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Additional Comments to Proposed Regulations to 34 CFR Parts 200 and 299 of the Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans.

*Note: These are additional to comments previously submitted jointly by CLE and the Advocacy Institute.*

Submitted via <https://www.regulations.gov/#!submitComment;D=ED-2016-OESE-0032-0001>

August 1, 2016

U.S. Dept. of Education  
Office of Elementary and Secondary Education  
Docket ID ED–2016–OESE–0032

## **§ 200.18 and 200.19 School Differentiation and Identification – Single Summative Rating and Identification of Schools in Need of Improvement.**

We approach these issues from the perspective that, in order for all children to succeed, we need, at the state level, an improvement system that addresses problems in any area, rather than solely relying on identifying the worst performing schools, based on a composite in which weaknesses in one area gets ignored because it's compensated by higher scores in another area or because some low-performing schools get ignored because there are others even lower performing. Any system of school improvement and support must be consistent with the Act's purpose of ensuring that *every* child succeeds, and conversely that if some children are not on a pathway to success, in terms of emerging from school college- and career-ready, including in terms of mastery of the State's standards for all, well-designed attention must be paid. In those terms, the fact that other schools may be experiencing even worse problems in student achievement, or that students in a school are on that pathway in one key indicator (for example mathematics) but not another (reading or language arts), cannot suffice as the basis for identifying the need for improvement and support. At the same time, our insistence that such attention must be paid; the fact that truly high standards means that of course many schools should be identified as not currently on that path in one or more areas, without it being a badge of dishonor; and what we know about the process of school change and improvement, all argue for combing a rigorous system of identifying when some students in a school are not on that path in one or more areas with a collaborative, primarily non-punitive set of responses in a continuous change system of educational improvement and support.

1. First, there does seem be one provision of Act that would seem impossible to carry out without boiling down the various indicators to a single rating appears to be, in effect, but only for 1 particular use: the requirement, in the system of meaningful differentiation of schools, to identify "*not less* than the lowest-performing 5 per cent of all [Title I] schools. We do note, however, that there is at least one way that a State could, even there, comply

without a summative single ranking – if it chose to identify all schools that were in the bottom x% on any measure (where x is 5 or more), which would identify a lot more than 5% of the schools, but it would include the lowest 5% overall, by any measure.

2. In either case – whether or not the Department concludes that, in exercising its authority to issue a regulation in order to effectively implement the Act, a summative rating is needed -- there are other things, even more important, that should be articulated in the regulations in order to effectuate the goals of the Act as described above, we can say about this that connect to our overall views about accountability, in focusing attention on inadequate progress. (An example of where we've already done this is on n-size and accountability, where we've now argued that even if the students in a group are too small by themselves to reliably draw wider conclusions, schools should attend to what is clearly the case about the current entire population of a subgroup that has been assessed.) The regulations should:
  - a. Note that nothing (including the "single rating" provision, if it remains in the final regulations) requires that the determination of the lowest performing schools be based on a strictly mechanical weighting and totaling – i.e., that it must be based on assigning percentages to each factor and then multiplying the score on each indicator by the percentage weight – there may be more nuanced approaches, provided that they are uniform and consistent. . . . Provide that in establishing a method for selecting the lowest achieving schools, the State should seek to minimize the extent to which schools that are most in need of improvement fail to get identified. . . .
  - b. Note that the Act requires the identification of "*not less than* the lowest-performing 5 percent of schools," and encourage the State to set a higher number to the extent that the lowest 5% leaves many schools unidentified that clearly need serious attention.
  - c. Point out that focusing on only the lowest 5% based on a single composite score is likely to mean, among other things that the only schools identified will be ones that are performing at an extremely low level in both language arts *and* mathematics. A school that is performing at the most extremely low level in one but not on the other is not likely to be in the very lowest 5% overall, even if performance in the other subject is very low and falls far short of the goals and indicators for proficiency. The result is that even if a school's performance in reading/language arts, or in mathematics, is among the very lowest in the State, the school will not get support and improvement activities, and a very high percentage of students in that school are likely to continue to emerge with very low achievement in one or the other. Again, this should not be acceptable in terms of ensuring quality programs capable of enabling all students to emerge proficient and college- and career-ready.
  - i. In this regard, the proposed use of a composite score does not resolve the problem of performance in one subject area compensating for low, even extremely low, performance in another. Just as it is not acceptable for a school's overall aggregate achievement to compensate for significant problems for a subgroup, so too should the fact that students doing relatively well in math (or under the 5% rule doing poorly but not as poorly as the bottom 5%) compensate for the fact that students are continually emerging from the school inadequately educated in reading and language arts. The State should be expected to develop an accountability system that avoids that result.

3. In addition to the identification of the lowest performing 5% schools under Section 1111(c)(4)(D)(i) of the Act, highlight the importance of (c)(4)(D)(ii), which allows the State to identify additional categories of schools, and advise States to do so to the extent necessary in order to provide attention and support to schools not on track to meet the goals and indicators in any areas.
  - a. First, the Department should recognize, and ensure that States recognize, the limitations of the 5% provision in (i), even if the State broadens it in the two dimensions noted above – (a) setting the percentage at more than 5% and (b) including schools that are in the lowest 5% on any measure. It will still leave out schools in serious need of assistance and improvement. Its additional limitations stem from the fact that it is a norm-based measure, i.e., how does this school compare with other low-performing schools? As such, it cannot by itself make any claim to identifying the schools in the State that are in serious need of improvement. Take a school, along with its students, that is in serious need of improvement. If there are, for example, 2,000 Title I schools in the State, whether this school will get that attention under (i) will depend upon whether its overall performance makes it one of the 100 very lowest performing. If it is the 101<sup>st</sup> lowest, it will not get identified because other schools scored even lower. But the performance of those other schools is *totally irrelevant* to the extent to which this school needs such improvement.
  - b. Thus, in order to implement the overall requirements of the Act, the State should be identifying, on its own terms, the criteria by which schools should be determined to be in need of support and improvement, and using its authority under (ii) to apply those criteria in identifying schools that meet them. Those criteria should be robust enough to address schools that are not on a path to meeting the goals and indicators and that, without such attention and assistance, are not likely to do so in a timely way.
  - c. The regulations should also point out that in using its discretion under (ii), the State is not required to base its criteria on the single summative measure and can include identification of schools based on any indicators.
  - d. States should also be advised that in using their authority under (ii) that they can include other indicators and should specifically be directed to performance in other subjects (such as science and social studies), responding to the need for students to have a well-rounded education. When the State has identified expectations for what all children should learn, including in other subjects, students in Title I schools should not be limited in getting a rich educational program that enables them to learn (e.g. pullouts from those classes for double-dosing reading or math) or overall cutbacks for all students in those subjects.
  - e. In allowing and encouraging accountability systems that can identify and address needs on any significant indicator, rather than only on a composite, part of encouraging it is pointing out that the States have the authority to devise an accountability system in which the primary response to problems on any indicator should be constructive rather than punitive -- rather than let some students fall through the cracks when not on a path to achieving what is expected for all, for fear that we don't want to "punish" too many schools. Under the Act, States clearly have the breathing room to create systems with that emphasis.

- i. In saying this, it is important to recognize that, in adopting well-designed collaborative developed, non-punitive approaches, “non-punitive” does not mean that adopting and putting them in place is optional. In addition, there will likely to be a need, in hopefully a much smaller number of schools, for the State to develop criteria for imposing changes in a way that amounts to involuntary sanctions, albeit educationally sound ones. But these need not, and in our view should not, necessarily be triggered by achievement rates alone. Failing to meet a target is not in itself a violation of the Act; failure to implement the all-too-often ignored front-end school-level program requirements of the Act for *all* Title I schools (and related front-end LEA program requirements)<sup>1</sup> designed to enable children to achieve mastery in the first place *is* a violation of the Act, as is failure to develop and implement the back-end required improvement responses to low achievement discussed here. Those school and LEA failures provide a basis for, and indeed demand, mandatory changes.
- (l) Indeed, faithful implementation of the school-level provisions for creating an educational program that is designed to enable all children to achieve at a high level in the first place in every Title I school, and LEA and SEA requirements for oversight of, and support for, real implementation of and compliance with those provisions, at the front end would greatly reduce the extent of need for, and number of schools requiring, identification and support and improvement actions at the back end. The regulations should connect these dots.
- (A) This includes the requirements that the school’s Title I program plan for *how* the school will carry out each of these program requirements must be *jointly developed with* the parents and families of the school, and that *how* it will be jointly developed must be spelled out in the school’s parent and family engagement policy, which in turn must be *jointly developed with and approved by* the parents and families of the school.<sup>2</sup> (Similarly, how the LEA will carry out its front-end responsibilities must be spelled out in the LEA’s Title I program plan, which must be jointly developed with the parents and families of the district, and how it will be jointly developed must be spelled out in the LEA-level parent and family policy, which in turn must be jointly developed with and approved by the parents and families of the children served by Title I in the district.<sup>3</sup>)
- (B) While there are obligations to ensure, review, improve, and enforce these up-front provisions in every Title I school – all of which have gotten too little meaningful attention -- the regulations in § 200.21 and § 200.22 should also require that review of these school- and LEA-level program provisions be part of the program improvement and support process for identified schools. They should part of the needs assessment that is required for these identified schools. Indeed, they seem crucial in developing an effective improvement and support plan – knowing the extent to which the school’s core program plan was properly developed in the first, evaluating how well it addressed the

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<sup>1</sup> Sections 1112-1116.

<sup>2</sup> Sec. 1116(c)(1) and (3).

<sup>3</sup> Sec. 1116(a).

required core components, or the extent to which parts of it simply have not been implemented, or not implemented well.

4. Require that in designing and implementing its accountability system, the State take into account the need for this system, in tandem with the front-end program planning and implementation requirements for all Title I schools, LEAs, and SEAs, to address not simply 5% of the schools in the State, but the improvement needs of *all* schools that experience gaps. Without that, there will be a huge mismatch between the accountability system and the goals and requirement of the Act for an educational system in which “every student succeeds” and for providing the educational program and improvements and supports that enable that child to succeed.

§299.13(b) and §299.15(a). State and Consolidated Plans – Timely and meaningful consultation.

**Comment:** Substantial family involvement in State decisions affecting families and their children would be important in any event. *To the extent that States will now be gaining much greater additional authority and discretion over important decisions, with less federal regulation or oversight, the need for strong involvement in those decisions by families – both directly and by organizations representing their interests – becomes all the greater.*

There has long been a general requirement that the State plan be developed “in consultation with” a range of parties (LEAs, teachers, principals, etc.), including parents, though not students. Just as a requirement for “consultation” at the local level, without more, was not adequate to secure the benefits of real parent involvement (and so were replaced with much stronger provisions in 1994 and carried forward in 2001 in section 1118, and now in ESSA’s section 1116), it is not adequate at the state level.

Thus, at a minimum, the regulations need to incorporate attention to factors that are central to resulting in timely and meaningful consultation at the State level, similar to those we have identified for stakeholder involvement in school improvement under §1021.

**Action requested:** The regulations should ensure that, in developing a process for timely and effective consultation, the State address the following factors:

First, if the consultation process is to be timely and meaningful for families and other key stakeholders, it should be developed *ahead of time* with those stakeholders – based on their own thoughts about what meaningful and timely consultation would be – rather than deciding on a process for consultation without them, then consulting on the plan according to that process and later have it not actually be timely and meaningful, because, for example, it did not address barriers that the stakeholders experience. The State should solicit participation in this initial step from among the full range of stakeholders who will be consulted, including a full range of students, parents, families and their advocates.

Second, if the consultation is to be meaningful, stakeholders must be made aware of the background information that the State believes is relevant for its own staff in developing the plan, must be provided effective access to that information, and assistance as needed in understanding it. To be both timely and meaningful, this information, as well as drafts, must be provided in sufficient time for stakeholders to absorb it and develop responses in advance of providing input.

Third, if consultation is to be meaningful, it must happen throughout the development of the plan – for the same reasons as discussed under §1021, noting the problems that occur if the consultation is only at the front end or only at the back end of the process. In this regard we note that §299.13(a)(2) requires consultation—

- (i) During the design and development of the SEA's plan a to implement the programs;
- (ii) Prior to submission of the plan by making it available for public comment for a period of not less than 30 days; and
- (iii) Prior to the submission of any revisions or amendments.

This distinction between (i) consultation during design and development and (ii) opportunity for public comment prior to submission gets at some of that iterative process. Given past experience, we are concerned that the distinction between the two may get lost, with public comment swallowing earlier ongoing consultation, so it should be clarified, as well as the need for it to be ongoing during the design and development phase.

Fourth, it should include secondary school students (the largest stakeholders), as well as their parents and families and their advocates, including civil rights and community based organizations – including students and their families that are low-income, from the full range of racial and ethnic groups, and students and parents who have disabilities, have limited literacy, or limited English proficiency, are in foster care or homeless. For stakeholders to be consulted in a meaningful way, the process needs to be designed to generate as much outreach to *all* those who are stakeholders as possible, to minimize the possibility that such stakeholders across the State who, if properly informed, would want to provide input.

Thank you for your consideration of our comments.

Yours truly,



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