-2018, and may use data from preceding schools year in conjunction with 2017-2018 school year data to differentiate and identify schools for support and improvement."*
7) *In sec. 200.19(d) add a new paragraph (4) as follows: "(4) A state must continue to require improvement and intervention activities for schools identified in the 2016-2017school year that have yet to meet applicable exit criteria through the 2017-2018 school year.*

Revise Proposed Regulations for the ESSA Accountability and Differentiation Systems

Academic Achievement Indicator

Disadvantaged students who comprise the vast majority of students enrolled in the Great City Schools often begin school with academic-readiness deficits. The Council seeks to ensure that states retain sufficient flexibility in their school accountability systems to properly reflect the progress made by these students. The adoption of a growth indicator for high schools and elementary and middle schools under the ESSA regulations should not restrict the scope of a state's Academic Achievement Indicator to only proficient and above scores on the state assessment, and should allow for partially proficient scores or attainment of higher level scores as well.

Recommendation: *In sec. 200.13 (a) insert a new paragraph (3) as follows: "(3) In determining school performance under paragraph (a)(1) of this section, a State may take into account assessment results above and below the proficiency level and improvement across performance levels or scale scores."*

School Ratings

The proposed regulations requiring states to establish at least three performance levels for each indicator, resulting in to a distinct rating for each school indicator is reasonable. However, establishing three performance levels for each indicator could result in significant over-identification of schools for Targeted Support and Improvement, while five levels would provide for further differentiation and more in-depth information on which schools and students may be struggling. The over-identification of schools

contributed to undermining national support for NCLB as thousands of schools were added each year to the list of failing schools. The Department should be cautious in its final regulations not to replicate the over-identification mistakes of NCLB and unintentionally undermine ESSA implementation.

The proposed Department regulations also require states to determine a "Single Summative Rating" for each school [sec. 200.18(b)(4) and (c)], which could be a particular index score, performance category, A to F grade, or other rating taxonomy. This proposed regulation has received widespread criticism for restricting the design of state accountability systems from using multiple measures or dashboard approaches. A number of Great City Schools are already working with their states on developing accountability systems that may involve unique combinations of multiple measures and indicators. There is an expectation that state accountability systems under ESSA will evolve into more sophisticated designs and therefore should not be unnecessarily constrained by federal regulations. A single summative rating would be one option allowable under the Act, while other options should be allowed as well, provided that the state system ultimately sets out a transparent and understandable method for delineating levels of school performance and identifying schools for the various categories of school improvement.
Recommendations:

1) *In sec. 200.18(b)(4) strike "to describe a school's summative performance".*
2) *In sec. 200.18(c) strike "a single summative rating for each school," and insert "a single summative rating or other rating method that describes overall school performance in an understandable manner and allows for identification of schools based on the requirements of section 200.19 through section 200.23,"*

Consistently Underperforming Subgroups

Although ESSA delegates to states how to differentiation schools with Consistently Underperforming Subgroups, the proposed Department regulations require States to include one or more of the following federal criteria in a state's differentiation of schools for Targeted Support and Improvement actions [200.19(c)(3)]:

- subgroups not meeting interim progress measures or are not on-track for long-term goals;
- subgroups at lowest performance level [Note: if states choose only three performances levels, this will result in large numbers of schools identified] or particularly low on a measure (e.g., math in Academic Achievement);
- subgroups at or below a state threshold compared to state average or state highest subgroup;
- subgroups performing significantly below the state average or the highest subgroup resulting in a performance gap among the largest in the state; or
- another definition using 2-year performance results and all performance indicators.

The Council views these proposed federal criteria for defining Consistently Underperforming Subgroups as unwelcome federal micromanagement. The Council recommends that these federally-specified criteria or factors be deleted or reworded as "such as" options. Moreover, since the fifth state option [200.19(c)(3)(v)] actually negates the preceding four "required" options, the use of mandatory regulatory language accompanied by a fifth state-level flexibility option is unnecessary, unwarranted, and confusing.
Recommendation: In sec. 200.19(c)(3) strike everything following "across all LEAs in the State" and insert a period. [In the alternative, in sec. 200.19(c)(3) strike "which must include one or more of the following:" and insert "such as:"]

The proposed regulations require state identification of schools for Targeted Support and Improvement based on Consistently Underperforming Subgroups using "no more than two years" of school performance results. In contrast, ESSA delegates this differentiation task to the states. In practice, "consistent" underperformance generally suggests multiple years of unacceptable results, rather than only two years. Requiring only two years of inadequate performance before triggering Targeted Support and

Improvement could contribute to over-identification of schools in this particular ESSA category and quickly exceed the capacity of states and school districts to manage improvement plans and interventions in so many schools – much like NCLB.
Recommendation: In sec. 200.19(c)(1) strike "over not more than two years" and insert "not less than three years".

Finally, the proposed regulations lack clarity in the terminology used to refer to the various categories of differentiation and school improvement. For example, schools to be identified for Additional Targeted Support appear to be referenced as having either a "chronically low-performing subgroup" [sec. 200.19(a)(3)] or a "low-performing subgroup receiving additional targeted support" [sec.200.19(b)(2)]. Other consistent and distinct terms for improvement categories such as Additional Local Action, More Rigorous State Action, and LEA Improvement Action would be helpful as well.
Recommendation: The Council recommends using consistent terminology such as "chronically low-performing subgroup" for schools that are subject to Additional Targeted Support.

Delete Unauthorized Regulations Assigning Financial Responsibility for Foster Care School Transportation Costs to School Districts.

ESSA requires school districts and local welfare agencies to collaborate on the cost of transportation for foster care students to the School of Origin, apparently including foster students placed outside the jurisdictional boundaries of the school district. The proposed Department regulations [sec. 299.13(c)(1)(ii)] disregard the language of the Act and assign ultimate financial responsibility for these transportation costs to LEAs. In contrast, ESSA does not place the responsibility for the cost of transportation on school districts unless the LEA agrees to assume those costs or any portion of those costs. A more appropriate approach would be issuing non-regulatory guidance to encourage collaboration between local welfare agencies and LEAs on transportation issues as stated in the Act, and encourage the applicable state agencies to help facilitate this interagency collaboration.
Recommendation: Strike sec. 299.13(c)(1)(ii), and rely on non-regulatory guidance to encourage collaboration. [In the alternative, restate section 1112(c)(5)(B)(i) and (ii) of the Act by striking sec. 299.13(c)(1)(ii) and inserting "(ii) The SEA will ensure that children in foster care needing transportation to the school of origin will promptly receive transportation and, if there are additional costs incurred to maintain children in their schools of origin, the LEA will provide transportation if – (A) the local child welfare agency agrees to reimburse the cost of transportation; (B) the LEA agrees to pay for the cost of transportation; or (C) the LEA and the local child welfare agency agree to share the costs of transportation."]

Revise All Evidence-Based Requirements in the Proposed Regulations to Reflect the Statutory Language Without Expansion.

The proposed regulations expand on the evidence-based requirements of ESSA in numerous ways. The ESSA requirements were carefully negotiated in recognition of the limited availability of studies with experimental, quasi-experimental, or correlational designs in elementary and secondary school settings. The proposed regulations ignore the statute in requiring, encouraging, incentivizing, or promoting levels of evidence not required under the Act. Moreover, there is no ESSA requirement that states must establish their own list of evidence-based interventions. In practice, school districts generally do not conduct the type of studies cited above, and typically rely on other analyses and impact evaluations to determine the operational effects of local strategies, activities, and interventions. Even districts with large research and evaluation departments do not undertake experimental, quasi-experimental, or correlational/controlled studies due to the need for withholding or not providing promising educational services to some group of at-risk students for purely research-design purposes. Small school districts have even less capability to meet the four tiers of evidence in sec. 8101(21). The proposed regulations, therefore, may result in school districts expending their own funds to secure external consultants to conduct studies to meet the expanded

requirements of these regulations. The Council underscores that the highest three tiers of evidence in the ESSA definition are required only for state-awarded School Improvement Grants under sec. 1003 of the Act, and should not be expanded into other ESSA activities by administratively-created requirements, including non-SIG funded Comprehensive Support and Improvement Plans, non-SIG funded Targeted Support and Improvement Plans, Additional Local Targeted Actions, More Rigorous State Comprehensive Actions, or priority in SIG funding awards.

Recommendations:

1) *In sec. 200.21(d)(3) strike subparagraphs (i) through (iv); and strike "that –" and insert "that meet the definition of "evidence-based" under section 8101(21) of the Act."*
2) *In sec. 200.22(c)(4) strike subparagraphs (i) through (iv); and strike "that –" and insert "that meet the definition of "evidence-based" under section 8101(21) of the Act."*
3) *In sec. 200.21(f)(3)(iii) strike everything that follows "school day and year)" and insert a period.*
4) *In sec. 200.22(e)(2) strike everything that follows "exit criteria" and insert a semicolon.*
5) *In sec. 200.24(c)(4)(iii)(A) strike "that are supported by the strongest evidence available".*

Reduce the Unauthorized Regulatory Requirements for Reviewing and Addressing State and Local Resource Allocations.

ESSA requires districts to identify resource inequities in schools identified for Comprehensive Support and Improvement and schools identified for Additional Targeted Support through their respective improvement plans, which may include a review of school district and school-level budgeting. In contrast to the statute, however, the proposed regulations require a review of LEA and school-level resources, including per pupil expenditures of federal, state and local resources for both categories of schools [sec. 200.21(d)(4) and 200.22(c)(7)]. The proposed regulations extensively expand the ESSA statutory requirements with an inordinate number of new regulatory requirements, considerations, and unnecessary cross-references. Finally, the proposed regulations also require prioritization in awarding school improvement grants based on state review of LEA and school resource allocations. The Council objects to the Department's efforts through these regulations to directly or indirectly influence the allocation of state and local funds, which is expressly prohibited under ESSA sec. 8527(a). While not as financially disruptive as the Department's "supplement not supplant" proposal, these provisions exceed ESSA authority and represent excessive federal regulation.

Recommendations:

1) *In sec. 200.21(d)(4) strike everything following "resource inequities" and insert "which may include a review of LEA and school-level budgeting;"*
2) *In sec. 200.22(c)(7) strike everything following "low-performing subgroup in the school" and insert "which may include a review of LEA and school-level budgeting;".*
3) *In sec. 200.24(c)(4)(ii) strike "that demonstrates the greatest need for such funds, as determined by the State, and"; and in sec. 200.24(c)(4)(ii) strike clause (B) and insert a new clause (b) as follows: "(B) demonstrating the greatest need for such funds;".*
4) *In sec. 299.19(a)(3) strike "including" and insert "which may include".*

Include Former Students with Disabilities, Former Foster Care Students, and Former ELs in Accountability Indicators including Graduation Rate Cohorts.

Response to Preamble Question: In response to the preamble question (see page 34541 of the May 31 Federal Register) regarding including students who were formerly included in a disaggregated subgroup for a period of time, the Council recommends a consistent policy of including former students with disabilities and former foster care students, in addition to former ELs for a comparable four-year period for all applicable accountability indicators. Including former students with disabilities, former foster care students, and former ELs in their disaggregated subgroup cohorts for graduation rate determinations is particularly important. Inclusion of these students would provide a better snapshot of actual school performance over time.

Delete Regulation Requiring School Districts to Obtain Modifications in Court Desegregation Orders [sec. 200.21(h)].

The Council objects to the proposed regulation requiring school districts to secure desegregation plan modifications in order to allow for the unfettered operation of the optional "public school choice" provision. The regulation is a hold-over from the previous administration and was not actually implemented in practice. The desegregation plans that currently remain in force address critical educational purposes for which optional ESSA school transfers should not interfere. Moreover, a federal regulation without any statutory foundation should not interfere with the proper jurisdiction and orders of federal courts. Requesting judicial modification of court orders should be a discretionary decision by local officials, not a regulatory requirement from the U.S. Department of Education.

Recommendation: In sec. 200.21(h) strike "must petition and obtain" and insert "may petition for".

Ensure that School Improvement Grant Awards under Sec. 1003 of the Act Are of Sufficient Size and Scope to Meet the Needs of the Target Student Population.

The proposed regulations for the award of school improvement grants under sec. 1003 of the Act do not clearly ensure that low-performing schools with large target populations will receive grant amounts that properly reflect the extent and severity of the instructional supports and interventions that are needed. The proposed regulation establishes a minimum grant award, but does not address the common practice under IASA and the initial eight years of NCLB of not providing large schools with appropriate levels of SIG funding. Current appropriations have set a $2 million maximum, which may or may not be appropriate. Nonetheless, some additional considerations in the regulatory language appear warranted.

Recommendation: In sec. 200.24(c)(2)(ii) insert after "award of sufficient size" the following: "(taking into account the number of students to be served, the severity of needs, and the cost of the proposed activities and interventions)"

Reduce the Excessive Regulatory Requirements for Well-Rounded and Supportive Education.

The proposed regulations set out a litany of state plan requirements to describe strategies, rationales, timelines, and uses of state and local funds for a variety of "well-rounded education" activities and "conditions of learning." In contrast, the statute requires SEAs merely to describe how the state will support LEAs – without a laundry list of required activities – to improve school conditions.

Recommendation: In sec. 299.19(a)(1)(iii) strike "School conditions" and insert "Support for LEAs to improve school conditions".

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

Sincerely,

Michael Casserly
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