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August 1, 2016

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

Docket ID: ED-2016-OESE-0032

Dear Ms. Miller:

I am writing to provide the comments of the New York State Education Department (NYSED or “the Department”) on the United States Department of Education’s (USDE) Notice of Proposed Rulemaking (NPRM) on accountability, data reporting, and state plans under the Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act (ESSA).

The overarching theme of the Department’s comments are that the USDE should seek in its NPRM to adhere to the clear intent of Congress, which is to give state educational agencies (SEAs) flexibility to create their own Title I accountability systems in cooperation with stakeholders. We appreciate that in many instances USDE’s proposals are consistent with the objectives and provisions of ESSA and, in many cases, helpfully clarify terms and provisions that are unclear in the statute. However, there are instances where the draft rulemaking goes beyond the statutory language and imposes conditions on states that are overly prescriptive, onerous and/or, in a few instances, unworkable.

We request that the USDE give serious consideration to addressing the issues specified below:

I. Timeline for Implementation of New Accountability Systems

ESSA provides that the revised accountability requirements of Title I “shall take effect beginning with the 2017-18 school year.” Given the ambiguity in this provision, New York State strongly urges that USDE interpret the statement to mean “beginning with 2017-18 school year results,” rather than beginning with 2016-17 school year results, as proposed in the draft rulemaking.

Using 2016-17 school year results creates multiple challenges:

- It will require New York to prematurely sunset its current list of Priority and Focus Schools before schools and districts have had sufficient time to implement their plans. New York, as required by ESEA flexibility, created new lists of Priority and Focus Schools in February 2016. Requiring that new lists of Comprehensive Support and Improvement Schools and Targeted Support and Improvement Schools be created using 2016-17 school year results means New York would have to sunset its Priority and Focus Schools lists after these schools have had only one full academic year to implement their plans.
- Identifying schools using 2016-17 school year results will significantly circumscribe the accountability measures that New York will be able to use in its new identification system. Using 2016-17 school year results not only precludes New York from incorporating any measures not based on data currently available, but also means that any measures based on growth from a baseline would need to have already been in place for a number of years. This severely limits the ability of New York to reimagine its accountability system to better address the strong desire of stakeholders for a “multiple” measures system rather than one that makes determinations largely based upon English language arts and mathematics assessments and graduation rates.
- Given that USDE is unlikely to approve state plans until the spring or summer of 2017, schools will not know at the start of the 2016-17 school year with any degree of confidence the measures and indicators for which schools will be held accountable. A core principle of a good accountability system is that those who are held accountable should know in advance that for which they shall be held accountable.

Recommendation:

We recommend that the USDE allow states to identify schools in the 2018-19 school year under ESSA’s new accountability system, using data for 2017-18 and prior years, and continue ongoing efforts to improve schools identified under ESEA flexibility or prior law during the 2016-17 and 2017-18 school years. This is consistent with the ESSA statute and will allow for states to implement high-quality accountability systems in 2017-18 and use these systems to

planning purposes, and implementation of plans is not required to occur until the year following identification.

Recommendation:

Each state after consultation with stakeholders should establish the timeline for identification of schools, and states may choose to use data that is lagged by one year, if the state determines that such a lag is necessary to ensure timely determinations are made.

III. Performance Levels for Indicators and Summative Ratings

ESSA requires that states develop accountability systems that meaningfully differ

Recommendation:

Blue Ribbon Schools when schools are unable to meet participation rate requirements.

Given this context, New York notes that § 200.15 of the proposed rulemaking requires a State to not only use 95 percent of the students in the grades assessed as the minimum denominator for making language arts/reading and mathematics accountability determinations regardless of the number of students who actually participate in state assessments, but also to take actions against schools that fail to meet participation as prescribed by the rulemaking, and to require these schools and LEAs to develop improvement plans to increase participation rates. We believe these requirements are inconsistent with the intent of the law to allow States to have broad discretion to determine the consequences when schools and LEAs are unable to meet participation rate requirements. We do not believe the law requires that States must at minimum take actions that are equally rigorous to those identified by the USDE, nor do we believe that an improvement plan must be required of schools and LEAs after a single failure to meet participation rate requirements. Finally, although we recognize that the statute contains the “95 percent denominator” provision, we are disappointed that USDE has not been creative in providing states with flexibility to address the potential unintended consequences of this provision of the law.

Recommendation:

The rulemaking should be limited to repeating the language of the statute and should only require states to provide a clear and understandable explanation of how the state will factor the participation requirement into the statewide accountability system. In addition, we recommend that the rulemaking provide flexibility to states so that schools need not be identified for Comprehensive Support and Improvement or Targeted Support and Improvement if there is compelling evidence that the school's academic performance is not at the level that warrants such identification.

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IX. Standard for Including Children with Disabilities, English Learners, Children Who are Homeless, and Children Who are in Foster Care in their Corresponding

## XI. Postsecondary Enrollment

§200.18 requires that, beginning with the report card prepared for 2017, rates of high school graduates who enroll in programs of public postsecondary education in the academic year immediately following graduation be reported. This section also stipulates that where practicable, rates for students enrolled in programs of private postsecondary education be reported. We believe the implementation requirement of 2017 is too ambitious. In addition, we are concerned with the associated burden on state resources, both in personnel and financial, that this requirement introduces. Data privacy legislation exists in New York that makes it difficult for the Department to share data with our public university systems, the State University of New York (SUNY) and the City University of New York (CUNY). The state legislation requires that we adhere to specific requirements and data protections, including the incorporation of a data security and privacy plan in all applicable contracts or agreements, the process for which is complicated and lengthy. SUNY and CUNY are considered third-party contractors in the legislation, not educational agencies, and as such must be subject to these data privacy provisions. Working with two separate entities with multiple institutions and campuses involved further increases burden. There is additional concern around the ability to turn the data around in time to be included in state report cards published in the academic year following high school graduation. An alternative method for obtaining postsecondary program enrollment data is to utilize the National Student Clearinghouse (NSC). This alternative would yield data from both the public and private sectors, capture students attending college out-of-state, and involve working with only one entity in establishing privacy protections. Required State personnel resources would be minimal compared to the SUNY/CUNY option. This alternative is monetarily costly to States, however. As a non-profit, NSC calculates their price based upon actual costs of matching and delivering data and charges on a per-record basis for the returned information. The per-record charge increases as the granularity of the data increases. For example, a state-level file would cost less than a state-level research with high-school level reports file. For a state the size of New York, the first-year annual cost is greater than \$200,000 for the state-level research with high-school level reports option. A five-year contract for this file would cost more than \$900,000. With both options, there will be students missed due to inaccurate matching algorithms.

The proposed rule also states that “By requiring States to define programs of postsecondary education using the definition in § 101(a) of the HEA, proposed § 200.36 would promote consistency in data reporting, which would allow users to compare outcomes across States, LEAs, and schools. Proposed § 200.36 would also help advance the Department's goals of raising awareness about the differences across States and LEAs in rates of enrollment in programs that are offered by accredited two-and four-year institutions by increasing the transparency of postsecondary outcomes.” We disagree that these metrics will allow valid comparisons across states as the postsecondary landscape in each state is different. Public university systems vary across states in size and





XIII. Use of State Assessments for English Language Learners and Students with Disabilities

The USDE has released draft negotiated rulemaking regarding assessments, with provisions related to the assessment of English Language Learners and Students with Disabilities. The New York State Education Department will be providing specific comments in a separate response regarding the assessment draft rulemaking, which are due to USDE in September, 2016. However, the New York State Education Department notes that the draft rulemaking regarding accountability and state plans requires the state to create long terms goals and progress targets for these subgroups based on assessments that do not give certain students in these groups an appropriate opportunity to demonstrate what they and ar

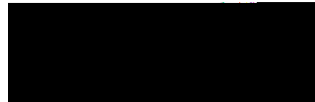
#### XIV. Reporting of Per Pupil Expenditures

Recommendation:

The provision contained in § 200.31 of the proposed rulemaking should be revised so that states after consultation with stakeholders should only be required to inform USDE of the date a state has selected by which the state and LEAs shall annually disseminate report cards.

If I can be of any further assistance, please do not hesitate to contact me at (518) 474-5844 or [commissioner@nysed.gov](mailto:commissioner@nysed.gov).

Sincerely,



MaryEllen Elia  
Commissioner