



September 14, 2017

Hilary Malawer
Assistant General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW, Room 6E231
Washington, DC 20202

Docket ID: ED-2017-05-0074

Dear Ms. Malawer:

On behalf of the Foundation for Excellence in Education (ExcelinEd), I am writing in response to the request from the U.S. Department of Education (ED or the Department) for public input on Department regulations that may be appropriate for repeal, replacement, or modification. ExcelinEd applauds the Department's efforts to amend its regulations to ensure they are better aligned with the Department's objectives and are maximally useful and helpful to state and local educational agencies as well as other organizations that administer ED programs.

ExcelinEd is a national nonprofit organization intent on helping states build education systems that ensure each child achieves his or her full potential. As an organization, ExcelinEd focuses on promotion and implementation of reforms in elementary and secondary education and thus our regulatory review for the purpose of preparing this response has centered on regulations in the K-12 domain. Further, because the state and local administrators who implement ED programs rely not only on formal regulations, but also on nonregulatory guidance (NRG), we believe that it would be appropriate for the Department's current regulatory reform initiative to result in improvements in both regulations and NRG in order to affect the total regulatory environment. Toward that end, we have examined both regulations and NRG and ask for your consideration on our recommendations that follow.

1. Repeal Obsolete ESEA Regulations

With the enactment of the Every Student Succeeds Act (ESSA), the most recent reauthorization of the Elementary and Secondary Education Act (ESEA), a number of ESEA regulations became obsolete. The Department has taken steps to update some of those regulations, but the recent rescission of Title I accountability and report card regulations has placed previous, and now obsolete, regulations back on the books. Although we are hopeful that the state and local officials making the transition to ESSA are aware that the current regulations are no longer in effect, retention of obsolete regulations is a potential source of confusion and program misdirection. It would be unfortunate if a state or school district mistakenly abided by the regulations, only to discover later that it was out of compliance with the statute. In order to prevent that type of outcome, the Department should repeal the obsolete Title I regulations. Those regulations are as follows:

- Adequate Yearly Progress (34 CFR 200.13-22)
- Local Educational Agency (LEA) and School Improvement (34 CFR 200.30-53)
- Qualifications of Teachers and Paraprofessionals (34 CFR 200.55-61)

In addition, we have identified regulations for several other ESEA programs whose authorizations were repealed by ESSA or earlier enactments. Because individuals and organizations interested in Federal programs may turn to the regulations for information, retaining the regulations for formerly authorized programs is another potential source of confusion. We recommend that the Department thus repeal the regulations for the following ESEA programs:

- Even Start Family Literacy Programs (34 CFR 200, Subpart B)
- Troops to Teachers (34 CFR 230)
- Christa McAuliffe Fellowship Program (34 CFR 237)
- Bilingual Education: Graduate Fellowship Program 34 CFR 535)

2. Formally Rescind, and Appropriately Archive, Obsolete NRG

When NRG packages become obsolete, it has been the Department's practice to archive that NRG on its website, with a statement indicating that the NRG is no longer in effect. However, we also understand that some state and local administrators and auditors may turn to and rely on obsolete NRG, to the detriment of program operations. We thus recommend that the Department carefully review all the ESEA-related NRG currently on the website and archive those packages that are now obsolete, with a clear and prominent statement that the NRG is no longer in effect, should not be ED in administration, and is available on the website only for historical purposes.

The enactment of ESSA has rendered obsolete not only certain ESEA regulations, but also certain NRG packages, including the following:

- Supplemental Educational Services (January 14, 2009)
- Public School Choice (January 14, 2009)
- LEA and School Improvement (January 7, 2004)
- School Improvement Grants (December 18, 2009)

3. Update the Regulations for Title I Schoolwide Programs

ESSA made significant changes to the Title I "Schoolwide Programs" authority (ESEA Section 1114), including to the requirements for development of a schoolwide plan and on the components of a schoolwide program. In addition, the reauthorization created a new authority for States to waive the requirement that a school operating a schoolwide program have at least a 40 percent child poverty rate. Yet the previous regulations for schoolwide programs (34 CFR 200.25-29), reflecting the requirements of the old law, are still in place. We recommend that ED update those regulations, doing so in a manner that simply brings the regulations into conformance with current law without adding requirements that go beyond the law or that could reduce local flexibility.

In addition, the Department should consider issuing updated NRG on Schoolwide Programs that further explains the flexibility that the schoolwide authority provides and describes best practices. For example, the NRG might clarify the authority of LEAs to combine the Federal, state, and local funds flowing into a schoolwide programs school, without having to account separately for that funding by source, and might provide examples of how the flexibility under the new schoolwide authority can empower LEAs to implement improvements that raise achievement for all students in a high-poverty school. The guidance should also clarify how LEAs can consolidate these funds and still meet the financial transparency requirements in ESEA Section 1111(h)(1)(C)(x), for instance by assuming that all Federal, state, and local funds flow in the same proportion into personnel and non-personnel expenditures.

4. Create NRG on the Title I “Supplement, Not Supplant” Requirement

ESSA made major changes to the statutory requirement that LEAs use Title I funds only to supplement, and not supplant, state and local funding (ESEA Section 1118(b)). Last year, the previous Administration developed new supplement not supplant (SNS) regulations, including by publishing a Notice of Proposed Rulemaking, but did not issue those regulations in final. This outcome has left the field without a clear understanding of what the revised statutory language entails. Moreover, the discussions undertaken at the 2016 Title I negotiated rulemaking sessions illustrated a wide range of opinions on what is required. This situation is unfortunate, because there should be consistent implementation of the SNS requirement by LEAs, auditors, and others.

We recommend that the Department not attempt to regulate on SNS, but instead issue NRG that provides a non-exhaustive list of ways in which LEAs may achieve compliance. Such NRG would be highly valuable to program administrators and auditors. The intent of SNS is that LEAs not use Title I funding to replace the state and local funds that a school would otherwise receive and, thus, that LEAs must distribute state and local funds neutrally with regard to whether a school is a Title I school. The NRG should clarify this intent and provide LEAs with a flexible, non-exhaustive menu of options for achieving that objective. For example, one option for districts to demonstrate compliance with the supplement, not supplant requirement would be the use a weighted student funding formula that distributes state and local funds based on counts of students, giving extra weight to students living in poverty, English learners, students with disabilities, and other groups of students with educational disadvantages.


5. Create NRG on Direct Student Services

ESSA created a new authority (in ESEA Section 1003A) for states to reserve a portion of their Title I allocations for “direct student services” (DSS). States are looking carefully at this new opportunity, and at least a few appear to be building the reservation into their ESEA consolidated state plans. However, a number of provisions of the statute may be unclear, including whether DSS is covered by the Title I SNS requirement and whether all states must offer academic tutoring as part of their services.

We do not believe that regulation would be warranted in this area, but recommend that the Department issue NRG that clarifies the statutory provisions and offers a non-exhaustive list of suggestions on how states can utilize the flexibility under DSS to advance state priorities. For example, the NRG could describe how LEAs could create an application process that prioritizes funds to LEAs intending to use DSS funds for state priorities, such as supporting online courses, credit-recovery programs for at-risk students, personalized learning, and transportation for students enrolled in comprehensive support schools to attend higher-quality public schools.

Thank you for the opportunity to provide input on this important initiative. Please do not hesitate to contact me if ExcelinEd can be of any assistance.

Sincerely,



Patricia Levesque