FairTest

National Center for Fair & Open Testing

FairTest Comments and Recommendations to Department of Education Draft Regulations on Accountability

While the accountability provision in the Every Student Succeeds Act (ESSA) are superior to those in No Child Left Behind (NCLB), the Department of Education's (DoE) draft regulations intensify ESSA's worst aspects and will have the effect of perpetuating many of NCLB's most harmful practices. The draft regulations over-emphasize testing, mandate punishments not required in law, and continue federal micro-management. All this will make it harder for states, districts and schools to recover from the educational damage caused by NLCB – the very damage that led Congress to fundamentally overhaul NCLB's accountability structure and return authority to the states.

To resolve this problem, the DoE must remove or thoroughly revise five draft regulations:

DoE draft regulation 200.15 would require states to lower the ranking of any school that does not test 95% of its students or to identify it as needing "targeted support." No such mandate exists in ESSA. In fact, this provision violates explicit statutory language that ESSA does not override "a State or local law regarding the decision of a parent to not have the parent's child participate in the academic assessments" (in ESSA at 1111(b)(2)(K), reinforced at 1112(e)(2)(A)). This regulation appears designed primarily to undermine the growing resistance to the overuse and misuse of standardized exams.

Recommendation: DoE should simply restate ESSA's language (cited above) allowing the right to opt out as well as its requirements that states test 95% of students in identified grades and factor low participation rates into their accountability systems. Alternatively, DoE could write no regulation at all. In either case, states should decide how to implement this provision.

DoE draft regulation 200.18 transforms ESSA's requirement for "meaningful differentiation" among schools into a mandate that states create "at least three distinct levels of school performance" for each indicator. ESSA does require states to identify their lowest performing five percent of schools as well as those in which "subgroups" of students are doing particularly poorly. But neither provision necessitates creation of three or more levels. This proposal serves no educationally useful purpose. Several states have indicated they oppose this provision because it obscures rather than enhances their ability to precisely identify problems and misleads the public. (E.g., Idaho, in Education Week, April 14, and California, in EdSource, June 12). This draft regulation would also pressure schools to focus on tests to avoid being placed in a lower level; FairTest has seen this problem in states across the nation. Performance levels are also another way to attack schools in which large numbers of parents opt out, as discussed above.

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DoE draft regulation 200.18 also mandates that states combine multiple indicators into a single "summative" score for each school. As Rep. John Kline, chair of the House Education Committee, pointed out (Education Week, April 13), no such requirement is included in ESSA. Summative scores are simplistically reductive and opaque. They encourage the sort of flawed school grading schemes promoted by diehard NCLB defenders.

Recommendation: DoE should drop this draft regulation. Instead, it should allow states to decide how to use their indicators to identify schools and whether to report a single score. Even better, the DoE should encourage states to drop their use of levels, which ESSA does not require.

DoE draft regulation 200.18 further proposes that a state's academic indicators together carry "much greater" weight than its "school quality" (non-academic) indicators. As reported in the media, members of Congress differ as to the intent of the relevant ESSA passage. Some say it simply means more than 50%, while others claim it implies much more than 50%. The phrase "much greater" is likely to push states to minimize the weight of non-academic factors in order to win plan approval from DOE, especially since the overall tone of the draft regulations emphasizes testing.

Recommendation: The regulations should state that the academic indicators must count for more than 50% of the weighting in how a state identifies schools needing support.

DoE draft regulation 200.18 also exceeds limits ESSA placed on DoE actions regarding state accountability plans, at (1111(e) (1)(B)(iii).

DoE draft regulation 200.19 would require states to use 2016-17 data to select schools for "support and improvement" in 2017-18. This leaves states barely a year for implementation, too little time to overhaul accountability systems. It will have the harmful consequence of encouraging states to keep using a narrow set of test-based indicators and to select only one additional "non-academic" indicator.

Recommendation: The regulations should allow states to use 2017-18 data to identify schools for 2018-19. This change is entirely consistent with ESSA's language at 1111(c)(4)(D) which says states are to identify "beginning with school year 2017–2018… one statewide category of schools." It does *not* say states should identify schools in 2016-17 for use in 2017-18.

Lastly, we are concerned that an additional effect of these unwarranted regulations will be to unhelpfully constrain states that choose to participate in ESSA's "innovative assessment" program (at Section 1204).

▪ FairTest also submitted a supplement that elaborates on some of these points and provides language from ESSA and the draft regulations to support the comment and recommendations. The supplement is available at http://www.fairtest.org/sites/default/files/FairTest-Comment-on-ESSA-draf-regulations-supplement.pdf