



July 29, 2016

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

Dear Ms. Miller:

I am writing to provide the comments of the Foundation for Excellence in Education (ExcelinEd) on the U.S. Department of Education's proposed regulations governing accountability and state plans under the Elementary and Secondary Education Act (ESEA) as reauthorized by the Every Student Succeeds Act (ESSA). ExcelinEd is a national nonprofit organization focused on helping states build education systems that ensure each child achieves his or her full potential.

We believe that the Department's implementation of ESSA ought to remain consistent with the bipartisan intent of the legislation: **reducing the federal role in education and providing more authority to states and school systems to develop and adopt innovative approaches to accountability for the performance of all students.**

To that end, ExcelinEd finds numerous provisions to support in the Department's proposal. In many places, the Department's proposed regulations strike an appropriate balance by providing states with enhanced flexibility to design and implement accountability systems that address unique state contexts while ensuring that state systems aim to expand educational opportunities and improve outcomes for all students, including historically underserved or underperforming subgroups. As examples, the provisions on state establishment of long-term goals, interim performance measures, mechanisms for weighting the indicators, and procedures for differentiating school performance strike that balance. In addition, the proposal usefully clarifies a number of terms and concepts that are somewhat vague in the new statute, including the requirement that states' accountability systems generate a single summative rating each year.

However, ExcelinEd has also identified a number of proposed rules that need significant revision. These proposals appear to exceed the statute's requirements; they would also be overly prescriptive and unworkable for our state partners who are committed to establishing powerful, transparent accountability systems and developing innovative ways to hold schools accountable for the performance of all of their students.

Our more detailed comments follow.

## Elements of the Proposed Regulations that ExcelinEd Supports

- **Establishment of goals.** ExcelinEd supports the provisions in §200.13 of the proposed regulations providing states with flexibility in setting their own long-term goals in the three areas called for in the statute (student academic proficiency, high school graduation, and English language proficiency for English learners (ELs)). This flexibility will allow states to select the ambitious but achievable goals that reflect the aspirations of their students, teachers and other stakeholders and their unique workforce needs.
  - The proposal in §200.13(a)(1) and elsewhere also appropriately clarifies that academic proficiency goals must be based on *grade-level* proficiency, which will ensure that states hold schools accountable for helping each student reach this important and rigorous expectation. This clarification will also validate the work of the more than 35 states that have raised their state standards and expectations to true grade-level proficiency over the past several years.
  
- **Single summative rating for schools.** We support the proposed requirement, in §200.18(b)(4), that a state’s accountability system generate a single summative rating of each school’s overall performance. We believe that this is an appropriate interpretation of §1111(c)(4)(D)(I) of the reauthorized ESEA, which clearly implies that states must aggregate school accountability data in order to identify the lowest-performing 5 percent of Title I schools in the state as in need of comprehensive support and improvement.
  - Furthermore, a single summative rating is essential to the transparency of a state’s accountability system, providing a clear and powerful signal to parents and other stakeholders about the overall quality of a school. And parents want that clear signal. In fact, a 2014 national survey by McLaughlin & Associates found that 84 percent of adults support assigning schools a letter grade based on how well they educate their students.
  - Requiring a single summative rating is also consistent with a wide variety of state-designed accountability systems. Currently, nearly all states produce some sort of summative rating, such as colors, stars, or A-F letter grades, all of which would be permissible under the proposed requirement.
  - Some opponents of summative ratings have argued that they are incompatible with evaluating schools based on a dashboard of valuable data on school performance and environment. We wholeheartedly disagree. States can – and should – provide parents with a dashboard of school information data *in addition to* the summative rating that helps parents make sense of all those great data. In fact, a dashboard of data serves as a critical tool for district and school leaders as they identify appropriate interventions and continuously monitor school improvement.
  
- **Non-exhaustive list of consequences for missing the 95 percent participation requirement.** ExcelinEd supports the menu of options (in §200.15(b)(2)) from which states may select when taking actions regarding schools that do not assess 95 percent of all students and 95 percent of students in each subgroup. We agree with the Department that the successful implementation of new accountability systems under ESSA will depend very heavily on a state receiving

information on all students and all subgroups. When a school's opt-out rate is high, it becomes impossible to know whether students, including students in traditionally low-performing subgroups, are being adequately served by that school. (See, Randy E. Bennett, *Opt Out: An Examination of Issues*, April 2016.) Furthermore, high opt-out rates prevent states and LEAs from researching and understanding what works to ensure they invest money only in those policies and programs that improve student achievement.

- We, therefore, find the Department's proposed set of meaningful, rigorous – and optional – consequences for missing the 95 percent requirement highly appropriate. And, we commend the Department for allowing, as one of those options, a state to come up with its own, equally rigorous set of actions rather than implementing one of the three federally identified ones. This reflects an appropriate balance between state flexibility and federal prescription.
- **Parameters around minimum "N size."** We support the proposed requirement (in §200.17(a)(2)(iii)) that states use an N size of no more than 30 for accountability purposes unless they submit a justification to the Department. We agree with the Department that an N size of 30 or less is reasonable; it balances the need to ensure as many students as possible are included in the accountability system with concerns about statistical validity and privacy. States may also opt to use a lower N size for reporting than they do for accountability purposes, which is a strategy we would support. The Department's approach gives states appropriate flexibility by allowing them (under §200.17(a)(3)(v)) to apply to use a higher number if they can demonstrate to the Department that doing so would promote "sound, reliable accountability determinations."
  - Additionally, we support the proposed policy of including, for the purposes of calculating whether the EL subgroup has met the minimum N, the former ELs who a state has decided to continue to include in that EL subgroup.
- **Clarifications around state support and improvement strategies.** ExcelinEd supports the proposed actions to be taken regarding schools identified for comprehensive support and targeted support. We are in general agreement with the language in this area because it clarifies that ESSA authorizes states to take an active role in developing statewide systems of supports and interventions that push low-performing LEAs and schools to adopt rigorous, evidence-based strategies. In particular, we support, the following proposed provisions (some of which are reiterations of the statutory language):
  - the proposed requirement for prompt parental notice that a school has been identified (§200.21(b));
  - the requirement that comprehensive improvement schools implement evidence-based interventions that are supported, to the extent practicable, by the strongest level of available evidence (§200.21(d)(3));
  - the inclusion, in §200.21(d)(3), of "converting the school to a public charter school" as one of the interventions that an LEA may take to improve an identified school;
  - the authorization for state educational agencies to establish lists of state-determined, evidence-based interventions from which LEAs and schools



transparency and make cross-district comparisons more difficult. The regulations should clarify that LEAs must include all expenditures benefiting students in each school, whether allocated at the school-level or not. The proposed regulations also require the use of an October 1 count of students for calculating per pupil expenditures, even though many states use a different and more meaningful way to determine the number of students. The regulations should require LEAs to use the student count the state uses for allocation of state funding.

### **Elements of the Proposed Regulations Where Substantial Changes Are Needed**

Although there is much in the proposed regulations that we believe strikes the appropriate balance and helpfully clarifies ESSA's requirements, we have identified several important provisions that, though well-intentioned, would tie the hands of states wanting to build – or preserve – their own powerful, transparent systems that hold their schools accountable for the success of all students. We believe these provisions must change significantly – or be deleted altogether – if ESSA is to achieve its objectives of ensuring that states help all students reach their full potential.

- **Indicator performance levels.** ExcelinEd opposes the requirement in §200.19(b)(2) that state accountability systems include at least three performance levels for each annual indicator. We believe this proposed requirement has no basis in the statute. It is also inconsistent with the clear bipartisan intent of ESSA: to free states from the one-size-fits-all approach to school accountability that burdened states during the No Child Left Behind (NCLB) era. The requirement that each indicator be broken into performance levels may be appropriate for some indicators in some states' accountability system, but requiring it across all 50 states would be overly restrictive and burdensome for states that wish to implement simple, transparent accountability systems. For example, states like Florida, Mississippi, Arizona, Utah, Oklahoma, Louisiana and Indiana have harnessed the power of a single summative grade to motivate schools and their stakeholders to make real improvements for students. Requiring these states to incorporate indicator achievement levels – for each subgroup – would likely weaken the power of the overall grade. It would also push these states back to an NCLB-like approach of having to make annual determinations about whether each subgroup has met a variety of achievement levels across a variety of indicators, something clearly not envisioned in the statute passed by Congress.
- **Limits on which schools can earn the highest summative rating.** ExcelinEd opposes the prohibition, in § 200.18(d), on a school with a subgroup that is low-performing on a single indicator (that is, a subgroup scoring at the lowest level on that indicator) from earning the state's highest overall performance rating. Like the indicator performance levels, this requirement has no basis in statute and represents an unnecessary intrusion into states' authority to design their own accountability systems.
  - We agree with the statute's requirement that schools with low-performing subgroups be identified for targeted support and improvement and should then implement improvement plans, consistent with the guidelines laid out in the proposed regulations. States should also ensure that parent-friendly school report cards clearly communicate that those schools have been identified, and the reason(s) for that identification.

- However, based on years of work with states and their accountability systems, we believe the restrictions would burden state efforts to build – or preserve – rigorous accountability systems that send powerful and clear messages to parents about school performance. Prohibiting any school that has one low-achieving subgroup out of several, on one annual indicator out of several from earning the highest rating, would lead to an NCLB-type approach that creates diluted incentives for teachers and administrators and is difficult to explain to parents. The proposed rule would also likely force states to adopt very complex business rules for categorizing schools, leading to reduced transparency. We, therefore, urge the Department to drop this requirement.
- **Identification of comprehensive and targeted improvement schools.** ExcelinEd has concerns about the requirements, in §200.19, that states must identify schools for targeted support using no more than two years of data and that targeted support schools would enter comprehensive improvement status if their low-performing subgroups do not significantly improve after three years. Given ESSA’s language that states must differentiate schools with consistently underperforming subgroups “*as determined by the state*” (§1111(c)(4)(C)), it is clear that Congress intended to give states flexibility to determine how many years of data they would take into account when identifying schools and that establishing these timelines is outside the scope of the Department’s authority. Furthermore, imposing these timelines on every state could lead to the over-identification of schools for targeted and comprehensive support. Under ESEA waivers, the Department recognized the threat of over-identification and recommended that each state identify 5 percent of schools as “priority” and 10 percent as “focus” schools. If too many schools are identified – which is what we believe would happen under the Department’s proposed timelines – states will not have sufficient resources to serve the schools that are most in need of federal and state turnaround support.
- **Required minimum resources to support school improvement.** ExcelinEd also opposes the requirement in §200.24(c)(2)(ii) that state allocations of school improvement funds provide at least \$500,000 for each comprehensive improvement school and at least \$50,000 for each targeted improvement school. This proposed requirement, a carry-over from the School Improvement Grants regulations, is overly rigid and does not recognize the diversity of states. For example, some rural states have a large number of, generally small, Title I schools and thus will have a large number of small schools in the 5 percent lowest-achieving Title I schools. In fact, 1 out of 5 schools nation-wide enroll fewer than 200 students. (See, 2013-2014 Common Core of Data, U.S. Department of Education, National Center for Education Statistics.) The Department’s proposal would result in these states having to give a few very small schools much more funding than they could fruitfully use, and at the same time not being able to give the great majority of their comprehensive improvement schools the amount of funding required to implement rigorous, whole-school improvement plans. The proposed rule is also inconsistent with the statutory provision (§1003(b)(1)(A)) that empowers states to choose whether they distribute school improvement funds through formula or competitive grants. We, therefore, recommend that the Department delete these funding requirements.

- **Treatment of charter schools.** ExcelinEd opposes two proposed rules related to charter schools.
  - First, we oppose the language related to charters in §200.23(c)(1), which would allow states, with respect to districts serving a significant number of identified schools, to “take action to initiate additional improvement in any LEA, or in any authorized public chartering agency . . . including in the case of a public charter school, revoking or non-renewing the school’s charter consistent with State charter school law.” This language presumes that state authorizing agencies are subject to federal school improvement requirements, which is not the case unless an agency is also an LEA. In addition, the language could be read as *encouraging* authorizing agencies to revoke the charters of any identified charter school in an LEA serving a significant number of identified schools. While revocation of a charter might be the right approach in some situations, it is certainly not the right approach in all circumstances. Decisions to revoke charters should be dictated by whether an individual school has met the requirements of its individual charter. Therefore, we recommend that the Department clarify that revocation is merely an option which should be determined solely as set forth in state law and the terms of a school’s charter.
  - Second, we oppose the proposed requirement in §200.30(a)(2)(ii) that state and local report cards compare demographic and student achievement data for each charter school with comparable data for the LEA or LEAs from which the school draws a significant portion of its students, or data for the geographic community within which the school is located. Not only would this requirement create a significant burden for states and LEAs (a burden that is not called for in the statute), but it would also likely lead to the dissemination of invalid and misleading data. Charter school data are typically not appropriately compared with data for an entire LEA. There is no natural way to match a charter school with particular schools in the LEA or with a particular geographic community, and demographic and achievement data are typically not available on a geographic area basis within an LEA. There is also no easy way to accommodate the fact that, unlike with the majority of district schools, parents choose their child’s charter school.
- **Requirements for consolidated state plans.** We also oppose a number of the proposed requirements for consolidated state plans. ESSA (§8302(b)(3)) specifies that the Secretary must require states to include in these plans only information that is absolutely necessary for operation of the federal programs. However, the proposal calls for states to provide a large number of descriptions and other information that would be extremely burdensome to collect and prepare (diverting states’ attention from much more important issues) and would be of, at best, uncertain value to the Department’s peer reviewers. Among the provisions we believe are most problematic are the following:
  - The requirement in §299.14(c) that each plan include a six-part description of the state performance management system for each element of the plan. Because the consolidated plan would include approximately 40 elements, this would mean 240 separate descriptions, in addition to other performance management information called for elsewhere in the proposal.

- The requirement in §299.19(a) that the plan include a review, on an LEA-by-LEA basis, of districts’ budgeting and resource allocations in four separate areas (per-pupil expenditures, educator qualifications, access to advanced coursework, and the availability of preschool). In states such as California and Texas – with their 1,059 and 1,241 LEAs, respectively – this would mean 4,236 and 4,960 separate descriptions of district allocations. Even for small states, such as Montana and Nebraska, the numbers would be 1,760 and 2,032, respectively.
- The requirement in §299.19(a)(1)(ii) that the plan include a description of how the state will support a well-rounded and supportive education for all students, broken out to include strategies (and the rationales for those strategies), timelines, and funding sources in at least 17 separate subject areas, for a total of 68 separate descriptions.
- We note that none of the above requirements for consolidated state plans are statutory, and we urge the Department to pare them back substantially and make every effort to minimize the administrative burden on states. As mandated under §8302(b)(3) of the statute, mandatory state plans should require only information that is specified in the statute and truly necessary for administration of the federal programs.

Thank you for the opportunity to comment on these proposed regulations. We appreciate your continued partnership on successful state implementation of ESSA. If we can provide any other information or assistance, please do not hesitate to contact me.

Sincerely,



Patricia Levesque  
Chief Executive Officer  
Foundation for Excellence in Education