ESSA Implementation Update: Key Provisions and Proposed Regulations School Attorneys Need to Know

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Presented at the 2016 School Law Practice Seminar, October 20-22, Portland, OR

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# ESSA Summary for School Attorneys

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# ESSA Summary for School Attorneys

*Erin D. Gilsbach, Esq.*

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HISTORY OF THE LAW

On December 10, 2015, President Obama signed into law the Every Student Succeeds Act. The year 2015 marked the 50th anniversary of the signing of the original Elementary and Secondary Education Act (ESEA) into law by President Lyndon Johnson.\(^1\) In a climate of great polarization among the political parties in Washington, D.C., Congress succeed in coming together with bipartisan support for the ESSA.\(^2\) Those with insider knowledge of the struggle to fix NCLB over the past eight years know that the bipartisanship was nothing short of miraculous. NCLB, which had long overstayed its welcome, had officially expired in 2007, but Congress extended it without amendment every year through 2015 through annual appropriations bills.

The ESSA is not without its detractors either, though. While the ESSA’s emphasis on state and local control has been generally applauded by many in the education community, some still feel that the ESSA is too closely aligned with its predecessor, NCLB, and is far too rooted in punitive measures, such as teacher and student failure to achieve specific targets, regardless of who sets them, rather than aiming to seek, understand, and address “the root causes of educational inequality.”\(^3\)

Still, most feel that, while not perfect, it is a welcome change from the inflexible and unyielding nationwide mandates under NCLB, such as federally-established performance goals, such as AYP. The "Race to the Top" grants that President Obama later put into place in an attempt to fix the system only served to compound the problem, effectively tying the student accountability mechanisms to teacher evaluations.\(^4\) Similarly, the Obama Administration’s NCLB mandate waivers, while intended to offer relief under a law that was not always equitable, had the effect of further reinforcing the message that the framework of the law itself needed to be changed.\(^5\)

Although the emphasis of state and local control is at the very heart of the ESSA, after even just a brief reading of some of the provisions, it becomes clear that while the return of the education process to

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\(^1\) See David A. Gamson’s *The ESEA at Fifty: Aspirations, Effects, and Limitations*, 1(3) RUSSEL SAGE J. OF THE SOC. SCI 1 (2015), for a comprehensive history of that law.

\(^2\) The ESSA passed by a vote of 359-64 in the House and 85-12 in the Senate.


local control is a clearly stated emphasis of the law, what emerges from the wording is what cannot be described in any other way but a fundamental mistrust of the federal government in educational policy and decision-making. As will be discussed below, the ESSA is unique in its language proscribing the federal Secretary of Education from acting outside of his or her scope and explicitly and significantly limiting his or her role and authority with regards to the nation’s educational decision-making.

**THE ESSA IN A NUTSHELL: AN OVERVIEW**

Many organizations have issued excellent summaries of key points of the new law, including the National School Boards Association,6 Education Commission of the States,7 and the National Conference of State Legislatures.8 However, the full text of the ESSA spans a whopping 1,061 pages, so reading any type of summary or overview, including this one, is analogous to reading the Cliffs’ Notes® version of *War and Peace*. (Many people find a comparison to the original ESEA, which was only 32 pages long, a fitting sign of the times.) It is likely that new legal and educational issues will continue to emerge for many years to come as they become apparent through the actual implementation of the law and through litigation and appeals at both the state and federal levels. This guide was compiled to give school attorneys and school leaders a quick reference guide to the law and its requirements, as well as some of the legal and practical issues that have already been raised nationally. This resource does not address those items in the law that were left untouched from the previous law. It is intended only to highlight key changes made by the ESSA. While it was compiled as a resource for the NSBA’s Council of School Attorneys (COSA), any errors and/or opinions that may be found are exclusively that of the author and not of COSA or the NSBA.

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CITATION: 20 USC §§ 6301-6576.

STATED PURPOSE: “to provide all children with an opportunity to receive a fair, equitable, and high-quality education.”

Authorization Period:
Fiscal Year 2017 – Fiscal Year 2020

Allocation of Title II Funds:

(a) Improving basic programs
   (1) $15,012,317,605 for fiscal year 2017;
   (2) $15,457,459,042 for fiscal year 2018;
   (3) $15,897,371,442 for fiscal year 2019; and
   (4) $16,182,344,591 for fiscal year 2020.

(b) State assessments
   $378,000,000 per year

(c) Education of migratory children
   $374,751,000 per year

(d) Prevention/intervention programs for neglected, delinquent, or at-risk children/youth
   $47,614,000 per year

(e) Federal activities
   $710,000 per year

Effective Dates:
Original ESSA language mandated that requirements go into effect for 2016/2017 school year, but Congress, in its appropriations bill, delayed the timeline to the 2017/2018 school year for most items.

Competitive grant programs are effective beginning with the 2017 fiscal year funding.

All waivers under the former law were null and void as of August 1, 2016.

Topics Included:

- State Plans
- State and LEA Report Cards
- Assessments

9 20 USC § 6301.
Title II – Preparing, Training, and Recruiting High-Quality Teachers, Principals, or Other School Leaders

**CITATION:** 20 USC §§ 6601–6692

**STATED PURPOSE:** “to provide grants to State educational agencies and subgrants to local educational agencies to— (1) increase student achievement consistent with the challenging State academic standards; (2) improve the quality and effectiveness of teachers, principals, and other school leaders; (3) increase the number of teachers, principals, and other school leaders who are effective in improving student academic achievement in schools; and (4) provide low-income and minority students greater access to effective teachers, principals, and other school leaders.”

**Authorization Period:**
2017-2020

**Allocation of Title II Funds:**

**Part A – Allocation of Funds to SEAs and LEAs**

- $2,295,830,000

**Part B – Allocation of Funds for “National Activities”**

- $468,880,575 for each of fiscal years 2017 and 2018;
- $469,168,000 for fiscal year 2019; and
- $489,168,000 for fiscal year 2020.

Specific allocations of funds reserved under the ESSA for the “national activities,” set forth in Part B of Title II, are as follows:

- Teacher and School Leader Incentive Program – 49.1% (2017-2019) and 47% (2020)
- Literacy Education for All, Results for the Nation – 34.1% (2017-2019) and 36.8% (2020)
- American History and Civics Education – 1.4%
- Programs of National Significance (PNS) – 15.4% (2017-2019) and 14.8% (2020)
  - Supporting Effective Educator Development – not less than 74% PNS funds allocated
  - School Leader Recruitment and Support – not less than 22% of PNS funds allocated
  - Technical Assistance – not less than 2% of PNS funds allocated

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10 20 USC §6601.
STEM Master Teacher Corps – not more than 2% of PNS funds allocated

**Topics Included:**
- Professional Development
- Teacher and School Leadership Training Programs
- Literacy
- Technical Assistance

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**Title III – Language Instruction for English Learners and Immigrant Students**

**CITATION:** 20 USC §§ 6801–7014

**Stated Purpose:**

The law sets forth the following purposes for this section:

1. to help ensure that English learners, including immigrant children and youth, attain English proficiency and develop high levels of academic achievement in English;
2. to assist all English learners, including immigrant children and youth, to achieve at high levels in academic subjects so that all English learners can meet the same challenging State academic standards that all children are expected to meet;
3. to assist teachers (including preschool teachers), principals and other school leaders, State educational agencies, local educational agencies, and schools in establishing, implementing, and sustaining effective language instruction educational programs designed to assist in teaching English learners, including immigrant children and youth;
4. to assist teachers (including preschool teachers), principals and other school leaders, State educational agencies, and local educational agencies to develop and enhance their capacity to provide effective instructional programs designed to prepare English learners, including immigrant children and youth, to enter all-English instructional settings; and
5. to promote parental, family, and community participation in language instruction educational programs for the parents, families, and communities of English learners.\(^{11}\)

**Authorization Period:**

2017-2020

**Allocation of Title III Funds:**\(^{12}\)

- $756,332,450 for fiscal year 2017;
- $769,568,267 for fiscal year 2018;
- $784,959,633 for fiscal year 2019; and

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\(^{11}\) 20 USC §6812.

\(^{12}\) 20 USC §6801.

Topics Included:

- English Language Learners
- Immigrant Students
- Native American / Alaska Native / Puerto Rican Students and Language Instruction
- Language Acquisition Instruction Professional Development

**Title IV – 21st Century Schools**

**CITATION:** 20 USC §§ 6601–6692

**STATED PURPOSE:** “to provide grants to State educational agencies and subgrants to local educational agencies to-- (1) increase student achievement consistent with the challenging State academic standards; (2) improve the quality and effectiveness of teachers, principals, and other school leaders; (3) increase the number of teachers, principals, and other school leaders who are effective in improving student academic achievement in schools; and (4) provide low-income and minority students greater access to effective teachers, principals, and other school leaders.”

**Authorization Period:**

2017-2020

**Allocation of Title IV Funds:**

- $1,650,000,000 for fiscal year 2017
- $1,600,000,000 for each of fiscal years 2018 through 2020.

Topics Included:

- Block Grants
- Technology
- Charter Schools
- Magnet Schools
- Family Engagement

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13 20 USC §6601.
14 20 USC §7305a.
Title V – Flexibility and Accountability

**CITATION:** 20 USC §§ 7305 – 7372

**STATED PURPOSE:** “to allow States and local educational agencies the flexibility to target Federal funds to the programs and activities that most effectively address the unique needs of States and localities.”

Authorization Period:
2017-2020

Allocation of Title V Funds:
- $169,840,000 for each of the fiscal years 2017 through 2020

Topics Included:
- Small, Rural School Achievement

Title VI – Indian, Native Hawaiian, and Alaska Native Education

**CITATION:** 20 USC §§ 7401 – 7492

**STATED PURPOSE:** “It is the purpose of this part to support the efforts of local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities--

(1) to meet the unique educational and culturally related academic needs of Indian students, so that such students can meet the challenging State academic standards;

(2) to ensure that Indian students gain knowledge and understanding of Native communities, languages, tribal histories, traditions, and cultures; and

(3) to ensure that teachers, principals, other school leaders, and other staff who serve Indian students have the ability to provide culturally appropriate and effective instruction and supports to such students.”

Authorization Period:
2017-2020

Allocation of Title VI Funds:
- Subpart 1 – Formulation of Grants to Agencies
  - $100,381,000 for fiscal year 2017,
  - $102,388,620 for fiscal year 2018,
$104,436,392 for fiscal year 2019, and
$106,525,120 for fiscal year 2020.

- Subpart 2 - Special Programs and Projects To Improve Educational Opportunities for Indian Children
  - $17,993,000 for each of fiscal years 2017 through 2020.
- Subpart 3 – National Activities
  - For the purpose of carrying out subpart 3, there are authorized to be appropriated $5,565,000 for each of fiscal years 2017 through 2020.

Topics Included:
- Indian, Native Hawaiian, and Alaska Native Education

**Title VII – Impact Aid**

**Citation:** 20 USC §§ 7701 - 7714

**Stated Purpose:** “In order to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that promotes control by local educational agencies with little or no Federal or State involvement, because certain activities of the Federal Government, such as activities to fulfill the responsibilities of the Federal Government with respect to Indian tribes and activities under section 4001 of Title 50, place a financial burden on the local educational agencies serving areas where such activities are carried out, and to help such children meet the same challenging State academic standards, it is the purpose of this subchapter to provide financial assistance to local educational agencies that—

1. experience a substantial and continuing financial burden due to the acquisition of real property by the United States;
2. educate children who reside on Federal property and whose parents are employed on Federal property;
3. educate children of parents who are in the military services and children who live in low-rent housing;
4. educate heavy concentrations of children whose parents are civilian employees of the Federal Government and do not reside on Federal property; or
5. need special assistance with capital expenditures for construction activities because of the enrollments of substantial numbers of children who reside on Federal lands and because of the difficulty of raising local revenue through bond referendums for capital projects due to the inability to tax Federal property.”

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19 20 USC §7701.
Authorization Period:
2017-2020

Allocation of Title VII Funds:

- Payments for Federal acquisition of real property
  - $66,813,000 in 2017 through 2019, and
- Basic payments; payments for heavily impacted local educational agencies
  - $1,151,233,000 in 2017 – 2019, and
- Payments for children with disabilities
  - $48,316,000 in 2017 – 2019, and
- Construction
  - $17,406,000 in 2017 – 2019, and
- Facilities maintenance
  - $4,835,000 in 2017 through 2019, and
  - $5,210,213 in 2020.

Topics Included:
- Children of Armed Forces
- Children Residing on Indian Lands
- Students with Severe Disabilities who are Indian, Native Hawaiian, Alaska Native, or Students who Reside on Federal Land

Title VIII – General Provisions

CITATION: 20 USC §§ 7801 – 7872

STATED PURPOSE: None.

Topics Included:
- Fund Flexibility
- Coordination of Programs
- Waivers
- Approval/Disapproval of State and LEA Plans

20 20 USC §7492.
- Private Schools
- Teacher Liability Protection
- Zero Tolerance – Tobacco and Guns
  - Transfer of School Disciplinary Records
  - Unsafe School Choice Option
- Numerous Miscellaneous Provisions
  - School Prayer
  - Prohibition on Aiding and Abetting Sexual Abuse
  - Civil Rights
  - Promise Neighborhoods
  - *many others...*

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**THE REGULATORY PROCESS**

Generally, once a statute is passed, it is passed on to the applicable state or federal agency to promulgate implementing regulations, which usually provide clarity and procedural detail to the framework of the law set forth in the statute. The agency in question drafts proposed regulations, which are then published in draft form as a formal Notice of Proposed Rulemaking (NPRM). That publication begins a comment period which lasts for a specific number of days (generally 60 or 90), during which time stakeholders and interested parties can provide public comment to the federal agency regarding the draft rules. Once the comment period has ended, the agency reviews all of the comments, makes any changes it deems necessary, and then re-issues the rules in final form with a discussion of some of the comments that it received and why it did or did not make changes suggested by the commenters. Upon publication of that document, which is called a Final Rule, the regulations are officially finalized and become effective either immediately or upon a specific effective date indicated in the Final Rule.

In addition to the typical rulemaking process, a law can require heightened requirements, restrictions, and/or specifically-designated timelines. The ESSA does so, setting forth specific requirements for the regulatory process for both the federal and state regulatory processes under Title I\(^2\) and for the federal process under Title III.\(^2\)

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\(^2\) Requirements regarding the federal process are set forth in 20 USC §6571, and requirements regarding the state process are set forth in 20 USC §6573.

\(^2\) 20 USC §7014.
Federal ESSA Regulations

In addition to the standard rulemaking process, a statute can require a heightened regulatory process and/or set parameters on rulemaking. In the ESSA, Congress set forth a few different levels of restrictions and requirements for rulemaking under different parts of the statute. These heightened requirements are likely due to the nature of the changes, the fact that the ESSA is designed to ‘defederalize’ much of the law, and the readily apparent mistrust of the federal Department of Education that is evident throughout the amended law (see the section entitled “Thou Shalt Not” below).

Title I Federal Rulemaking Requirements:

First, the ESSA specifically states that:

Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.23

While this requirement is not exclusive to the rulemaking process, since it can also include non-regulatory guidance, interpretive summaries of the law, Departmental mandates, and other types of directives or materials issued by the federal government, including the U.S. Department of Education, it does certainly pertain to federal regulations and rulemaking process. This provision sets forth the most basic parameters of restriction of federal authority. (For a discussion of additional parameters and restrictions, see the section below titled “Thou Shalt Not: Specific Statutory Restrictions on the Authority of the U.S. Secretary of Education.”)

The ESSA also sets forth specific limitations on the Secretary’s rulemaking authority in Title I:

(A) when promulgating any rule or regulation, to promulgate any rule or regulation on the development or implementation of the statewide accountability system established under this section that would--

(i) add new requirements that are inconsistent with or outside the scope of this part;
(ii) add new criteria that are inconsistent with or outside the scope of this part; or
(iii) be in excess of statutory authority granted to the Secretary;

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23 20 USC §6575.
As discussed below in the section titled “Thou Shalt Not: Specific Statutory Limitations on the Authority of the U.S. Secretary of Education,” these restrictions are not legally necessary, since they merely identify basic limitations of federal regulatory authority under any statute. The language does make a statement, however. Its inclusion highlights Congress’s frustration with the actions of the U.S. Department of Education under NCLB, and it warns against future federal overreach of statutory authority.

With regards to specific statutory requirements pertaining to the promulgation of federal regulations under Title I, the law requires that the Secretary “obtain the advice and recommendations of representatives of Federal, State, and local administrators, parents, teachers, principals, other school leaders (including charter school leaders), paraprofessionals, and members of local school boards and other organizations involved with the implementation and operation of programs” prior to drafting any regulations. In addition, Congress has opted for mandatory “negotiated rulemaking” in two specific provisions of Title I, and it permits such negotiated rulemaking for the entirety of the Title I federal regulations. The first provision subject to negotiated rulemaking is 20 US.C § 6311(b)(2), which addresses academic assessments, and the second is for 20 US.C § 6321, which addresses the “supplement, not supplant” mandate in Title I. Under the negotiated rulemaking, the Secretary is required to:

select individuals to participate in such process from among individuals or groups that provided advice and recommendations, including representation from all geographic regions of the United States, in such numbers as will provide an equitable balance between representatives of parents and students and representatives of educators and education officials; and prepare a draft of proposed policy options that shall be provided to the individuals selected by the Secretary under subparagraph (B) not less than 15 days before the first meeting under such process.

When a consensus cannot be reached regarding the first step of the process, as set forth above, or if the Secretary deems the negotiated rulemaking process unnecessary, prior to any proposed rulemaking, the Secretary is required to provide a minimum of fifteen (15) days’ notice to the Committee on Health, Education, Labor, and Pensions of the Senate, the Committee on Education and the Workforce of the House of Representatives, and “other relevant congressional committees” of the Secretary’s intent to issue a notice a proposed rule, which must include:

24 20 USC §6571(b)(1).
25 20 USC §6571(b)(3).
26 20 USC §6571(b)(3)(A).
27 20 USC §6571(b)(3)(B) and (C).
28 20 USC §6571(c).
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(A) a copy of the proposed regulation;
(B) the need to issue the regulation;
(C) the anticipated burden, including the time, cost, and paperwork burden, the regulation will impose on State educational agencies, local educational agencies, schools, and other entities that may be impacted by the regulation;
(D) the anticipated benefits to State educational agencies, local educational agencies, schools, and other entities that may be impacted by the regulation; and
(E) any regulations that will be repealed when the new regulation is issued.\(^{29}\)

In addition, before issuing the NPRM, the Secretary must:

provide Congress with a comment period of 15 business days to make comments on the proposed regulation, beginning on the date that the Secretary provides the notice of intent to the appropriate committees of Congress under paragraph (1); and

include and seek to address all comments submitted by Congress in the public rulemaking record for the regulation published in the Federal Register.\(^ {30}\)

The comment and review period of the proposed regulations must be a minimum of sixty (60) days “unless an emergency requires a shorter period.”\(^ {31}\) In such case, the Secretary is required to:

(A) designate the proposed regulation as an emergency with an explanation of the emergency in the notice to Congress under paragraph (1);

(B) publish the length of the comment and review period in such notice and in the Federal Register; and

(C) conduct immediately thereafter regional meetings to review such proposed regulation before issuing any final regulation.\(^ {32}\)

Status of Federal ESSA Title I Rulemaking Process (As of August 26, 2016)

With the § 6311(b)(2) academic assessments regulation process, the negotiated rulemaking was successful, and a consensus was reached. The NPRMs were issued on July 11, 2016, and public comments are due on or before September 9, 2016.\(^ {33}\) The negotiations were not successful, however, for the regulations related to “supplement, not supplant” (see the “Supplement, Not Supplant” section, below, for a discussion of the Departmental interpretation and legal issues related to that section). Because a

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\(^{29}\) 20 USC §6571(c)(1).

\(^{30}\) 20 USC §6571(c)(2).

\(^{31}\) 20 USC §6571(c)(3).

\(^{32}\) Id.

consensus was not reached, pursuant to law,\textsuperscript{34} the Secretary is required to proceed with the Congressional review process set forth above for any regulations related to the Title I “supplement, not supplant” provision prior to issuing a NPRM for public comment.

**Title III Federal Rulemaking Requirements:**

The requirements for federal rulemaking under Title III are more straightforward:

In developing regulations under this subchapter, the Secretary shall consult with State educational agencies and local educational agencies, organizations representing English learners, and organizations representing teachers and other personnel involved in the education of English learners.

This provision is consistent with the framework and ideology of the ESSA in that it emphasizes the importance of state and local input and participation in the process.

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**State ESSA Rulemaking**

**General Title I State Rulemaking Requirements**

Under the ESSA, states are also subject to specific parameters with respect to their issuance and development of any regulations pertaining to the ESSA Title I mandates.\textsuperscript{35} Under the law, states must:

- **(A)** ensure that any State rules, regulations, and policies relating to this subchapter conform to the purposes of this subchapter and provide any such proposed rules, regulations, and policies to the committee of practitioners created under subsection (b) of this section for review and comment;

- **(B)** minimize such rules, regulations, and policies to which the State’s local educational agencies and schools are subject;

- **(C)** eliminate or modify State and local fiscal accounting requirements in order to facilitate the ability of schools to consolidate funds under schoolwide programs;

- **(D)** identify any such rule, regulation, or policy as a State-imposed requirement; and

- **(E) (i)** identify any duplicative or contrasting requirements between the State and Federal rules or regulations; and

\textsuperscript{34} 20 USC §6571(c).

\textsuperscript{35} 20 USC §6573.
(ii) eliminate the State rules and regulations that are duplicative of Federal requirements.\(^{36}\)

The “committee of practitioners” referenced in Paragraph (A), above, must include:

(A) as a majority of its members, representatives from local educational agencies;
(B) administrators, including the administrators of programs described in other parts of this subchapter;
(C) teachers from traditional public schools and charter schools (if there are charter schools in the State) and career and technical educators;
(D) principals and other school leaders;
(E) parents;
(F) members of local school boards;
(G) representatives of private school children;
(H) specialized instructional support personnel and paraprofessionals;
(I) representatives of authorized public chartering agencies (if there are charter schools in the State); and
(J) charter school leaders (if there are charter schools in the State).\(^{37}\)

**Emergency Provision**

The ESSA permits a shortened process where a rule or regulation “must be issued within a very limited time to assist local educational agencies with the operation of the program under this subchapter.”\(^{38}\)

In such a case, the State educational agency may issue a regulation without prior consultation of the committee of practitioners, “but shall immediately thereafter convene the State committee of practitioners to review the emergency regulation before issuance in final form.”\(^{39}\)

**State ESSA Rulemaking Process Status (As of August 26, 2016)**

Because so much depends upon the language of the federal regulations, and because no final federal rules have been issued, states have likely not yet begun formal regulatory drafting processes. However, many states have begun the process of planning for the regulatory process and assembling their “committees of practitioners,” as required by the ESSA. Some states appear to be more prepared than others.\(^{40}\)

Washington state has already assembled thirteen working groups on ESSA-related topics, and

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\(^{36}\) 20 USC §6573(a)(1).

\(^{37}\) 20 USC §6573(b)(2).

\(^{38}\) 20 USC §6573(b)(3).

\(^{39}\) *Id.*

Georgia has established committees to examine accountability systems and school leadership and development. Still, in many other states, little is being done prior to the roll-out of the federal regulations. Once the federal regulations are issued, states will have little time to process the final-form documents, since full implementation of the ESSA begins with the 2017/2018 school year. So states need to be proactively preparing for the process by assembling their teams, studying the parameters of the ESSA and its proposed regulations, and evaluating current practices to determine what targeted areas need to be addressed.

Supplement, Not Supplant

The regulations pertaining to the ESSA concept of “supplement, not supplant” hit a snag during the negotiated rulemaking process. The negotiators could not reach a consensus on the proposed regulation language, so the Department is now tasked with drafting a proposed rule for Congressional review, which was not available at the time this paper was submitted for publication.

The idea of “supplement, not supplant” has been part of the ESEA from the beginning, and the reasoning makes perfect sense. In brief, the rule requires that states use federal funds they are receiving to enhance the spending that is already happening at the state level, not as a substitution for it. In other words, it must be used in addition to what a state is providing to educate its students, not instead of those funds. It is designed to ensure that the funds are being used to provide supplemental aid to students in high-poverty areas, and not to fill in gaps of state or local budget shortfalls. The “supplement, not supplant” language can be found in the ESSA in Titles I, II, IV and V. The language in Titles II, IV, and V does not pose an issue, since it is simple and plainly-stated. However, in this most recent round of amendments to the ESEA, the ESSA made a subtly-stated but hugely significant change to the Title I “supplement, not supplant” provision…. Under the old rule, states were required only to demonstrate that they used Title I funds for purchases above and beyond what they would have been spending with State money. Now, under the ESSA, to demonstrate compliance with the “supplement, not supplant” provision:

a local educational agency shall demonstrate that the methodology used to allocate State and local funds to each school receiving assistance under this part ensures that such school

41 Id.
receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part.\textsuperscript{42}

In essence, LEAs are responsible for ensuring and “demonstrating” to the feds that they are not giving a particular school fewer state and/or local funds simply because they got extra federal money under Title I. Not only is this new requirement a huge burden in terms of calculating what a school “would otherwise receive” without Title I funding provided to the LEA, which would already be difficult, if not impossible, but the federal Department of Education has proposed rules that would make the requirement even more restrictive and onerous.

In the negotiated rulemaking process, the Department has proposed a new requirement under “supplement, not supplant” that each LEA must spend at least as much in each Title I school as it does in the non-Title I schools. The Department is looking for a dollar-for-dollar similarity and not just a comparison of staffing or other resources. In the current economic climate, states are having significant difficulty funding the basic education services that currently exist, so compliance with the Department’s proposed rule would not be as simple as throwing additional State money at Title I-eligible schools. Rather, schools would be required to shift assets from school to school. Teachers are one of the largest areas of economic differentiation within a school system, due to the fact that, traditionally, teachers are paid based on seniority. Because more experienced teachers are also more expensive teachers, this would mean potentially shifting teachers from building to building to equalize the per-pupil cost within each building.

As Dr. Nora Gordon points out in an excellent article that she wrote for the \textit{Atlantic},\textsuperscript{43} the issue of equity within a school is much more complex than simply moving dollars around within a district. Additionally, the experience levels of teachers can affect the total dollar amount spent in any given classroom or building, but removing teachers from schools with higher student expenditures to those with lower expenditures is not guaranteed to solve the problem, and teachers and their unions are generally strongly opposed to such forced transfers.

\textsuperscript{42} 20 USC §6321(b)(2).
Dr. Gordon’s article also pointed out the fact that many school districts have been making a concerted effort towards economic integration of students.\(^{44}\) In essence, districts are reassessing school boundaries and residency requirements to ensure that concentrated poverty levels are diluted as much as possible in order to ensure a more diverse group in each school. The Department’s proposed rule, however, would actually incentivize districts to go back to a more economically segregated model due to the fact that determining compliance is much easier if the students are “clustered in a few Title I schools.”\(^{45}\) Additionally, inner-city initiatives such as those designed to attract a more diverse teaching staff to more closely mirror a school’s population or those offering student loan forgiveness in exchange for teaching service in the most impoverished schools would potentially put a district’s Title I funding at risk, due to the fact that those programs are generally targeted towards new teachers, who would be too inexpensive under the proposed rules, which would negatively impact a district’s ability to show dollar-for-dollar equivalency.

Another issue that has been raised by many is the fact that schools cannot control or predict how many students with disabilities they will have or what the cost will be to educate them. Due to IDEA and Section 504 legal requirements, however, the cost to educate a student with a disability can be considerably higher than educating a non-disabled student. The Department’s initial draft of the regulations did not contain any exceptions related to students with disabilities, although due to significant concern on the part of stakeholders and others, the Department did make an attempt to address that issue in its second revision of the draft regulations. In that revision, the Department recognized an exception to a spending-differential among schools due to “special circumstances related to a particular school’s population.”\(^{46}\)

(iv) An LEA may rebut a finding that its methodology does not meet the requirements in paragraph (b)(1)(ii) of this section due to special circumstances related to a particular school’s population of disadvantaged students. Specifically, this would pertain to a non-Title I school that serves a high proportion of students with disabilities or English learners and therefore requires higher per-pupil expenditures and disproportionately impacts the average amount of State and local funds spent in non-Title I schools in the district or grade-span.\(^{47}\)

\(^{44}\) Id.
\(^{45}\) Id. For a more detailed analysis on this issue, see Dr. Gordon’s testimony to the U.S. Senate on May 18, 2016, available here: [http://www.help.senate.gov/imo/media/doc/Gordon%20-%20Testimony.pdf](http://www.help.senate.gov/imo/media/doc/Gordon%20-%20Testimony.pdf).
\(^{47}\) Id.
The proposed regulations, however, give no indication of the threshold of the differentiation that the Department would require (what is a “high proportion”?) or what the rebuttal would look like, substantively or procedurally. More importantly, this newly-revised section requires that there actually be a finding of non-compliance prior to a district being able to defend itself on this point. That seems nonsensical, given the fact that the LEA would have needed to compile all of the relevant data and information for the initial submission and could easily submit the information regarding ELL students and students with disabilities along with the initial submission. There should be no practical reason that, in order to show the availability of an exception, a school district must “rebut” a negative finding with information it already had and could have (or may actually have) provided to the Department with the initial report.

The issue will continue to be a challenging one, given the statutory language, and it will be interesting to see the changes (if any) that the Department will be making to the draft rules both before and after the Congressional comment period. Regardless of how the issues are ultimately decided, one thing is certain: the amended “supplement, not supplant” provision will undoubtedly cause a great deal more time and effort for compliance than any of its predecessors.

TRANSITIONING TO THE ESSA

On December 18, 2015, Ann Whalen, the Acting Assistant Secretary of Elementary and Secondary Education, issued a Dear Colleague letter48 that touched upon a number of different transition issues. In the letter, she confirmed that the Department would not be requiring states to submit annual measurable objectives for the 2014-15 or 2015-16 school years. The letter further clarified that, in light of the transition, the Department was not going to require states to hold LEAs accountable for their performance against annual measurable achievement objectives 1, 2, and 3 under Title III for the same years.

With regards to the priority and focus school lists for the 2016/2017 school year, schools had two options: 1) do nothing, and the list that was on the books on the date of the enactment of the ESSA (Dec.

48 The 12/18/15 Dear Colleague letter re: transitioning to the ESSA is available here: https://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf.
10, 2015) would be the priority/focus list through the end of the 2016/2017 school year; or 2) review the list already on the books, exit those schools that had already met the state’s exit criteria, identify new priority schools (at least 5% of schools) and focus schools (at least 10% of schools), and issue the new list to the Department by no later than March 1, 2016.

The letter went on to remind schools that the principles regarding educator evaluation and support systems were required to be implemented until August 1, 2016, but that, because the ESSA did not contain any mandates regarding educator evaluation systems, the Department’s role with respect to that topic would be in the nature of technical assistance, feedback, and support from that time on.

State Capacity and Readiness

The ESSA is here, and there is no doubt that it gives a great deal of authority back to the states. But the real question is … can they handle it?? U.S. Senator Lamar Alexander, R-Tenn., one of the key lawmakers behind the ESSA, said “when we take the handcuffs off, we’ll unleash a whole flood of innovation and ingenuity classroom by classroom, state by state, that will benefit children.”49 While there is certainly no doubt that educators and lawmakers alike would like that to be true, the reality is that states have spent the last fourteen-plus years becoming finely-tuned NCLB compliance monitoring machines. No Child Left Behind allowed for little to no ingenuity, creativity, or educational experimentation at the state level. States were able to be innovative and imaginative only in the same ways that an accountant can be creative in finding loopholes, deductions, and credits in a giant maze of tax laws and IRS rules. Working within a rule-based, federally-defined system is very different from creating a working system of their own. After fourteen years, state education agencies are largely filled with the educational equivalent of legislative compliance wonks for whom a decade and a half of finely-tuned technical expertise has just gone up in smoke with the stroke of President Obama’s pen. Given the expertise of their current personnel, will states be able to fill the gap?

A practical reality involved in the problem is the fact that many of the individuals in state education agencies were hired and trained exclusively in NCLB compliance and do not have a background, or at

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least any recent experience, in research-based educational theory or design. Furthermore, bringing in the ‘thinkers’ and innovators to fulfill Lamar Alexander’s grand idea of the de-federalization of education will be difficult, if not impossible, due to the fact that those highly-skilled NCLB compliance officers at the state level possess things like seniority and pensions. Many are even members of unions. Contractors and consultants may be able to fill the void, but that can get very expensive very quickly for states that are already under great financial strain. NCLB, with its emphasis on federally-designed programs and assessments, naturally resulted in a core group of national experts that were paid extremely well for their work. For the past decade and a half though, the federal government, under the umbrella of NCLB, drove educational theory and design, and the majority of the national experts are schooled and skilled in the creation of educational programs and assessments compatible with NCLB. In short, while they can be considered to be educational innovators, they have, for very good and lucrative reasons, spent the last decade and a half thinking and researching inside the NCLB box and not with a truly open mind or open ideas. As a result, states may find it difficult to compete with salary expectations of these experts, and, even if they could, those national experts may be of limited value when seeking a true change from NCLB’s rigid and tight restrictions.

But what about grass-roots innovation at the local level? The ESSA does permit states to pass the educational-reform torch down to potential innovators at the local levels through sub-grants. School leaders at the local levels are closer to the classroom and may have a greater understanding of the changes that need to be made. However, public schools have been under overwhelming financial strain, perhaps even more than the states, since the recession. Although the ESSA sub-grants may provide some budgetary relief to allow for innovation to come from the local levels, it is uncertain whether it will be enough to sustain the innovation process long enough to culminate in a meaningful end product. In addition, cobbling together a state-wide educational program through piecemeal LEA sub-grants may not be effective without effective, innovative, forward-looking leadership at the state level to guide the project.

In addition, to complicate matters even further, the ESSA does not prohibit the familiar, comfortable practices to which the states have become accustomed. States are now free to plan their own curricula that are not tethered so directly to common core, but they are still welcome to return to the familiar embrace of the federal system. State assessments now can (to an extent, depending upon what the final regulations look like) be modeled after what the state deems to be appropriate and valid testing science, not what the federal government tells them assessments must look like. But here’s the rub …
there is nothing in the ESSA that says that states can’t continue using the same curriculum, or assessments, or standards, or anything else to which they have become accustomed under NCLB. And since most states have just spent an extraordinarily large amount of (primarily federal) money on the development of all of those curricula, assessments, standards, etc., are the states really going to be all that incentivized to leap into the uncharted waters of creativity and innovation when most of them are already struggling financially? Who will push for those changes? Probably not the compliance-monitoring experts who just spent the last fourteen years designing their NCLB-compliant programs and systems, beaming with pride when their programs received national recognition as successful archetypes. If their programs, created with NCLB compliance in mind, still meet the requirements of the ESSA and its implementing regulations (which they probably will), what would be the great incentive to seek substantial change?

True change bears significant risks that the safe, if unremarkable, status quo does not. If state education agencies, weakened by almost a decade of budget and staffing cuts and comprised of NCLB compliance experts instead of educational innovators, attempt to create an educational system and fail in the process, will such failure be viewed as proof that states cannot handle public education without heavy-handed federal guidance and oversight? The recent challenge over the “supplement, not supplant” regulations have clearly indicated that the Department is not intending to take a back seat in the regulatory process, if it can help it. The text of the ESSA, itself, indicates that the drafters were highly concerned about the Secretary jumping back in and reclaiming at least some of the authority that belonged to the Department under NCLB, just a few short months ago.

Some states are taking strides to get ready. Minnesota, for example, is undertaking the task of restructuring its department, and Kentucky is convening statewide task forces and increasing training, but there are legitimate questions as to how much any state’s educational leadership is able to accomplish in what will likely be an all-too-brief tenure. Statistically, there is very high turnover for state education agency leaders. Their average tenure is just 3.2 years, which is not a lot of time to institute and oversee the process of a systematic overhaul of the type that would be necessary for lasting, meaningful, successful change. Given all of the economic, personnel, and human pride factors involved, there will be a strong inclination on the part of the states to re-brand and re-package their stale NCLB programs that never quite

51 Id.
worked well in the first place, touting them as new, innovative, and local – ESSA-worthy – but there is a very good possibility that the real change may just be on the wrapping paper. Time will tell.

ESSA TITLE I BASICS

“The Thou Shalt Not”: Specific Statutory Restrictions on the Authority of the U.S. Secretary of Education

The ESSA language provides specific statutory language that prohibits the U.S. Secretary of Education from generally overstepping his/her statutory authority in the development of the federal regulations implementing the ESSA, which is unusual to see so explicitly stated in a statute. In addition to general prohibitions against the Secretary exceeding statutory authority, the law also contains specific preclusions. These specific preclusions expressly limit the authority of the Secretary, thereby effectively precluding the implementing regulations from containing requirements that are generally outside the scope of authority, as set forth in the ESSA. The language also, however, anticipates the types of statutory overreach that might be undertaken. Among other things, the law precludes the Secretary from mandating as a condition of approval of a state plan, any specifically-prescribed methodology that must be used in a state’s differentiation determination (which has been left to the states to determine under the statute); a federal mandate that schools include a measurement of student growth (which is permissible but not required under the statute); federal parameters of a student growth measurement, if it is chosen to be used by a state; and any involvement in or mandates regarding teacher, principal or other school leader evaluation or effectiveness. (See the “Approval of State Plans” section below for a more detailed list regarding statutory prohibitions on the Secretary’s authority to reject a state plan.)

The prohibitory language also precludes the Secretary from promulgating definitions for any of the terms in the state plan section of the law that would be broader than the statute allows, exceeds the scope of the law, or is otherwise inconsistent with the Secretary’s federal regulatory authority. Finally, the

52 20 USC §6311(e).
53 20 USC §6311(e).
statute also prohibits the Secretary from issuing any new non-regulatory guidance, which would include guidance that “seeks to provide an explanation of requirements” regarding state plans for state or local agencies, even in response to specific requests for information, provides a “strictly limited or exhaustive list to illustrate successful implementation” of the state plan requirements, or “purports to be legally binding.”\textsuperscript{54} Types of non-regulatory guidance included in this prohibition would include FAQs, statutory summaries, white papers, and/or legal opinion letters issued from the U.S. Department of Education on any of the topics specifically precluded under the law.

Finally, the Secretary is prohibited from prescribing any specific methodology that an LEA may use to allocate state and local funds to each school receiving Title I assistance.\textsuperscript{55}

The explicit prohibitory language in the law speaks volumes about the lack of trust that the drafters and lawmakers had in the federal Secretary and Department of Education. Many of the prohibitions, such as general prohibitions against exceeding the scope of the law, are unnecessary, as they simply state already-existing rules of regulatory construction and authority. The fact that they are contained within the law underscores the mistrust that the drafters had of the federal agency as well as the clear intent to give deference and authority to the states and LEAs whenever possible. As if the language in the statute did not convey the message clearly enough, Senator Lamar Alexander met with the annual National Governors Association on February 21, 2016, emphasizing the limitations on the federal government’s role in the law and encouraging the governors to sue if the federal government tries to overreach its authority.\textsuperscript{56}

On February 10, 2016, the National Governors Association, the National Conference of State Legislatures, and a number of national organizations supporting public education,\textsuperscript{57} including the National School Boards Association, issued a joint letter to now Secretary of Education John B. King, Jr. emphasizing the fact that “[e]ducation decision making now rests with states and districts, and the federal

\textsuperscript{54} Id.
\textsuperscript{55} 20 USC §6321(b)(4).
\textsuperscript{57} The organizations were as follows: the National Association of State Boards of Education, the National School Boards Association, ASSA: The School Superintendents Association, the National Association of Elementary School Principals, the National Association of Secondary School Principals, the American Federation of Teachers, the National Education Association, and the National PTA.
role is to support and inform those decisions.”58 These explicit limitations on the authority of the U.S. Department of Education will likely result in an initial rush of federal litigation involving allegations of overreach once the regulatory process is completed and Title I funds begin to flow from the federal to the state and local levels.

Approval of State Plans59

Under the ESSA, states are required to submit a state plan to the U.S. Secretary of Education for approval. The Secretary is required to approve the state plan within 120 days after submission unless the Secretary meets statutory criteria to disapprove the plan.60 The U.S. Department of Education may not require, as a condition of approval of a state plan, anything that is inconsistent with § 6311.61 The Department also may not “require a State to add or delete one or more specific elements of the challenging State academic standards,”62 or prescribe any of the following:63

(I) numeric long-term goals or measurements of interim progress that States establish for all students, for any subgroups of students, and for English learners with respect to English language proficiency, under this part, including--

(II) specific academic assessments or assessment items that States or local educational agencies use to meet the requirements of subsection (b)(2) or otherwise use to measure student academic achievement or student growth under this part;

(III) indicators that States use within the State accountability system under this section, including any requirement to measure student growth, or, if a State chooses to measure student growth, the specific metrics used to measure such growth under this part;

(IV) the weight of any measure or indicator used to identify or meaningfully differentiate schools, under this part;

(V) the specific methodology used by States to meaningfully differentiate or identify schools under this part;

(VI) any specific school support and improvement strategies or activities that State or

59 20 USC §6311.
60 20 USC §6311(a)(4).
61 20 USC §6311(e).
62 Id.
63 20 USC §6311(e)(1)(B)(iii).
local educational agencies establish and implement to intervene in, support, and improve schools and improve student outcomes under this part;

(VII) exit criteria established by States under subsection (d)(3)(A)(i);

(VIII) provided that the State meets the requirements in subsection (c)(3), a minimum number of students established by a State under such subsection;

(IX) any aspect or parameter of a teacher, principal, or other school leader evaluation system within a State or local educational agency;

(X) indicators or specific measures of teacher, principal, or other school leader effectiveness or quality; or

(XI) the way in which the State factors the requirement under subsection (c)(4)(E)(i) into the statewide accountability system under this section.64

School-Wide Eligibility

Where school-wide eligibility was available under Title I only for those schools with a 40% poverty level or higher, the ESSA permits states to approve schools to operate a district-wide program with a lower poverty percentage if they have one or more schools that qualify at the 40% or higher poverty level.65

Assessments

The ESSA contains no significant changes to the basic requirements for aligned assessments. There is no change in the grade levels or the subjects in which students are required to take a test. Schools do, under the new law, have a 1% limitation on students with cognitive disabilities who are not able to take the regular assessments,66 which can be expanded but which may have an impact on the school’s graduation rates if extended too far (see Special Education section, below).

64 Id.
65 20 USC §6314.
66 This requirement will undoubtedly cause significant issues with regards to how it is implemented with respect to, and its impact on, students with disabilities who qualify for IDEA protections. Under the IDEA, students may be graduated based upon their successful fulfillment of their individually-appropriate IEP goals instead of via the pre-established parameters for graduation of non-disabled students.
The requirement that English Language Learners are assessed in English Language Proficiency is maintained under the ESSA, however, the law permits states to set forth the following system for inclusion of ELL students in reading/English language assessments:67

- 1st Year – ELL students are excluded
- 2nd Year – Data may include a measure of student growth;
- 3rd Year and Beyond – ELL students are measured on proficiency standards.

For the purposes of accountability, ELL students may remain in the ELL subgroup for up to 4 years after the student becomes proficient in English. This is a change from the 2-year allowance under NCLB.

The law now specifically states that schools may utilize locally-selected nationally-recognized assessments, such as the ACT or SAT, if such assessment meets specific statutory criteria68 and has been approved by the state. This amounts to a significant change, due to the fact that the determination of school performance, for the purposes of accountability and school improvement, may, for the first time, be made using data from different tests for different schools at the high school level, which may result in inconsistent data, depending upon the calculations used. Depending upon the tests approved, the data being collected may result in a “comparing apples to oranges” type approach, due to the fact that student achievement scores are being calculated through different measures. The effectiveness and equity of this approach has yet to be determined, but states are likely to face challenges based upon their differentiation determinations.

Although the ESSA requires that 95% of students be tested, parents retain the right to opt out of testing on behalf of their children under the ESSA, and schools are obligated to notify parents of their right to receive any testing participation policy utilized by the state or the school. This opt-out issue may continue to pose problems for schools, as it had under NCLB, due to the fact that states have the prerogative to decide consequences for schools with low test-participation rates. Indeed, the proposed regulations issued by the Federal Department of Education set forth possible consequences that states can impose on schools with low participation rates, including lowering a school’s overall rating. Because schools are required to uphold the opt-out rights of parents and, for that reason, have limited control over

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67 20 USC 6311(b)(3).
68 20 USC 6311(b)(2)(H)(v).
participation rates, states that impose punitive sanctions related to low participation issues will likely face legal challenges. When determining low-participation consequences, states could require schools to track and identify whether non-participation is due to a parent asserting his/her opt-out rights or another reason. This would enable states to address low participation rates that may be effectively raised through better school management procedures without punishing schools unnecessarily for parents’ assertion of legal rights over which the schools have no control.

Unlike its predecessor, the ESSA does permit states to administer “multiple statewide interim assessments” that result in a single summative score rather than one large annual assessment.69

### A Tale of Two Tests… ESSA Legislation = Big Business for ACT and SAT

As described above, ESSA allows states to choose a “nationally-recognized high school academic assessment that has been reviewed and approved by the state” in high schools. Many schools already use the ACTs and SATs, and this provision was designed to enable schools to reduce the number of assessments that they give by allowing those college entrance exams to be utilized for the purposes of measuring student achievement under the ESSA, as well. Designed to allow for greater flexibility, this has become a fast-and-furious power-grab by the ACTs and SATs.70 Public school assessments are a big business – a market that currently rakes in almost $700 million dollars per year.71 It’s not difficult to see why national testing companies are angling to get the biggest piece of that pie that they can. Common core assessments that were created through the use of federal funds, like Smarter Balance, are being cast aside for tests that schools believe may better be able to help students with college readiness.

While the ESSA’s addition of a “nationally-recognized high school academic assessment” does not necessarily limit the choices of assessments to only the ACT and SAT, or any other college entrance exam, the proposed regulations appear to make such a limitation. The proposed regulations define “nationally-recognized high school academic assessment” as an assessment that “[1] is administered in multiple states [2] for the purpose of entrance or placement into courses in postsecondary education or training programs.”72 This is significant, because it limits assessment choice at the high school level to

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71 Id.
72 Proposed 34 CFR 200.3(d).
only postsecondary entrance or placement exams when the statutory language makes no such limitation. Under the plain language of the law, a curriculum-based assessment designed to assess a student’s grasp of core curricular knowledge, including many of the assessments that have already been created through the use of federal funds, would be permissible if an LEA believed it to be a suitable measure at the high school level and if it was approved by the state. A school that did not wish to use the ACT or SAT would still be entitled to consider alternative testing options for the high school level under the statute, but the regulations, due to the way that they are written, preclude most assessments other than the ACTs and SATs.

To further complicate matters, just as public schools are beginning to embrace these two tests on a national scale due to the ESSA’s newfound statutory freedom to choose high school assessments at the local level, the tests themselves are changing in both actual content as well as in purpose and significance at the post-secondary level. In 2014, the College Board announced sweeping changes to the SAT, designed to be rolled out in the spring of 2016. The changes include an emphasis on making the assessment more curriculum-based and a reduction in the esoteric concepts. It was almost as if they knew the language from the ESSA was coming. (Surely lobbying efforts for that type of national legislative deference would have needed to be well under way by 2014.) As promised, the redesigned “SAT Suite of Assessments” is now readily available, just in time to harness all of the coveted school district contracts that were neatly packaged and handed to the College Board and its solitary rival. The ACT has undergone similar changes, prominently featuring “ACT State and District Solutions” on its product webpage.

From a product sales perspective, the new change could not have come at a better time for these companies. As The New York Times points out in a recent article, which highlighted the University of Delaware’s decision to abandon the entrance exam requirement as the latest example among many others across the nation, colleges are beginning to place less of an emphasis on those tests just as the public high schools are beginning to embrace them en masse. Similarly, The Washington Post, referencing George Washington University’s decision to no longer require the tests, reported on a growing number of

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74 A look at the newly-designed SAT website clearly emphasizes the shift. https://collegereadiness.collegeboard.org/.
postsecondary institutions joining that trend.\textsuperscript{77} The \textit{Post’s} article indicates that postsecondary schools are increasingly viewing over-reliance on those types of test scores as a barrier to underprivileged students, a viewpoint which is underscored by the fact that Kaplan, the Princeton Review, Huntington, and other test prep companies have been successfully teaching to the test for decades at a great profit.

Because of this, the public school market has become increasingly important for those companies whose original purpose as a college entrance exam is waning. The language in the ESSA that would permit substitution of the SATs or ACTs for the NCLB common core, curriculum-based tests has opened a whole new world of possibility for the SAT and ACT testing companies, and they are currently lobbying with vigor. As evidence of their zeal on the part of the companies for legislative lobbying, the Florida legislator behind a bill designed substitute the ACTs for the common core assessment told \textit{The New York Times} that the testing companies actually helped him write the legislation in FL that would approve the use of the college prep tests instead of the common core assessments.\textsuperscript{78}

The ESSA’s permissive use of the college prep tests has raised the stakes in an already fierce competition between the two companies. In 2015, the ACT appealed a Michigan school district’s decision to contract with the College Board, which owns the SATs, citing technical improprieties regarding the bidding process.\textsuperscript{79} In Illinois, the ACT has formally challenged the state’s decision to award a 3-year, $14.3 million dollar contract to the College Board. College entrance exams have always been a dueling ground for these two high-profile companies, and now with the giant, diamond-studded prize of federally-funded, legally-mandated assessment contracts dangling in front of them, it will likely become a fight to the death.

In order for the SAT, ACT, or any other test to be used for the purposes of fulfilling the requirements of the ESSA, the test must:

(I) be aligned to the State’s academic content standards under paragraph (1), address the depth and breadth of such standards, and be equivalent in its content coverage, difficulty,
and quality to the State-designed assessments under this paragraph (and may be more rigorous in its content coverage and difficulty than such State-designed assessments);

(II) provide comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students defined in subsection (c)(2), with results expressed in terms consistent with the State’s academic achievement standards under paragraph (1), among all local educational agencies within the State;

(III) meet the requirements for the assessments under subparagraph (B) of this paragraph, including technical criteria, except the requirement under clause (i) of such subparagraph; and

(IV) provide unbiased, rational, and consistent differentiation between schools within the State to meet the requirements of subsection (c).\(^{80}\)

These requirements explain the recent shift in the SAT and ACT formats and product line, since the traditional test with its erudite and esoteric content would likely not have met the requirement for coverage of core curricular content and alignment with state standards.

### Accountability

Under the ESSA, the adequate yearly progress (AYP) system has been a system that is designed to be state-controlled and defined within specific, measured parameters of federal oversight and requirements. States are now required to establish long-term goals, which must include goals for student achievement, improved graduation rates, and an increase in the number of English language learners making progress towards proficiency.\(^{81}\) States are required to measure school progress and differentiate between schools, based upon academic indicators, such as assessment scores, measures of student growth, graduation rates, and English proficiency. The state-defined system must also incorporate in its measurement system at least one measure of “school quality or student success,”\(^{82}\) although academic indicators must be given “much greater weight” in the differentiation process than the “school quality or student success” measurement.\(^{83}\) The “school quality or student success” measurement must:

- Allow for meaningful differentiation in school performance;

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\(^{80}\) 20 USC 6311(b)(2)(H)(v).
\(^{81}\) 20 USC §6311(c)(4)(A).
\(^{82}\) 20 USC §6311(c)(4)(B)(v)(I).
\(^{83}\) 20 USC §6311(c)(4)(C)(ii)(II).
• Be valid, reliable and comparable statewide; and
• Include one or more of the following measures:
  o Student engagement;
  o Educator engagement;
  o Student access to and completion of advanced coursework;
  o Postsecondary readiness;
  o School climate and safety; or
  o “any other indicator the State chooses that meets the requirements of this clause.”84

States are annually required to “differentiate” schools using the formula that they have established based upon these statutory criteria.85 Then, every three years or less, as determined by the state, states are then required to use these indicators and measurements to identify schools that are in need of “comprehensive support and improvement.”86 Under the ESSA, this category must include the lowest-performing 5% of schools in the states; high schools that graduate less than 2/3 of their students; and school that have been receiving “targeted support” from the state, under § 6211(d)(2), for a specific number of years (to be determined by the state) but are not improving. In addition to making a finding of a need for “comprehensive support and improvement,” states must also establish exit criteria to determine when schools have improved to the point that they are no longer defined by that classification.

It is important to note that the ESSA does not specifically require a “single score” system of accountability, where the state’s calculation results in a single number or grade. Indeed, many have challenged the idea that the consideration of all of the legally-required factors discussed above could or should be narrowed down to a specific score. However, in the proposed regulations, the U.S. Department of Education has required a single-score model of accountability.

This level of specificity is not duplicated under the ESSA, however, for charter schools. With regards to charter schools, the law simply states: “[t]he accountability provisions under this chapter shall be overseen for charter schools in accordance with State charter school law.”87 This apparent unrestricted deference to states and state law, even by the standards of this decidedly state-friendly statute, is strikingly

84 20 USC §6311(c)(4)(B)(v)(II).
85 20 USC §6311(c)(4)(C).
86 20 USC §6311(c)(4)(D).
87 20 USC §6311(c)(5).
minimalist in comparison to the level of restriction imposed upon the states with regards to public school districts. It is also alarming, given the recent well-documented evidence of states failing to hold charter schools accountable and even, in some cases, committing fraud to receive federal charter school grant funding. \(^88\) (For more information on the ESSA’s treatment of charter schools, see the “Charter Schools” section of this document.)

### School Improvement

Once a school is identified as in need of “comprehensive support and improvement,” LEAs are required to develop comprehensive support and improvement plans for each of the schools, which must include evidence-based interventions and identify resource inequities. These plans must be approved by the school, the LEA, and the state. The state must then periodically monitor their progress towards improvement. As with the NCLB, the ESSA includes a provision that requires these underperforming schools to allow students transfer to another public school. The ESSA also requires the schools to pay for the transportation costs of such students, which can be up to 5% of the total Title I allocation of funds.

Additional funds are available for assessment improvement and assessment audits at the state and local level. Instead of a separately-authorized School Improvement Grant program, states must reserve 7% of Title I funds for school improvement services. The law does not provide any information regarding specific models or activities that would be mandated under this provision. States may, but are not required to, reserve an additional 3% for direct student services.

The state is required to notify annually those LEAs with schools that have “consistently underperforming” subgroups, which must be defined by the state in its accountability program. Such schools must then develop and implement a “targeted support and improvement plan,” which must include

evidence-based interventions and be approved and monitored by the LEA. If the plan is not successful after a set number of years (to be determined by the LEA), additional action must take place.

**Report Cards**

With regards to state and local report cards, the ESSA has largely kept the NCLB’s requirements intact, with the addition of some new reporting requirements:

- A description of the state’s system of accountability, which must include a description of the methodology that the state uses to differentiate schools and the factors involved;
- Specific types of data that are collected through the Civil Rights Data Collection;
- Identification of two required assessment and graduation reporting categories – foster children and homeless students; and
- The professional qualifications required for teachers due to the new law’s elimination of the highly-qualified mandate.

**STUDENT-SPECIFIC ISSUES**

**Special Education and Students with Disabilities**

**Curriculum and Standards**

The ESSA provides one exception to its universal standards requirement, and that is the exception pertinent to students with the “most significant cognitive disabilities.” These standards must, among other requirements, be aligned with the regular state standards and be designated in a student’s IEP.

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89 20 USC §6311(h).
90 20 USC §6311(b)(1)(E).
Assessments

Under the ESSA, schools have a 1% limitation on students with significant cognitive disabilities who are not able to take the regular assessments.\(^91\) States can grant permission for LEAs to exceed that limitation, however, and states are precluded, by law, from enforcing any specific cap or limitation on the number or percentage of alternate assessments allowed by an LEA. Rather, the state must simply require that the LEA to submit information justifying the need to exceed the 1% statutory cap.\(^92\) Where the state itself exceeds a 1% cap due to the decisions of its LEAs expanding the cap locally, the state must apply for a waiver of the ESSA’s provisions under 20 USC § 7861.\(^93\)

Students who take an alternate assessment must be given an alternate diploma,\(^94\) and states must ensure that parents are notified when their child will be assessed under an alternate standard and of the fact that such alternate testing will result in preclusion from receipt of a regular diploma.\(^95\)

While these provisions allow LEAs the flexibility that they may need to expand the overall percentage of those who take the alternate assessments, based upon the learning capabilities and needs of a specific school’s or LEA’s population, the alternate diploma mandate for alternate testing may significantly impact the school’s graduation rate, which could then impact a school’s overall scores in the state’s accountability and differentiation calculations if the state adopts an adjusted cohort graduation rate (ACGR) calculation, which most states currently use, or other calculation that factors in only those students who have graduated with a regular diploma. This can be a significant issue, since there is already a large disparity between ACGR rates of IDEA students and those of the regular education population, due to the higher numbers of special education students who are receiving alternate diplomas due to special education needs. Since the graduation rate is required, under the ESSA, to factor into a state’s determination of a school’s success, though, any increase in the number of students taking the alternate test would statistically decrease the graduation rate of that school simply by virtue of the fact that the

\(^91\) This requirement will undoubtedly cause significant issues with regards to how it is implemented with respect to, and its impact on, students with disabilities who qualify for IDEA protections. Under the IDEA, students may be graduated based upon their successful fulfillment of their individually-appropriate IEP goals instead of via the pre-established parameters for graduation of non-disabled students.
\(^92\) 20 USC §6311(a)(2)(D)(ii)(II).
\(^93\) 20 USC §6311(2)(D)(ii)(IV).
\(^94\) The ESSA requires that alternate diplomas be standards-based and aligned with the state requirements for a regular high school diploma. 20 USC §7221b(23)(A)(ii)(I)(bb).
\(^95\) 20 USC §6311(b)(2)(D).
student is not receiving a regular diploma and, therefore, is not considered to be “graduated” for the purposes of the ACGR or other similar calculation. It will be important to follow how the regulations on both the federal and state levels handle the graduation rate calculation issue with regards to students with alternate diplomas.

Enhanced Music and Art Education Emphasis in the ESSA Significant for Special Needs Students

The ESSA contains heightened emphasis on and funding for programs related to music and the arts (see the “Music and Arts Education” section below for more detail). This has been praised by advocates of students with special needs due to the fact that music and arts education can play a significant role in the education of students with disabilities. Music and arts education can be integral to students with social skills needs, behavioral needs, and sensory needs. In addition, these types of programs can be important parts of the day for students who receive their core-curriculum classes outside of the regular education classroom. For such students, music and arts education provides an opportunity for them to be with their age-appropriate peers in a least restrictive environment.

Homeless Students

The ESSA did not only amend the ESEA with respect to enhanced legal protection for homeless students…. It also effectively amended the McKinney-Vento Act.

ESEA Provisions

Homeless students now comprise a separate reportable subgroup on the state report cards.96 The ESSA contains a mandate that appropriate school personnel, including homeless liaisons, receive training to identify, enroll, and support homeless children and youth. Each LEA plan must include the services to be provided to homeless children and youth to support their enrollment, attendance, and success in school.97 SEAs are required to support LEAs in this role.98

97 20 USC §6312(b)(6).
98 20 USC §6311(g)(1)(F).
McKinney-Vento Provisions

The Coordinator for the Education of Homeless Children and Youth is now required to provide LEAs with training and information regarding their obligations under McKinney-Vento, including identifying students protected under the law.\footnote{42 U.S.C. 11432(f)(6).} It is the responsibility of the LEA to make sure that the proper training occurs.\footnote{42 U.S.C. 11432(g)(6)(A)(ix).} The LEA is required to develop “policies and practices” to ensure that the LEA’s homeless liaison receives training and technical assistance.\footnote{42 U.S.C. 11432(g)(1)(J)(iv).} The Coordinator is also now authorized to and tasked with conducting compliance monitoring to make sure that LEAs are fulfilling their obligations.\footnote{42 U.S.C. 11432(f)(5).}

There is now, under the law, a presumption that keeping a homeless child in his or her school of origin is in the child’s best interests with the exception of when doing so is contrary to the wishes of the parent(s) or unaccompanied youth.\footnote{42 U.S.C. 11432(g)(3)(B)(i).} Where an LEA determines that it is not in a homeless student’s best interests to remain in the school of origin, or that a particular student does not qualify under McKinney-Vento, the LEA must provide a written description of its reasons to the parents or unaccompanied youth as well as notice of the appeals process.\footnote{42 U.S.C. 11432(g)(3)(B)(iii) and 42 U.S.C. 11432(g)(3)(E)(ii).}

The McKinney-Vento amendment clarifies that when a student is scheduled to move from one building to another at his/her school of origin, the term “school of origin” “shall include the designated receiving school at the next grade level for all feeder schools.”\footnote{42 U.S.C. 11432(g)(3)(I)(ii).}

The amendment also states that a student who qualifies under McKinney-Vento must be admitted regardless of missed application deadlines or retention at a previous school due to fees, fines, or absences.\footnote{42 U.S.C. 11432(g)(1)(I).} In the event that there is ever a question as to the eligibility of a student, the student must be immediately enrolled until there is final resolution of the dispute, including all appeals.\footnote{42 U.S.C. 11432(g)(3)(E)(i).}
The law now requires that the homeless liaison of a school ensure that unaccompanied youths “have opportunities to meet the same challenging State academic standards as the State establishes for other children and youth.”\textsuperscript{108}

Liaisons must also ensure that unaccompanied youth “are informed of their status as independent students under section 480 of the Higher Education Act of 1965 (20 U.S.C. 1087vv) and that the youths may obtain assistance from the local educational agency liaison to receive verification of such status for purposes of the Free Application for Federal Student Aid described in section 483 of such Act (20 U.S.C. 1090).”\textsuperscript{109}

The new amendments also give young children who qualify under McKinney-Vento access to public preschool programs\textsuperscript{110} as well as access to early Head Start and/or Part C of the IDEA (commonly referred to as “Early Intervention”).\textsuperscript{111}

The amendments also clarify that homeless students with disabilities are entitled to coordination of services under IDEA and/or Section 504,\textsuperscript{112} and that information about the child’s living situation is an educational record under FERPA but may not be considered to be directory information.\textsuperscript{113} Homeless liaisons who have received the proper training may affirm eligibility with HUD.\textsuperscript{114}

In addition to health care, dental care, medical care, and other appropriate services, LEA homeless liaisons are expressly required to ensure that homeless students and their families are referred to substance abuse programs and housing assistance, where appropriate.\textsuperscript{115}


In July, 2016, the U.S. Department of Education, pursuant to their obligations under the ESSA, issued a 49-page non-regulatory guidance manual regarding schools’ obligations under McKinney-

\textsuperscript{108} 42 U.S.C. 11432(g)(6)(A)(x)(II).
\textsuperscript{110} 42 U.S.C. 11432(g)(1)(F)(i).
\textsuperscript{111} 42 U.S.C. 11432(g)(6)(A)(iii).
\textsuperscript{112} 42 U.S.C. 11432(g)(5)(D).
\textsuperscript{113} 42 U.S.C. 11432(g)(3)(G).
\textsuperscript{114} 42 U.S.C. 11432(g)(6)(D).
\textsuperscript{115} 42 U.S.C. 11432(g)(6)(A)(iv).
The guidance addresses the LEA requirements regarding homeless students under both McKinney-Vento and the ESEA. The Department also issued a 4-page fact sheet entitled “Supporting the Success of Homeless Children and Youths,” which provides facts and statistics about homelessness, a brief summary of the legal changes, and tips for schools in supporting homeless students.

**Foster Children**

The ESSA also contains new protections for students who are in foster care. Under the ESSA, LEAs have obligations to students in foster care similar to their obligations to homeless students, namely, to maintain the child in his/her school of origin where it is in the child’s best interests, to coordinate with the child welfare system with regards to the child’s attendance and/or transportation, facilitate the immediate school enrollment of students in foster care, and arrange with the child welfare agency which party will be responsible for paying the costs of transportation. Similar to McKinney-Vento, either party may shoulder the burden of the cost of the transportation, or the two parties may share the cost. To ensure that these new requirements are followed, the Title I State Plan must now include information required to ensure the educational stability of children in foster care, including assurances that--

(i) any such child enrolls or remains in such child’s school of origin, unless a determination is made that it is not in such child’s best interest to attend the school of origin, which decision shall be based on all factors relating to the child’s best interest, including consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(ii) when a determination is made that it is not in such child’s best interest to remain in the school of origin, the child is immediately enrolled in a new school, even if the child is unable to produce records normally required for enrollment;

(iii) the enrolling school shall immediately contact the school last attended by any such child to obtain relevant academic and other records; and

(iv) the State educational agency will designate an employee to serve as a point of contact for child welfare agencies and to oversee implementation of the State agency responsibilities required under this subparagraph.

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118 See 20 U.S.C. 6312(c)(5).
121 20 USC 6311(g)(1)(E)(iv).
It is important to note that the ESSA prohibits the Homeless Liaison from being the point-of-contact individual described in paragraph (iv), above.122

**SCHOOL CHOICE ISSUES**

**Charter Schools**

The Charter Schools Program has been broadened significantly both in scope and in funding, receiving an $80 million increase in funding despite increasing evidence of charter school mismanagement and the failure of state accountability systems in multiple states.123 As discussed in the “Accountability” section above, under the ESSA, charter schools are not held to the same standard of accountability to which public school districts are held. Rather, states must define and ensure charter school accountability through their own charter school laws.124 The law does not set forth any parameters regarding the accountability system though, as it does for school districts.

In addition to greater funding for charter school programs, the Charter Schools Program is expanding in scope. There is now dedicated funding for the replication and expansion of high-performing charter schools both at the state and federal levels.125 The state charter school grant program has also been expanded to allow for administration by governors and charter support organizations in additional to the state education agencies that were authorized under NCLB.126

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122 Id.
124 20 USC §6311(c)(5).
125 20 USC §7221d(b).
126 20 USC §7221c(a)(2).
The state grant program now provides schools with more flexibility and uses for grant-based startup funds, and there are additional protections to prioritize funding to states that provide equitable resources to charters and assist them in accessing facilities. The new rules allow charter schools to establish “feeder patterns” for networked charter schools to allow students to easily and reliably matriculate to the higher grades in schools within the same network without going back through the entire lottery process as well as use a weighted lottery to increase access for disadvantaged students.

Private / Nonpublic Schools

The ESSA also made some significant changes that will benefit nonpublic schools, including parochial schools. The most notable change is regarding the calculation of Title I services. Under NCLB, LEAs were permitted to first subtract certain expenditures before allocating the nonpublic school’s share of Title I funds, which was reducing nonpublic school shares dramatically. This is no longer allowable under the ESSA. In addition, LEAs must now disseminate Title II-A funds proportionately, based on its total Title II-A allocation. Under NCLB, LEAs were permitted to calculate shares based only on the funds that the LEA chose to set aside for professional development. This change will also result in private schools receiving a substantially larger amount of those funds.

State education agencies are also now required to designate an “ombudsman” who will “help ensure equitable services are provided to private school children, teachers, and other educational personnel.” The ombudsman is tasked with monitoring and enforcing equitable participation requirements, as set forth in § 7881 of the ESSA, throughout the state.

Two new grant programs, “Student Support and Academic Enrichment” and “Supporting High Ability Learners and Learning,” require equitable participation in the funding shares. With the “Student Support and Academic Enrichment” grant program, schools have flexibility in using the grant funds for a range of educational purposes, including health and safety, technology, foreign language instruction, and

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127 20 USC §7221b(g).
130 20 USC §7111 et seq.
131 20 USC §7294.
STEM education. The “Supporting High Ability Learners and Learning” grant program serves as a gifted education program which allows high-ability learners to obtain additional support and services.

Each of the following titles include a provision for equitable participation by nonpublic schools:

- Title I, Part A: Improving Basic Programs Operated by State and Local Educational Agencies
- Title I, Part C: Education of Migratory Children
- Title II, Part A: Preparing, Training, and Recruiting Teachers and School Leaders
- Title III, Part A: Language Instruction for English Learners and Immigrant Students
- Title IV, Part A: Student Support and Academic Enrichment Grants
- Title IV, Part B: 21st Century Community Learning Centers
- Title IV, Part F, Subpart 4: Supporting High-Ability Learners and Learning
- Title V, Part A: Funding Transferability for State and Local Educational Agencies
- Title VIII, Uniform Provisions: Participation by Private School Children and Teachers

The National Catholic Educational Association has prepared a very thorough summary of the changes in the law as they pertain to nonpublic schools, and the Office of NonPublic Education of the U.S. Department of Education has prepared a side-by-side comparison of the NCLB and ESSA provisions that pertain to nonpublic schools.

A number of programs received enhanced funding and enhanced or new recognition under the ESSA. The following sections provide detail regarding some of the programs that have been expanded under the ESSA.

132 20 USC §7111 et seq.
133 20 USC §7294.
134 Available at: http://www.ncea.org/NCEA/Lead/Public_Policy/Every_Child_Succeeds_Act__ESSA__aspx?WebsiteKey=60819b28-9432-4c46-a76a-a2e20ac11efd.
## Gifted Education

The ESSA expanded its emphasis on Gifted and Talented education. Where NCLB previously addressed the issue under a single federal block grant, the ESSA requires LEAs to show, in their state plans, how they will support “gifted and talented” education.\(^{136}\)

While the Jacob K. Javits Gifted and Talented Students Education Act of 2001\(^{137}\) had previously been available to schools as a federal block grant under Title IV, schools can now receive sub-grants under Title I as well. The sub-grants can be used for:

Providing training to support the identification of students who are gifted and talented, including high-ability students who have not been formally identified for gifted education services, and implementing instructional practices that support the education of such students, such as--

- early entrance to kindergarten;
- enrichment, acceleration, and curriculum compacting activities; and
- dual or concurrent enrollment programs in secondary school and postsecondary education.\(^{138}\)

These sub-grants will provide much-needed relief for gifted program coordinators. Because gifted education, unlike special education, is exclusively reserved for the states, many gifted programs have suffered the adverse effects of state budget shortfalls and economic struggles. Under the ESSA, there are more funds available for gifted programming. States and LEAs, however, will need to ensure that they are complying with the “supplement, not supplant” requirements applicable under Title I and Title IV (see discussion of “supplement, not supplant” below for a discussion of the issue and the differences between the Title I and Title IV provisions).

## Music and Arts Education

The ESSA reverses the course of NCLB with regards to funding for music and arts programs in public schools. NCLB limited much of its funding to “core subject” areas. Title IV expressly authorizes state grants for “programs and activities that use music and the arts as tools to support student success

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\(^{136}\) 20 USC §6312(b)(13)(A).

\(^{137}\) Codified at 20 USC 7294.

\(^{138}\) 20 USC §6613(b)(J).
through the promotion of constructive student engagement, problem solving, and conflict resolution.”

Music and arts education grants are also specifically available to charter schools as well as community learning centers.

**Early Childhood**

**Inclusion of Federal Preschool Development Grants Program**

The ESSA contains expansive pre-K funding that did not exist under NCLB, including an absorption of President Obama’s Preschool Development Grants program. Section 9212 of the ESSA authorizes $250 million per year, the statutory purpose of which is:

(1) to assist States to develop, update, or implement a strategic plan that facilitates collaboration and coordination among existing programs of early childhood care and education in a mixed delivery system across the State designed to prepare low-income and disadvantaged children to enter kindergarten and to improve transitions from such system into the local educational agency or elementary school that enrolls such children, by--

(A) more efficiently using existing Federal, State, local, and non-governmental resources to align and strengthen the delivery of existing programs;
(B) coordinating the delivery models and funding streams existing in the State's mixed delivery system; and
(C) developing recommendations to better use existing resources in order to improve--

(i) the overall participation of children in a mixed delivery system of Federal, State, and local early childhood education programs;
(ii) program quality while maintaining availability of services;
(iii) parental choice among existing programs; and
(iv) school readiness for children from low-income and disadvantaged families, including during such children's transition into elementary school;

(2) to encourage partnerships among Head Start providers, State and local governments, Indian tribes and tribal organizations, private entities (including faith- and community-based entities), and local educational agencies, to improve coordination, program quality, and delivery of services; and

(3) to maximize parental choice among a mixed delivery system of early childhood education program providers.

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139 20 USC §7117(a)(3)(B).
140 20 USC §7221b.
141 20 USC §7171(a)(2).
142 Program information is available at the U.S. Department of Education’s website, here: [http://www2.ed.gov/programs/preschooldevelopmentgrants/index.html](http://www2.ed.gov/programs/preschooldevelopmentgrants/index.html).
143 20 USC §9212.
The program requires a 30% funding match. Under the law, states receiving funds must first work on coordination of services, then they can move onto program improvement and professional development initiatives. Some concern has been expressed regarding the fact that the program quality requirements of the administrative grant program were not duplicated in the ESSA provisions and that the law does not mandate that teachers of pre-K programs have bachelors degrees or other minimum requirements.\(^{144}\)

**New Policy Promoting Dual-Language and Revitalization of “Heritage” Languages in Pre-K**

The U.S. Departments of Education and Health and Human Services have issued a joint policy statement, “Supporting the Development of Children who are Dual Language Learners in Early Childhood Programs.”\(^{145}\) The policy suggests that pre-K schools should establish a “culturally responsive” learning environment that promotes preservation and encouragement of dual-language use by bilingual students and that encourages the revitalization of “heritage” languages, such as Native American languages.

**Pre-K TV**

For those children who do not have access to pre-K programs, or to supplement those programs, the ESSA contains specific “Read to Learn Program Awards” to support the research and development of television programs for pre-K children that promote school readiness.\(^{146}\)

### Technology

Not surprisingly, given the frequent use of educational technology in classrooms today, Title IV has granted statutory authority for states and LEAs to pursue innovative educational technology strategies. Almost 60% of the grant funds – which constitutes almost $9 million – is permitted to be used for edtech, but no more than 15% can go towards technology infrastructure. This is presumably to ensure that the majority of the funds are spent on education innovation rather than structural technology.

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\(^{145}\) Available at: [https://www.acf.hhs.gov/sites/default/files/ecd/dll_policy_statement_final.pdf](https://www.acf.hhs.gov/sites/default/files/ecd/dll_policy_statement_final.pdf).

\(^{146}\) 20 USC §7293.
Venture capital funding in the edtech sector has increased dramatically over the last few years. In 2010, the edtech market was approximately worth $400 million. In 2016, it is anticipated that that number will be close to $2 billion. There is certainly no shortage of tech companies claiming to be the next big innovation in education, and the ESSA, as well as other laws, can help schools achieve the financial means to invest in the latest technology. Funding from edtech can come through Title I, Title II, Title III, and/or Title IV. Schools need to carefully consider their professional development obligations with regards to educational technology, though. In a recent survey, 86% of those surveyed said teachers in their district need more professional development in the area of technology. Title II now specifically provides for funding for technology-related professional development. Where funding is available for new technology and new tech-related initiatives, schools should also include related professional development to ensure that the educational programs are maximizing the effectiveness of the technology and tech-related initiatives.

Parents and Community

Title I

Under the ESSA, Title I requires that LEAs take an active role in engaging parents. It states:

A local educational agency may receive funds under this part only if such agency conducts outreach to all parents and family members and implements programs, activities, and procedures for the involvement of parents and family members in programs assisted under this part consistent with this section. Such programs, activities, and procedures shall be planned and implemented with meaningful consultation with parents of participating children.\[147\]

Title IV-E Family Engagement Centers

Title IV-E provides grants to support family engagement in education programs. The statutory purpose of these grants is:

(1) To provide financial support to organizations to provide technical assistance and training to State educational agencies and local educational agencies in the implementation and enhancement of systemic and effective family engagement policies, programs, and activities that lead to improvements in student development

\[147\] 20 USC §6318(a)(1).
and academic achievement.

(2) To assist State educational agencies, local educational agencies, community-based organizations, schools, and educators in strengthening partnerships among parents, teachers, school leaders, administrators, and other school personnel in meeting the educational needs of children and fostering greater parental engagement.

(3) To support State educational agencies, local educational agencies, schools, educators, and parents in developing and strengthening the relationship between parents and their children’s school in order to further the developmental progress of children.148

The program, with a total nationwide budget of $10 million in 2017, provides grants of at least $500,000 to aid the creation of statewide family engagement centers. The centers may not be established with federal funds alone, though. States must pick up part of the tab.

Promise Neighborhoods

The ESSA also now codifies a White House Neighborhood Revitalization Initiative that has been in existence since 2010.149 The Promise Neighborhoods program is a “cradle-to-career” program that offers “The provision of assistance to public elementary schools or secondary schools to function as full-service community schools.”150 The budget for the program is approximately $70 million annually in 2017 and 2018 and upwards of $90 million in 2019 and 2020.151 There is a 100% matching requirement for all grants. Matching funds can be provided by federal, state, local, or private sources.152 The Department of Education, in a FAQ document regarding the Promise Neighborhoods grant, describes it as follows:153

A-1. What is the purpose of a Promise Neighborhoods grant?
A Promise Neighborhoods implementation grant is a three- to five-year award to support eligible organizations in carrying out their plans to create a continuum of solutions that will significantly improve the educational and developmental outcomes of children and youth in the target neighborhood. These grants will aid eligible organizations that have developed a plan that demonstrates the need for implementation of a

148 Id.
150 20 USC §7273(b).
151 See 20 USC §§7273 and §7051.
152 20 USC §7273.
Promise Neighborhood strategy in the geographic area they are targeting, a sound strategy, and the capacity to implement the plan.

A-2. **What are the expected outcomes for Promise Neighborhoods, and what types of activities are allowable?**

Grantees will use grant funds to develop the administrative capacity necessary to successfully implement a continuum of solutions, such as managing partnerships, integrating multiple funding sources, and supporting the data system. Accordingly, the Department is requiring that grantees undertake the following activities during the implementation period—

1. Implement a continuum of solutions that addresses neighborhood challenges, as identified in a needs assessment and segmentation analysis, and that will improve results for children and youth in the neighborhood.

2. Continue to build and strengthen partnerships that will provide solutions along the continuum of solutions and that will commit resources to sustain and scale up what works.

3. Collect data on indicators at least annually, and use and improve a data system for learning, continuous improvement, and accountability.

4. Demonstrate progress on goals for improving systems, such as by making changes in policies and organizations, and by leveraging resources to sustain and scale up what works.

5. Participate in a community of practice, as described in the notice.

The Department will monitor the grantees’ progress toward completion of these activities. During the grant period, grantees must be able to demonstrate performance, or show significant progress toward completion of activities (1)-(5), including by responding to the Department’s questions and concerns regarding progress.\(^{154}\)

Cradle-to-Career programs are designed to collect and process data throughout the life of the project for the purposes of using the data to tailor the program for increased efficacy, and the data that they collect is significant. Public schools in areas with Promise Neighborhoods initiatives should be extremely cautious with regards to data that is collected and/or requested by any party due to the legal privacy and data-release constraints placed upon the schools through federal laws, such as FERPA, the IDEA, and the

\(^{154}\) *Id.*
Protection of Pupil Rights Amendment (PPRA), which may not apply to other organizations involved in the Promise Neighborhoods initiative.

The Promise Neighborhoods Research Consortium, which is funded by the National Institute on Drug Abuse and working to build the proper “infrastructure” for the Promise Neighborhoods initiative, emphasizes the collection and use of data as part of the cradle-to-career initiative and process:

The PNRC is creating a sophisticated website to collect and manage longitudinal data in school and neighborhood change efforts. As noted above, we have already identified most of the archival and survey measures that will be needed for the Promise Neighborhood intervention. The system is designed to provide ongoing summaries of recently collected data that will enable the delivery of services to those who need them and the evaluation and refinement of the system of solutions.

…

For example, surveys of families will identify those that would benefit from learning more about cultivating their children’s cognitive development. The data system will produce a report about the needs of each family that will prompt referrals to the organizations that can provide those services.

The consortium provides a toolkit for data collection and measuring progress in Promise Neighborhoods, which includes comprehensive data collection from students, parents, and community members on educational performance, medical information, socioeconomic conditions, and other items. A quick look at the student surveys in grades 6-8 reveals questions about sex, drug use (specifically asking about use of marijuana, cocaine, powder, crack, freebase, heroin, meth, ecstasy, huffing), sex, and condom use, as well as a detailed series of questions regarding the individual’s health, emotional status, habits, smoking, and other personal questions. All of these types of questions are regulated by the PPRA. Teachers are also asked to provide information about students in the data collection process, including the collection of data regarding observable student behaviors as well as teacher opinions regarding whether the teacher thinks that the student has engaged in illegal drug use, smoked tobacco, or consumed alcohol

155 See the “About Us” page at the Promise Neighborhoods Research Consortium website at: http://promiseneighborhoods.org/about.html.
157 See the Promise Neighborhoods Research Consortium’s “System of Measuring Progress” webpage at: http://promiseneighborhoods.org/measures.html.
in the past 30 days. In the instructions to the teacher at the top of the Promise Network Research Consortium’s model teacher survey, it states: “The answers you give will be kept private. No one, including the student or their parents, will know what you write.” The survey collects the teacher’s name, the classroom, and the student’s ID number, date of birth, grade level, and sex. This data collection process necessarily raises FERPA concerns and must be carefully vetted by public schools before teachers engage in it.

The Consortium’s website contains no information regarding limitations on where or how the data would be used, how it would be safeguarded, and what legal protections it is or should be afforded. The U.S. Department of Education has two different websites regarding Promise Neighborhoods, and, on one of them, it does provide a guide regarding “DATA-SHARING TOOL KIT FOR COMMUNITIES: How To Leverage Community Relationships While Protecting Student Privacy.” The guidance targets “civic and community leaders who wish to use shared data to improve academic and life outcomes for students.” The organization's such large-scale data collection initiative, particularly if being carried out by those not familiar with data protection laws and/or standards of care in handling sensitive data, raises significant concerns regarding data privacy.

Teacher Qualifications and Evaluation Systems

Consistent with the intended premise of the ESSA to transfer authority back to the state and local levels, the ESSA relinquishes federal control over the establishment of teacher qualifications and evaluation systems. The ESSA eliminates the NCLB “highly qualified” requirement for most teachers. It now simply requires that they “meet applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification.” The ESSA also does not include any specific teacher evaluation requirements and rejects the U.S. Dept. of Education’s

160 Id.
162 Available at: http://www2.ed.gov/programs/promiseneighborhoods/datasharingtool.pdf.
163 20 USC §6311(d)(2)(f).
waiver requirements and Race-to-the-Top grants that mandated highly-restrictive teacher evaluation systems that were required to be partially based on students’ test scores. It further prohibits the Secretary of Education from prescribing any aspect of the accountability system, including teacher evaluation systems or defining teacher effectiveness.

Title II-Part A does, however, provide funding to support efforts to enhance teacher and leader quality. Optional state funding has been added to the law specifically focused on development of principal and school leadership programs.\textsuperscript{164} There are also National Activities funds for technical assistance, evaluation, and competitive programs.

The ESSA does, however, mandate that states retain the NCLB standard for paraprofessionals (which, under the ESSA, includes the terms ‘paraeducator,’ ‘education assistant’ and ‘instructional assistant’), but it does so in an unusual way. Instead of simply restating the requirements in the new law, the ESSA references the outdated law by requiring, in the State Plan section of Title I, that states provide assurance that paraprofessionals have the “qualifications that were in place on the day before December 10, 2015.”\textsuperscript{165} While incorporating laws by reference is a standard practice, incorporating a law that no longer exists through this type of vague reference is odd. A full understanding of the legal requirements for this section cannot be obtained without researching legislative history and prior texts of the law. Puzzling.

For those who do not have time to go searching through old volumes of now-defunct law, Section 1119 of the No Child Left Behind Act required the following of paraprofessionals:

(A) completed at least 2 years of study at an institution of higher education;
(B) obtained an associate's (or higher) degree; or
(C) met a rigorous standard of quality and can demonstrate, through a formal State or local academic assessment —
   (i) knowledge of, and the ability to assist in instructing, reading, writing, and mathematics; or
   (ii) knowledge of, and the ability to assist in instructing, reading readiness, writing readiness, and mathematics readiness, as appropriate.

(2) CLARIFICATION- The receipt of a secondary school diploma (or its recognized equivalent) shall be necessary but not sufficient to satisfy the requirements of paragraph (1)(C).

\textsuperscript{164} 20 USC §7114(b).
\textsuperscript{165} 20 USC §6311(d)(2)(M).
Professional Development

Title II provides for a larger compendium of funding options for professional development programs for educators than were previously available under the NCLB. The ESSA provides a very detailed definition of “professional development.”\(^{166}\) Under the new definition, professional development activities must be “sustained (not stand-alone, 1-day, or short term workshops), intensive, collaborative, job-embedded, data-driven, and classroom-focused.”\(^{167}\) This emphasis on contextual learning is an ideal model, but it is a burdensome one. Integrated and sustained professional development takes significant planning and preparation and will be challenging in today’s schools due to the increased responsibilities placed on educators in recent years and the limited amount of time available for professional development activities. Schools will need to use their resources wisely – especially the finite resource of time – and put significant thought and planning into their professional development requirements to ensure that they fall within this definition.

**COMPLIANCE WITH FEDERAL REGULATIONS RE: RECIPIENTS OF FEDERAL AWARDS**

It is important to note that all non-federal entities, including states and LEAs, that receive federal grants are required to comply with the federal regulations pertaining to the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.”\(^ {168}\) Effective December 26, 2014, regulations from the Office of Management and Budget (OMB), codified as Title 2 of the Code of Federal Regulations (2 CFR) Part 200,\(^ {169}\) govern all federal grants awarded by the U.S. Department of Education (USDE) to the state or to an LEA on or after that date. Grants awarded before December 26, 2014, will continue to be governed by the OMB circulars that were in effect when the grant was awarded. This change resulted in major changes to 34 CFR, known as the Education Department General Administrative Regulations (EDGAR). The new EDGAR consists of multiple parts and regulations. For

\(^{166}\) 20 USC §7801(42).
\(^{167}\) 20 USC §7801(42)(B).
\(^{168}\) 2 CFR 200.0 et seq.
\(^{169}\) The regulations are available online here: [http://www.ecfr.gov/cgi-bin/text-idx?SID=f5459049733bfb47041d318a2e64486b&tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?SID=f5459049733bfb47041d318a2e64486b&tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl).
a complete description of the federal regulations that apply to federal education grant awards, visit USDE’s EDGAR website.\textsuperscript{170} This significantly impacts schools receiving funds under the ESSA.

All public schools should undergo a review of their current practices, policies, and procedures. The review should include a legal review as well as a review of accounting practices to ensure compliance with the federal requirements.

\textsuperscript{170} http://www2.ed.gov/policy/fund/reg/edgarReg/edgar.html.
The United States Department of Education issued proposed regulations to implement the ESSA on May 31, 2016 and July 11, 2016, which were met with some significant criticisms. The proposed regulations were the result of the negotiated rulemaking process provided for under ESSA, but a number of critics have suggested that the proposed regulations in reality ignore the recommendations made by this process, ignore the ESSA itself in many respects, and in fact take control over the education decision making process back to the federal level via regulation, when the statute intended to return it to the state level. Nonetheless, the Department noted that in the process of the rulemaking, it received three hundred and sixty-nine (369) comments and held two (2) public meetings with stakeholders and reported that it reached consensus, which the team took to mean unanimous agreement, on the regulations proposed. With respect to the proposed regulations, the Department permitted comment on the same for about two months after the issuance of each set, and that timeframe has now expired. It is anticipated that the final regulations will be released sometime in November of 2016 and certainly prior to the end of year.

171 81 Fed. Register 104, 34540 (May 31, 2016). It is noted that these portions of the proposed regulations revise the current regulations related to State Accountability System, Adequate Yearly Progress, Schoolwide Programs and LEA and School Improvement found at 34 CFR 200.11 through 200.54, although the vast majority of the proposed regulations replace the citations with entirely new provisions.
172 81 Fed. Register 132, 44928 (Jul. 11, 2016). It is noted that these portions of the proposed regulations revised the current regulations related to Standards and Assessments found at 34 CFR 200.1 through 200.10.
174 ESSA Sec. 1601(a).
Below are addressed some of the more significant areas of interest to LEAs under the proposed regulations, should they become law. It is important to note, however, that, as of the writing of this article, no regulations have been proposed with respect to the issue of “supplement, not supplant.”

1. **School Report Cards**

   The proposed regulations require that each state and each LEA are required to prepare and disseminate a “report card” on the status of education that includes certain information. Under the proposed regulations, the LEA report card must include the following:

   - The information required by the ESSA itself, including:
     - The number and percentages at each level of achievement on the assessments in reading/language arts, mathematics, and science.
     - Each measure included in the Academic Progress indicator for elementary and secondary students that are not in high school.
     - Four-year graduation rate.
     - Each measure included within the School Quality or Student Success indicators.
     - The number and percentage of English learners achieving English learning proficiency.

   - Must contain how this information for the LEA compares to the state as a whole and how this information compares for the specific school to the rest of the LEA and state.

   - Must explain the state’s accountability system.

   - Must include current expenditures per pupil from federal, state, and local funds and include funds per student in the LEA that were not allocated to public schools in the LEA.

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179 Proposed 34 CFR 200.31(a)(2).
180 Proposed 34 CFR 200.31(b).
181 Proposed 34 CFR 200.32(a).
182 Proposed 34 CFR 200.35.
- Must include the cohort rate at which graduating students enroll in post-secondary programs.\textsuperscript{183}

- Must include in the aggregate for the LEA and in the disaggregate by high poverty and low poverty schools the percentage of (1) inexperienced teachers, principals, and school leaders, (2) teachers who are teaching with emergency or provisional certifications, and (3) teachers who are not teaching in the subject matter for which they are certified or licensed.\textsuperscript{184}

- It must be issued directly to the parents of students in the LEA by mail or e-mail and available to the public, including on the LEA’s website.\textsuperscript{185}

- It must be issued by December 31 following the end of the school year that the data is on.\textsuperscript{186}

- It must be on a single piece of paper.\textsuperscript{187}

2. \textbf{Interventions and Replacement of AYP}

With respect to the issue of LEA and school improvement, the proposed regulations in large measure throw out the old regulations used under NCLB, including the concept of AYP, and develop something entirely different.\textsuperscript{188} The proposed regulations require that each state have a single statewide accountability system “to improve student academic achievement and school success among all public elementary and secondary schools, including charter schools.”\textsuperscript{189} The system must include the following:\textsuperscript{190}

- Must be based upon the challenging state academic standards.

\textsuperscript{183} Proposed 34 CFR 200.36.
\textsuperscript{184} Proposed 34 CFR 200.37. It is noted that the draft regulations propose that the terms “inexperienced” and “not teaching in the subject or field for which the teacher is certified or licensed” are to be defined by each state, meaning that this measurement, if approved, could vary significantly from state to state and arguably would make comparisons from state to state fairly difficult.
\textsuperscript{185} Proposed 34 CFR 200.31(d)
\textsuperscript{186} Proposed 34 CFR 200.31(e).
\textsuperscript{187} Proposed 34 CFR 200.31(b)(3).
\textsuperscript{189} Proposed 34 CFR 200.12(a).
\textsuperscript{190} Proposed 34 CFR 200.12(b).
- Must be “informed by” the state’s long term goals and measure of interim progress, which must look at academic achievement, graduation rates, and English language proficiency.191
- Must take into account the achievement of all students.
- Must be the same system that is used to differentiate all public schools in the state and used to identify the schools for comprehensive and targeted support and improvement. This requires that the state differentiate schools annually, based upon performance and identifying schools that are in need of comprehensive support and improvement and schools that are in need of targeted support and improvement.192
- Must include a plan for the state to develop and implement school support and improvement plans.

3. **Testing and Assessing Students**

The Department of Education explains that the changes to the area of student assessment and testing under the ESSA and proposed regulations are “limited.”193 Below is a summary of the key proposed changes.

First, the proposed regulations require that each state have a yearly assessment in math, reading/language arts, and science. The regulations also permit states to test in other subject areas, but they require that, if states do those assessments, they must also meet the regulatory requirements.194 The assessment, subject to certain exceptions, must be given to all students and given under the schedule provided for under the regulations.195 It is important to note that the state must have at least ninety-five percent (95%) of all students generally and in each subgroup assessed each year.196 With respect to what

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194 Proposed 34 CFR 200.2(a).
195 Proposed 34 CFR 200.2(b).
is required of the assessments the regulations require that the following elements must be included in the assessments:

- Must use the same assessment for all students.\(^{197}\)

- Must be designed to be valid and accessible to all students, including students with disabilities and English learners and be designed using “the principals of universal design for learning.”\(^{198}\)

The regulations define this term as requiring “a scientifically valid framework for guiding educational practices that”:

- (1) “provides flexibility [a] in the ways information is presented, [b] in the ways students respond or demonstrate knowledge and skills, and [c] in the ways students are engaged.”\(^{199}\)

- (2) “Reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and English learners.”\(^{200}\)

- Must be aligned with the challenging state academic standards – which must be aligned with entrance requirements for credit bearing coursework in public higher education in the state or state career and technical education \textit{or}, in the case of alternative assessments, it must be aligned to “the highest possible standards achievable by such students to ensure that a student who meets the alternative academic standards is on track to pursue postsecondary education or competitive integrated employment” consisted with Section 504.\(^{201}\)

- Must be valid, reliable, and fair and “be consistent with relevant nationally recognized professional and technical testing standards.”\(^{202}\)

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\(^{197}\) Proposed 34 CFR 200.2(b)(1).

\(^{198}\) Proposed 34 CFR 200.2(b)(2).


\(^{201}\) Proposed 34 CFR 200.2(b)(3). It is noted that this language is not included in the ESSA itself.

\(^{202}\) Proposed 34 CFR 200.2(b)(4).
- Must be supported by evidence that the assessments are adequate to meet the purposes of the law and that evidence must be available to the public.\textsuperscript{203}
- Be administered in accordance with the schedule provided for under the regulations.\textsuperscript{204}
- Must “involve multiple up-to-date measures of student academic achievement”, including measuring understanding of challenging content and assess higher-order thinking skills.\textsuperscript{205}
- Must be objective and measure achievement, knowledge and skills “without evaluating or assessing personal or family beliefs and attitudes.”\textsuperscript{206}
- Must provide for participation in the assessment by all students in the grades required under the schedule for assessments.\textsuperscript{207}
- May be, as determined by the state, administered through a single or multiple assessments.\textsuperscript{208}
- Must be able to disaggregate the results of the assessment by (1) gender, (2) race and ethnic group, (3) status as English learners, (4) status as migrant children, (5) children with disabilities, (6) economically disadvantaged students and non-disadvantaged, (7) homeless children, (8) foster children, and (9) status as child with a parent in the armed services.\textsuperscript{209}
- Must produce individual student reports of results.\textsuperscript{210}
- Must be able to itemize results by LEA and school.\textsuperscript{211}
- Must submit evidence that the assessment or assessments was peer reviewed to show that it meets all standards under the law and regulations.\textsuperscript{212}

\textsuperscript{203} Proposed 34 CFR 200.2(b)(5).
\textsuperscript{204} Proposed 34 CFR 200.2(b)(6).
\textsuperscript{205} Proposed 34 CFR 200.2(b)(7).
\textsuperscript{206} Proposed 34 CFR 200.2(b)(8).
\textsuperscript{207} Proposed 34 CFR 200.2(b)(9).
\textsuperscript{208} Proposed 34 CFR 200.2(b)(10).
\textsuperscript{209} Proposed 34 CFR 200.2(b)(11).
\textsuperscript{210} Proposed 34 CFR 200.2(b)(12).
\textsuperscript{211} Proposed 34 CFR 200.2(b)(13).
\textsuperscript{212} Proposed 34 CFR 200.2(d).
The proposed regulations do permit the assessment to be done by computer, and they also include a provision that permits a local school district, if approved by the state, to administer “a nationally recognized high school academic assessment” in lieu of the state’s assessment. A “nationally recognized high school academic assessment” is defined by the regulations as an assessment of high school students that “[1] is administered in multiple states [2] for the purpose of entrance or placement into courses in postsecondary education or training programs.” In addition, if a LEA seeks to use such an assessment, it must get permission from the state, notify parents of its intention to do so and the effect it may have on instruction, and provide parents opportunity for meaningful input regarding the same.

In terms of how often the assessments are to be offered, the proposed regulations leave essentially the same schedule in place that was provided for under the prior regulations as set out in the chart below. However, the regulations do permit, consistent with the statute, that the assessment may be given either in the form of “a single summative assessment” or multiple assessments throughout the year that results in “a single summative score that provides valid, reliable, and transparent information on student achievement.” In addition, states may administer assessments in other areas chosen by the state.

<table>
<thead>
<tr>
<th></th>
<th>Current</th>
<th>Proposed</th>
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<tbody>
<tr>
<td>Math</td>
<td>Once per year in grades 3 through 8 and at least one time during grades 10 through 12</td>
<td>Once per year in grades 3 through 8 and at least one time during grades 9 through 12</td>
</tr>
<tr>
<td>Reading/Language Arts</td>
<td>Once per year in grades 3 through 8 and at least one time during grades 10 through 12</td>
<td>Once per year in grades 3 through 8 and at least one time during grades 9 through 12</td>
</tr>
<tr>
<td>Science</td>
<td>At least one time during - Grades 3 through 5</td>
<td>At least one time during each: - Grades 3 through 5</td>
</tr>
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213 Proposed 34 CFR 200.2(c).
214 Proposed 34 CFR 200.3(a).
215 Proposed 34 CFR 200.3(d).
216 Proposed 34 CFR 200.3(c).
217 Proposed 34 CFR 200.2(b)(10).
218 Proposed 34 CFR 200.5.
220 Proposed 34 CFR 200.5(a).
The draft regulations place a heavy emphasis on the idea that all students should participate in these assessments. The draft regulations specifically provide that students with disabilities, including students with IEPs or students eligible under Section 504 and/or the ADA, should be provided accommodations to the extent deemed appropriate, but should be assessed on the standards for the grade in which the student is enrolled.\textsuperscript{221} While the proposed regulations do permit an alternate assessment, it states that an alternate assessment must be given to only one percent (1%) of the student population of a state and that this should be limited to “students with the most significant cognitive disabilities.”\textsuperscript{222} While the draft regulations, consistent with the statutory language, limit the total number of students who may take an alternate assessment in the state, they further provide that states may not tell an LEA that the LEA is limited to a one percent (1%) cap, which is also consistent with the statutory language. The proposed regulations require that if a LEA does require the alternate assessment for more than one percent (1%) of its population “that an LEA submit information justifying the need of an LEA to assess more than 1.0 percent of the assessed students” with the alternate assessment,\textsuperscript{223} which is also consistent with the statutory language. The regulations go on to provide that the decision to use the alternate assessment must be made on a case by case basis, although this seems to be contrary to the suggestion that there is a cap. The proposed regulations permit a state to seek an exception to this one percent (1%) limit on the use of an alternate assessment.\textsuperscript{224} The proposed regulations also provide that English learners must be included in the academic assessments.\textsuperscript{225} However, this provision does include an exception and alternatives for

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\hline
- Grades 6 through 9, and & - Grades 6 through 9, \\
- Grades 10 through 12 & and \\
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\begin{footnotes}
\textsuperscript{221} Proposed 34 CFR 200.6(b).
\textsuperscript{222} Proposed 34 CFR 200.6(c).
\textsuperscript{223} Proposed 34 CFR 200.6(c)(3).
\textsuperscript{224} Proposed 34 CFR 200.6(c)(4).
\textsuperscript{225} Proposed 34 CFR 200.6(f).
\end{footnotes}
students who are “recently arrived English learners”, which is defined as having been enrolled in school in the United States for less than twelve (12) months.\textsuperscript{226}

\textsuperscript{226} Proposed 34 CFR 200.6(f)(4)-(5).