

Hogan
Lovells



Overview of the Every Student Succeeds Act

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Overview

The following outline summarizes the law under the Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act (ESEA). ESSA sustains and provides new federal funding opportunities for states, school districts, and educational institutions—such as colleges and universities, and both for profit and nonprofit entities that provide services to, and evaluate, students and teachers. By rolling back many of the obligations under No Child Left Behind (NCLB), ESSA increases flexibility for states and school districts to set their own goals and define the means by which they will track and achieve them. ESSA does, however, maintain many obligations under NCLB, and imposes some new obligations on states, school districts, and schools. The Department of Education (ED) has proposed, but has not yet promulgated, regulations to interpret the law.

This memorandum first summarizes major provisions within Title I of ESSA, then summarizes Titles II, III, and IX of the law. Within each section, the memorandum summarizes the state of the law during the transition to ESSA, the state of the law once ESSA goes into effect (during the 2017-2018 school year), and the state of the law should ED promulgate its recently proposed regulations.

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I. Summary of the State of the Law

1. The transition to ESSA has already begun.
 - a) This school year (2015-2016), schools are no longer required to submit Annual Measurable Objectives (AMOs),¹ or meet certain AMOs related to English Language Learners (ELLs).² Schools are also not required to report progress towards achieving AMOs.³ States will be able to hire paraprofessionals using Title I funds.⁴
 - b) In 2016-2017, states will experience increased flexibility in how they fund and implement efforts to improve “priority” and “focus” schools,⁵ and will no longer be required to ensure or report whether teachers teaching core academic subjects⁶ or special education⁷ are “highly qualified.”
2. All of ESSA’s provisions will go into effect in the 2017-2018 school year.
3. ED has not promulgated any regulations interpreting ESSA, but has issued a Notice of Proposed Rulemaking providing potential regulatory language regarding ESSA’s accountability provisions.
 - a) ED is accepting comments on the Notice of Proposed Rulemaking from May 31 to August 1, 2016.
 - b) Due to the regulatory process for “significant”⁸ rules, such as those in ED’s notice,⁹ once ED publishes a final rule, it cannot become effective for at least 60 days.

¹ ED, “Dear Colleague Letter,” Dec. 18, 2015, at 2 (<http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>).

² *Id.*

³ *Id.* at 3.

⁴ ED, “Transition to the Every Student Succeeds Act Frequently Asked Questions,” May 4, 2016, at 15 (<http://www2.ed.gov/policy/elsec/leg/essa/faq/essatransitionfaqs050316.pdf>) (hereinafter “ESSA Transition FAQ”).

⁵ ED, “Dear Colleague Letter,” Jan. 28, 2016, at 2 (<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

⁶ *Id.* at 3.

⁷ ESSA Transition FAQ 14.

⁸ Federal Register, “The Rulemaking Process,” 8 (https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf); Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993) at Section 3(f) (https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

⁹ 81 F.R. 34539, 34587 (<https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12451.pdf>).

II. List of ESSA Provisions

- Title I: Improving Basic Programs Operated by State and Local Educational Agencies
- Part A: Improving Basic State and Local Programs
 - Part B: State Assessment Grants
 - Part C: Education of Migratory Children
 - Part D: Prevention and Intervention Programs for At-Risk Children
 - Part E: Flexibility for Equitable Per Pupil Funding
- Title II: Preparing, Training, and Recruiting High-Quality Teachers, Principals, or Other School Leaders
- Title III: Language Instruction for English Learners and Immigrant Students
- Title IV: 21st Century Schools
- Part A: Student Support and Academic Enrichment Grants
 - Part B: 21st Century Community Learning Centers
 - Part C: Expanding Opportunity through Quality Charter Schools
 - Part D: Magnet School Assistance
 - Part E: Family Engagement in Educational Programs
 - Part F: National Activities
- Title V: State Innovation and Local Flexibility
- Title VI: Indian, Native Hawaiian, and Alaska Native Education
- Title VII: Impact Aid
- Title VIII: General Provisions
- Title IX: Education for the Homeless

III. Title I: Improving Basic Programs Operated by State and Local Educational Agencies

A. Student Assessments

1. During the Transition

- a. States are required to assess students as they did before ESSA.

2. Under ESSA (2017-2018 School Year)

- a. States are required to assess students in Reading and Math in 3rd-8th Grades and once in High School, and at least 3 times in 10 years in science.¹⁰
- b. These assessments must:
 - i. involve multiple up-to-date measures of student achievement, including measures that assess higher-order thinking skills and understanding, which may include:
 - A. measures of student academic growth,¹¹
 - B. portfolios,¹² and / or
 - C. extended performance tasks;¹³
 - ii. include 95% of a state's students and 95% of students in each of the following student subgroups:
 - A. race, ethnicity, economic status, disability status, English proficiency, gender, and migrant status;¹⁴ and
 - iii. enable disaggregation of assessment results by these subgroups.¹⁵

¹⁰ Elementary and Secondary Act of 1965 ("ESEA") § 1111(b)(2)(B)(v) (as amended through the Every Student Succeeds Act ("ESSA") P.L. 114-95, Dec. 10, 2015) (made available by the Legal Counsel Office of the House of Representatives at <http://legcounsel.house.gov/Comps/Elementary%20And%20Secondary%20Education%20Act%20Of%201965.pdf>).

¹¹ ESEA § 1111(b)(2)(B)(vi) (as amended by ESSA).

¹² *Id.*

¹³ *Id.*

¹⁴ ESEA § 1111(b)(2)(B)(xi) (as amended by ESSA).

¹⁵ *Id.*

- c. States can:
- i. either administer a “single summative assessment” or administer “multiple state-wide interim assessments during the course of the academic year that result in a single summative score”;¹⁶
 - ii. provide alternate assessments for students with the most significant cognitive disabilities so long as:
 - A. the tests are aligned with challenging state academic standards,¹⁷
 - B. fewer than 1% of students are assessed using the alternate assessment method,¹⁸ and
 - C. parents are informed that students will be assessed using alternate standards, and informed about how such assessments might delay or affect completion of requirements for a regular high school diploma;¹⁹
 - iii. allow districts to select “a nationally-recognized high school academic assessment that has been approved for use by the State”;²⁰ and
 - iv. set target limits on the aggregate amount of school time devoted to assessments for each grade.²¹
- d. ESSA forbids the Secretary of Education and ED from mandating that states adopt specific types of assessments.²²

3. If ED Promulgates Its Proposed Regulations

- a. The proposed regulations do not impact state and district obligations to assess students.

¹⁶ ESEA § 1111(b)(2)(B)(viii) (as amended by ESSA).

¹⁷ ESEA § 1111(b)(2)(D) (as amended by ESSA).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ ESEA § 1111(b)(2)(H) (as amended by ESSA).

²¹ ESEA § 1111(b)(2)(L) (as amended by ESSA).

²² ESEA § 1111(e) (as amended by ESSA).

B. Curriculum

1. During the Transition

- a. States and districts have the same curricular obligations that they had before ESSA.

2. Under ESSA (2017-2018 School Year)

- a. States are not required to adopt specific content standards, such as common core.
 - i. ESSA even specifically states that the Secretary cannot mandate specific content standards.²³
- b. States also are not required to submit standards to ED for review.²⁴
- c. But states are still free to adopt common core or other federally developed standards, if they so choose.²⁵
- d. States are now only required to provide an assurance that they have adopted “challenging content standards” that:
 - i. have at least three levels of achievement;²⁶
 - ii. apply to all public schools and students;²⁷
 - iii. include standards for mathematics, reading or language arts, and science;²⁸
 - iv. are aligned with higher education admissions standards;²⁹ and
 - v. include English language proficiency standards.³⁰
- e. States may use alternate academic achievement standards for students with the most significant cognitive disabilities so long as they:
 - i. are aligned with state standards;³¹
 - ii. promote access to the general curriculum;³²

²³ ESEA § 1111(b)(1)(G)(ii) (as amended by ESSA).

²⁴ ESEA § 1111(b)(1)(G)(i) (as amended by ESSA).

²⁵ ESEA § 1111(b)(1)(H) (as amended by ESSA).

²⁶ ESEA § 1111(b)(1)(A) (as amended by ESSA).

²⁷ ESEA § 1111(b)(1)(B) (as amended by ESSA).

²⁸ ESEA § 1111(b)(1)(C) (as amended by ESSA).

²⁹ ESEA § 1111(b)(1)(D) (as amended by ESSA).

³⁰ ESEA § 1111(b)(1)(F) (as amended by ESSA).

³¹ ESEA § 1111(b)(1)(E) (as amended by ESSA).

³² *Id.*

- iii. reflect professional judgment as to the highest possible standards achievable by such students;³³
- iv. are designated as the standards to be used for that student in the student’s individualized education program;³⁴ and
- v. are aligned to ensure students who meet the standards are on track to pursue either postsecondary education or employment.³⁵

3. If ED Promulgates Its Proposed Regulations

- a. The proposed regulations do not impact state and district curricular obligations.

C. Accountability, Identification, and Intervention

1. During the Transition

- a. As of the 2015-2016 School Year,
 - i. schools are no longer required to submit Annual Measurable Objectives (AMOs) or report performance against AMOs,³⁶ and
 - ii. states are no longer required to hold districts accountable towards a number of AMOs related to increasing English language proficiency among students.³⁷
- b. As of the 2016-2017 School Year,
 - i. states that have received waivers from NCLB obligations are no longer required to do the following if it impedes their interventions in “priority” or “focus” schools:
 1. reserve 95% of district funds for school improvement, corrective action, and restructuring,³⁸

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ ED, “Dear Colleague Letter,” Dec. 18, 2015, at 2 (“ED will not require States to submit AMOs (for school years 2014–2015 or 2015–2016) in January 2016 for ED’s review and approval, nor will ED require States to report performance against AMOs for the 2014–2015 or 2015–2016 school years.”) (<http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>).

³⁷ *Id.* (“ED will not require States to hold districts accountable for their performance against AMAOs 1, 2, and 3 under Title III of the ESEA for the 2014–2015 or 2015–2016 school years.”)

³⁸ ED, “Dear Colleague Letter,” Jan. 28, 2016, at 2 (<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

2. only implement school-wide programs in schools that have a 40% or higher poverty rate,³⁹
 3. limit the amount of funds districts can transfer between programs,⁴⁰ or
 4. rank and serve eligible schools according to their poverty rate;⁴¹
- ii. states that have not received waivers from NCLB obligations are no longer required to, but *may*, ensure that districts with “priority” or “focus” schools provide those schools with supplemental educational services, public school choice, and related notice to parents⁴²—
1. however, if these states choose not to require districts to provide supplemental educational services, they must develop and implement a one-year transition plan for ensuring that their districts provide alternative supports for students eligible for such services and schools with high percentages of eligible students;⁴³
- iii. states are no longer required to ensure that all teachers teaching core academic subjects are “highly qualified,”⁴⁴ or notify parents if their child was assigned to or is taught by a teacher who was not designated as “highly qualified” for four consecutive weeks;⁴⁵
- iv. states no longer have to implement the statewide system of intensive and sustained support and improvement for school districts and schools identified in NCLB in Section 1117,⁴⁶ which required districts to create school support teams for each identified school, and required states to create and provide awards for schools realizing certain academic achievements.⁴⁷

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 2-3.

⁴⁴ *Id.* at 3.

⁴⁵ ED, “Transition to the Every Student Succeeds Act Frequently Asked Questions,” May 4, 2016, at 8 (<http://www2.ed.gov/policy/elsec/leg/essa/faq/essatransitionfaqs050316.pdf>).

⁴⁶ ED, “Dear Colleague Letter,” Jan. 28, 2016, at 3 (<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

⁴⁷ ESEA § 1117(a)-(b) (before ESSA).

2. Under ESSA (2017-2018 School Year)

- a. States are no longer required to meet federally mandated accountability goals.
- b. States are required to set their own “ambitious,” “long term” goals for students and subgroups. State accountability systems must annually measure:
 - i. academic achievement, as measured by annual assessments;⁴⁸
 - ii. progress towards English proficiency for English learners;⁴⁹
 - iii. student academic growth (or another valid academic indicator) in elementary and middle schools,⁵⁰ and graduation rates in high schools;⁵¹ and
 - iv. at least one comparable, statewide indicator of school quality or student success,⁵² which may include one or more of the following:
 1. student engagement,
 2. educator engagement,
 3. student access to, and completion of, advanced coursework,
 4. postsecondary readiness, and / or
 5. school climate and safety.⁵³
- c. States must establish a system of differentiating public schools (previously the federal government defined the system).⁵⁴
- d. Beginning in the 2017-2018 School Year, and every three years thereafter, states must identify:
 - i. the 5% of Title I fund receiving schools that are “lowest-performing,”⁵⁵
 - ii. all high schools failing to graduate one third or more of their students,⁵⁶ and

⁴⁸ ESEA § 1111(c)(4)(A)(i)(I)(aa) (as amended by ESSA); ESEA § 1111(c)(4)(B)(i)(I) (as amended by ESSA).

⁴⁹ ESEA § 1111(c)(4)(A)(ii) (as amended by ESSA); ESEA § 1111(c)(4)(B)(iv) (as amended by ESSA).

⁵⁰ ESEA § 1111(c)(4)(B)(ii) (as amended by ESSA).

⁵¹ ESEA § 1111(c)(4)(A)(i)(I)(bb) (as amended by ESSA).

⁵² ESEA § 1111(c)(4)(B)(v) (as amended by ESSA).

⁵³ *Id.*

⁵⁴ ESEA § 1111(c)(4)(C) (as amended by ESSA).

⁵⁵ ESEA § 1111(c)(4)(D)(i)(I) (as amended by ESSA).

- iii. schools that have been identified for comprehensive support and have not achieved state-specified targets by a state-specified time period (which must be identified for “additional targeted support”).⁵⁷
- e. States must inform school districts of all schools identified for comprehensive support under these definitions.⁵⁸
- f. School districts must then develop and implement a plan for these schools⁵⁹ (previously, school districts were required to undergo specific federally mandated interventions).
- g. States are required to take additional action (now to be determined by the state) if schools do not improve.⁶⁰
- h. Districts *may*, but are not required to, provide students at a school identified for comprehensive support with the option to transfer to another public school.⁶¹ If they do, they:
 - i. may spend up to 5% of their allocation to pay for transportation,⁶² and
 - ii. must give transfer priority to the lowest achieving children.⁶³
- i. Schools where subgroups are deemed to be consistently underperforming must develop and implement a school-level targeted support and improvement plan that:
 - i. is informed by student performance against long-term goals,⁶⁴
 - ii. include evidence-based interventions,⁶⁵
 - iii. is approved by the district,⁶⁶
 - iv. is monitored by the district,⁶⁷ and
 - v. results in additional action should implementation be unsuccessful.⁶⁸

⁵⁶ ESEA § 1111(c)(4)(D)(i)(II) (as amended by ESSA).

⁵⁷ ESEA § 1111(c)(4)(D)(i)(III) (as amended by ESSA); ESEA § 1111(d)(3)(A)(i)(II) (as amended by ESSA).

⁵⁸ ESEA § 1111(d)(1) (as amended by ESSA).

⁵⁹ ESEA § 1111(d)(1)(A) (as amended by ESSA).

⁶⁰ ESEA § 1111(d)(2) (as amended by ESSA).

⁶¹ ESEA § 1111(d)(1)(D) (as amended by ESSA).

⁶² ESEA § 1111(d)(1)(D)(v) (as amended by ESSA).

⁶³ ESEA § 1111(d)(1)(D)(ii) (as amended by ESSA).

⁶⁴ ESEA § 1111(d)(2)(B) (as amended by ESSA).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

- j. Whenever a school is identified for targeted support and any subgroup is performing at the bottom 5% on statewide assessments, the district must identify resource inequalities.⁶⁹
- k. States must inform parents of all schools identified for targeted support and improvement,⁷⁰ and must inform districts of any of their schools where a subgroup is performing in the bottom 5% on statewide assessments.⁷¹
- l. States must also:
 - i. develop exit criteria for determining when a school is no longer in need of comprehensive support;⁷²
 - ii. periodically review resource allocation in districts serving significant numbers of schools identified for comprehensive or targeted support;⁷³ and
 - iii. provide technical assistance to districts serving substantial numbers of schools identified for comprehensive or targeted support.⁷⁴

3. If ED Promulgates Its Proposed Regulations

- a. As noted, under ESSA, states can develop their own accountability systems. Under the proposed regulations:
 - i. state accountability systems must:
 - 1. measure the performance of all students in all public schools (including public charter schools);⁷⁵
 - 2. measure progress in achieving English language proficiency;⁷⁶
 - 3. consider each subgroup individually rather than measuring performance among members of “super-subgroups”;⁷⁷

⁶⁸ *Id.*

⁶⁹ ESEA § 1111(d)(2)(C) (as amended by ESSA).

⁷⁰ ESEA § 1111(d)(2)(A)(i) (as amended by ESSA).

⁷¹ ESEA § 1111(d)(2)(D) (as amended by ESSA).

⁷² ESEA § 1111(d)(3) (as amended by ESSA).

⁷³ ESEA § 1111(d)(3)(A)(ii) (as amended by ESSA).

⁷⁴ ESEA § 1111(d)(3)(A)(iii) (as amended by ESSA).

⁷⁵ ED, “Summary of Proposed Regulations on Accountability, State Plans, and Data Reporting under ESSA,” May 17, 2016, at 2 (hereinafter “ED Regulation Summary”)

(<https://www2.ed.gov/policy/elsec/leg/essa/essaaccountabilitynprmsummary52016.pdf>).

⁷⁶ ED Regulation Summary, *supra*, at 3.

4. allow for comparisons between subgroups of students on each measure of school quality;⁷⁸
 5. demonstrate variation across schools in the state;⁷⁹
 6. be likely to increase graduation rates or academic achievement;⁸⁰ and
 7. consider ELLs' unique student characteristics, such as initial English language proficiency, in setting goals and measurements towards interim progress.⁸¹
- ii. If a state determines that it will not consider subgroup performance where the number of students in a subgroup is any number larger than 30 students, it must justify this high threshold.⁸²
 - iii. States must factor into their accountability systems whether all schools have assessed 95% of their students and 95% of students in all subgroups.⁸³
 - a. States that do not reach the 95% student and subgroup participation requirement must develop a rigorous strategy to do so,⁸⁴ and this plan must be approved by their district.⁸⁵
 - iv. States' measurements must include all public charter schools in their accountability systems.⁸⁶
 - v. States must select indicators of school quality and student success that are supported by research indicating that performance or progress on the measure will translate to student achievement or graduation from high school.⁸⁷

⁷⁷ *Id.*

⁷⁸ ED Regulation Summary, *supra*, at 2-3.

⁷⁹ ED Regulation Summary, *supra*, at 2.

⁸⁰ *Id.*

⁸¹ ED Regulation Summary, *supra*, at 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

- vi. Under ESSA, states must include students with the most significant cognitive disabilities who earn alternate diplomas in graduation rate calculations. The regulations suggest ways of including them.⁸⁸
- b. Under ESSA, states can develop their own method of differentiating schools. Under the proposed regulations:
 - i. states must assign every school a summative rating based on accountability metrics;⁸⁹
 - ii. states must also report each measure of school quality for each school;⁹⁰
 - iii. a school identified for comprehensive support based on an indicator of school quality must remain identified for comprehensive support until it makes significant progress on an academic indicator;⁹¹
 - iv. a school identified for comprehensive support based on the performance of a subgroup must remain identified for comprehensive support until that subgroup makes significant progress on an academic indicator;⁹² and
 - v. states must identify schools for *targeted* support and improvement, including schools:
 - 1. with a low-performing subgroup performing similarly to students in the bottom 5% of Title I schools (identified at least once every three years),⁹³ and / or
 - 2. with a consistently underperforming subgroup, as defined by the state annually.⁹⁴
- c. Under ESSA, states can develop their own system of interventions for struggling schools. Under the regulations:
 - i. schools can select evidenced-based strategies based on local needs and circumstances, but they must:
 - 1. involve parents, educators, and other stakeholders in developing improvement plans,⁹⁵ and

⁸⁸ ED Regulation Summary, *supra*, at 5.

⁸⁹ ED Regulation Summary, *supra*, at 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ ED Regulation Summary, *supra*, at 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

2. emphasize identifying and addressing critical resource inequities, including:
 - a. per-pupil expenditures,⁹⁶ and
 - b. disproportionate access to ineffective, out-of-field, or inexperienced teachers identified by the state and district;⁹⁷
- ii. states must prioritize school improvement funds to the schools that need the most help and provide a solid base of funding for schools, proportionate to the need for intervention;⁹⁸
- iii. states must provide districts that receive funds for school improvement a minimum of \$500,000 for each comprehensive support school it serves and \$50,000 for each targeted support school it serves, unless the state determines that a smaller amount is sufficient;⁹⁹
- iv. ED will provide approximately \$10 million in technical assistance funds to help states and districts focus on low-performing schools.¹⁰⁰

D. Report Cards and Information for Parents

1. During the Transition

- a. As of the 2015-2016 School Year,
 - i. states are still required to include information regarding teacher quality in report cards,¹⁰¹ including:
 1. the professional qualifications of those teachers,¹⁰²
 2. the percentage of those teachers with emergency or provisional licensure,¹⁰³ and

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ ED, “Proposed ESSA Regulation Supports Well-Rounded Education, Protects All Students,” May 26, 2016 (<http://www.ed.gov/news/press-releases/proposed-essa-regulation-supports-well-rounded-education-protects-all-students>).

¹⁰¹ ESSA Transition FAQ, *supra*, at 15.

¹⁰² ED, “State and Local Report Cards, Non Regulatory Guidance,” Feb. 8, 2013, at 14 (http://www2.ed.gov/programs/titleiparta/state_local_report_card_guidance_2-08-2013.pdf).

3. the percentage of classes in core academic subjects in the state not taught by highly qualified teachers in the aggregate and disaggregated by high-poverty compared to low-poverty schools;¹⁰⁴
 - ii. schools are no longer required to report student performance against AMOs in their annual report cards;¹⁰⁵ and
 - iii. states are no longer required to report the performance of demographic subgroups (race, ethnicity, economic status, disability status, English proficiency, gender, and migrant status) against AMOs in their annual report cards.¹⁰⁶
- b. As of the 2016-2107 School Year,
- i. districts are required to notify parents:
 1. of their right to request and receive information about the professional qualifications of their children’s classroom teachers,¹⁰⁷ and
 2. regarding mandated assessments, and their right to opt their children out of those assessments;¹⁰⁸
 - ii. districts are not required to include information regarding teacher quality.¹⁰⁹
2. Under ESSA (2017-2018 School Year)
- a. States and school districts must develop report cards that:
 - i. describe the state’s accountability system;¹¹⁰

¹⁰³ ED, “State and Local Report Cards, Non Regulatory Guidance,” Feb. 8, 2013, at 14 (http://www2.ed.gov/programs/titleiparta/state_local_report_card_guidance_2-08-2013.pdf).

¹⁰⁴ *Id.*

¹⁰⁵ ED, “Dear Colleague Letter,” Dec. 18, 2015, at 2 (“ED will not require States to submit AMOs (for school years 2014–2015 or 2015–2016) in January 2016 for ED’s review and approval, nor will ED require States to report performance against AMOs for the 2014–2015 or 2015– 2016 school years.”) (<http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>).

¹⁰⁶ *Id.* (“ . . . report cards need not include the information required under ESEA section 1111(h)(1)(C)(ii).”)

¹⁰⁷ National School Boards Association, “The Ever Student Succeeds Act, Transition Timetable and FAQ,” at 2 (<http://www.mabe.org/wp-content/uploads/2015/12/NSBA-ESEA-Timetable-FAQs.pdf>).

¹⁰⁸ *Id.*

¹⁰⁹ ESSA Transition FAQ, *supra*, at 15.

¹¹⁰ ESEA § 1111(h)(1)(C)(i) (as amended by ESSA).

- ii. describe the state’s methodology for differentiating schools and identifying a school as in need of comprehensive support and improvement;¹¹¹
- iii. provide information regarding student performance, including the percentage of students in each subgroup attaining target levels of achievement on state assessments,¹¹² where:
 1. for the purposes of report cards, in addition to the typical subgroups, subgroups include students in foster care¹¹³ and homeless students,¹¹⁴ and
 2. report cards must also include foster student high school graduation rates;¹¹⁵
- iv. include the professional qualifications of teachers in the state, disaggregated by high-poverty and low-poverty schools;¹¹⁶
- v. include per pupil expenditures of federal, state, and local funds, disaggregated by district and school;¹¹⁷
- vi. include the number and percentage of students with the most significant cognitive disabilities who take alternate assessments by grade and subject;¹¹⁸
- vii. include results of National Assessment of Education Progress (NAEP) tests in reading and math in grades 4 and 8.¹¹⁹

3. If ED Promulgates Its Proposed Regulations

- a. State report cards must include:
 - i. a comprehensive, summative rating for each school;¹²⁰
 - ii. information about a school’s performance on each indicator;¹²¹

¹¹¹ ESEA § 1111(h)(1)(C)(i) (as amended by ESSA).

¹¹² ESEA § 1111(h)(1)(C)(ii)-(vii) (as amended by ESSA).

¹¹³ AASA, “New Requirements for Educating Students in Foster Care” (<http://www.aasa.org/content.aspx?id=39549>).

¹¹⁴ National Association for Education of Homeless Children and Youth, “Press Release: Historic Gains for Homeless Children and Youth in New Education Law,” Dec. 10, 2015 (hereinafter “NAEHCY Press Release”).

¹¹⁵ *Id.*

¹¹⁶ ESEA § 1111(h)(1)(C)(ix) (as amended by ESSA).

¹¹⁷ ESEA § 1111(h)(1)(C)(x) (as amended by ESSA).

¹¹⁸ ESEA § 1111(h)(1)(C)(xi) (as amended by ESSA).

¹¹⁹ ESEA § 1111(h)(1)(C)(xii) (as amended by ESSA).

¹²⁰ ED Regulation Summary, *supra*, at 2.

- iii. information about children in foster care, ELLs with disabilities, and long-term English language learners (those who have not gained English proficiency within a period of five years of their initial identification);¹²²
 - iv. information about student achievement and graduation rates, which must be easily accessible to parents and the public;¹²³
 - v. information about resource equity measures, such as access to preschool, access to rigorous coursework, and school discipline;¹²⁴ and
 - vi. information regarding district- and school-level expenditures, calculated based on uniform, state-developed procedures.¹²⁵
- b. States and districts must consult parents in designing state and district report cards and must make report cards public before the end of each calendar year.¹²⁶

E. State Accountability Plans

1. During the Transition

- a. As of the 2015-2016 School Year,
 - i. while under NCLB, states were required to submit state plans to ED every July, states are not required to submit state plans that comply with NCLB obligations by this July in order to receive fiscal year 2016 formula funds.¹²⁷
 - ii. generally, states are no longer required to develop or submit AMOs or data relating to progress towards AMOs.¹²⁸

¹²¹ *Id.*

¹²² ED, “Proposed ESSA Regulation Supports Well-Rounded Education, Protects All Students,” May 26, 2016 (<http://www.ed.gov/news/press-releases/proposed-essa-regulation-supports-well-rounded-education-protects-all-students>).

¹²³ ED Regulation Summary, *supra*, at 5.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ ESSA Transition FAQ, *supra*, at 6.

¹²⁸ ESSA Transition FAQ, *supra*, at 10.

2. Under ESSA (2017-2018 School Year)

- a. States must submit state plans to ED that must include descriptions of how the state will:
 - i. provide assistance to districts and elementary schools to support early childhood education programs;¹²⁹
 - ii. ensure low-income and minority children are not served at disproportionate levels by ineffective, out-of-field, or inexperienced teachers, and the steps the state will take to evaluate and publicly report progress towards ensuring access to teachers;¹³⁰
 - iii. support districts to improve school conditions by reducing:
 1. bullying and harassment,¹³¹
 2. the overuse of discipline tactics that remove children from classrooms,¹³² and
 3. the use of aversive behavioral interventions that compromise student health and safety;¹³³
 - iv. support districts to ensure students transition to middle and high school without dropping out;¹³⁴
 - v. collaborate with the state's child welfare agency to ensure foster children enjoy educational stability;¹³⁵
 - vi. provide support to districts in the identification, enrollment, attendance, and school stability of homeless children and youths.¹³⁶
- b. State plans must also assure that states will:
 - i. allow foster children to remain in their school of origin unless a determination is made that attending said school is not in the child's best interest,¹³⁷ and, if such a determination is made, that
 1. the child is immediately enrolled in a new school regardless of their ability to produce required records,¹³⁸ and

¹²⁹ ESEA § 1111(g)(1)(A) (as amended by ESSA).

¹³⁰ ESEA § 1111(g)(1)(B) (as amended by ESSA).

¹³¹ ESEA § 1111(g)(1)(C)(i) (as amended by ESSA).

¹³² ESEA § 1111(g)(1)(C)(ii) (as amended by ESSA).

¹³³ ESEA § 1111(g)(1)(C)(iii) (as amended by ESSA).

¹³⁴ ESEA § 1111(g)(1)(D) (as amended by ESSA).

¹³⁵ ESEA § 1111(g)(1)(E) (as amended by ESSA).

¹³⁶ ESEA § 1111(g)(1)(F) (as amended by ESSA).

¹³⁷ ESEA § 1111(g)(1)(E)(i) (as amended by ESSA).

2. the enrolling school immediately contacts the prior school to obtain the child’s educational records;¹³⁹
 - ii. designate an employee to serve as a point of contact for child welfare agencies and oversee the state’s obligations to foster children;¹⁴⁰
 - iii. make public any methods or criteria it uses to measure teacher, principal, or other school leader effectiveness;¹⁴¹
 - iv. notify districts, Indian tribes, and the public of its academic standards, assessments, and accountability system;¹⁴²
 - v. participate in biennial assessments in reading and math in grades 4 and 8 by the National Assessment of Educational Progress (NAEP);¹⁴³
 - vi. modify or eliminate fiscal or accounting barriers to ensure they can consolidate federal, state, and local funds;¹⁴⁴
 - vii. collect and disseminate parent and family engagement strategies developed by districts and schools;¹⁴⁵
 - viii. provide the least restrictive regulations for districts and schools;¹⁴⁶
 - ix. ensure districts work with outside organizations and individuals with practical expertise to develop strategies and programs to improve teaching, learning, and schools;¹⁴⁷
 - x. establish safeguards and procedures that ensure the validity of its assessments;¹⁴⁸
 - xi. ensure the state has standards for paraprofessionals working in programs receiving Title I funds,¹⁴⁹ and that all teachers and

¹³⁸ ESEA § 1111(g)(1)(E)(ii) (as amended by ESSA).

¹³⁹ ESEA § 1111(g)(1)(E)(iii) (as amended by ESSA).

¹⁴⁰ ESEA § 1111(g)(1)(E)(iv) (as amended by ESSA).

¹⁴¹ ESEA § 1111(g)(2)(A) (as amended by ESSA).

¹⁴² ESEA § 1111(g)(2)(B) (as amended by ESSA).

¹⁴³ ESEA § 1111(g)(2)(D) (as amended by ESSA).

¹⁴⁴ ESEA § 1111(g)(2)(E) (as amended by ESSA).

¹⁴⁵ ESEA § 1111(g)(2)(F) (as amended by ESSA).

¹⁴⁶ ESEA § 1111(g)(2)(G) (as amended by ESSA).

¹⁴⁷ ESEA § 1111(g)(2)(H) (as amended by ESSA).

¹⁴⁸ ESEA § 1111(g)(2)(I) (as amended by ESSA).

¹⁴⁹ ESEA § 1111(g)(2)(M) (as amended by ESSA).

- paraprofessionals in programs supported by Title I funds meet applicable state certification and licensure requirements;¹⁵⁰
- xii. involve a Committee of Practitioners¹⁵¹ in developing and monitoring the implementation of the state plan;¹⁵²
 - xiii. publicly disseminate information cross-tabulated by race and ethnicity, gender, level of English proficiency, and disability status that does not reveal individual student data, does not include a number of students in any subgroup that is insufficient to yield statistically reliable information, and is consistent with the Family Educational Rights and Privacy Act.¹⁵³
- c. They also must develop state plans after consulting with key stakeholders, including:
- i. the Governor,
 - ii. state legislators,
 - iii. the State Board of Education,
 - iv. school districts,
 - v. representatives from native tribes,
 - vi. teachers, principals, and other school leaders,
 - vii. charter school representatives,
 - viii. specialized instructional support personnel,
 - ix. paraprofessionals,
 - x. administrators, and
 - xi. parents.¹⁵⁴
- d. State plans must undergo peer review by a geographically diverse and varied peer-review team representative of the stakeholders and put together by the Secretary of Education.¹⁵⁵
- e. State plans must ensure coordination between programs and obligations under the:
- i. Individuals with Disabilities Education Act (IDEA),

¹⁵⁰ ESEA § 1111(g)(2)(J) (as amended by ESSA).

¹⁵¹ ESEA § 1603(b) (as amended by ESSA).

¹⁵² ESEA § 1111(g)(2)(L) (as amended by ESSA).

¹⁵³ ESEA § 1111(g)(2)(N) (as amended by ESSA).

¹⁵⁴ ESEA § 1111(a)(1)(A) (as amended by ESSA).

¹⁵⁵ ESEA § 1111(a)(4) (as amended by ESSA).

- ii. Rehabilitation Act,
 - iii. Perkins Career and Technical Education Act,
 - iv. Workforce Innovation and Opportunity Act,
 - v. Child Care and Development Block Grant Act,
 - vi. Education Sciences Reform Act,
 - vii. Education Technical Assistance Act,
 - viii. National Assessment of Educational Progress Authorization Act,
 - ix. McKinney-Vento Homeless Assistance Act, and
 - x. Adult Education and Family Literacy Act.¹⁵⁶
- f. State plans shall remain in effect so long as states are participating in Title I of ESEA and states only have to periodically review and revise their own plans “as necessary . . . to reflect changes in the State’s strategies and programs.”¹⁵⁷
- g. To receive funds from states, districts must secure approval of district plans by states.¹⁵⁸ These plans must:
- i. be developed in consultation with:
 - 1. teachers, principals, and other school leaders,
 - 2. local charter school leaders,
 - 3. specialized instructional support personnel,
 - 4. paraprofessionals,
 - 5. administrators, and
 - 6. parents;¹⁵⁹
 - ii. be coordinated with other relevant federal programs;¹⁶⁰
 - iii. describe how the district will:
 - 1. monitor student progress in meeting state academic standards by:
 - a. developing and implementing a well-rounded system of instruction to meet the needs of all students,¹⁶¹

¹⁵⁶ ESEA § 1111(a)(1)(B) (as amended by ESSA).

¹⁵⁷ ESEA § 1111(a)(6)(A) (as amended by ESSA).

¹⁵⁸ ESEA § 1112(a)(1) (as amended by ESSA).

¹⁵⁹ ESEA § 1112(a)(1)(A) (as amended by ESSA).

¹⁶⁰ ESEA § 1112(a)(1)(B) (as amended by ESSA).

- b. identifying students who may be academically at risk,¹⁶²
 - c. providing additional support to students that the district or a school identifies as needing help to meet academic standards,¹⁶³ and
 - d. identifying and implementing instructional and other strategies to strengthen academic programs and improve school conditions,¹⁶⁴
 2. identify and address disparities resulting from low-income and minority students being taught at higher rates by ineffective, inexperienced, or out-of-field teachers,¹⁶⁵
 3. improve schools identified as in need of comprehensive and / or targeted support,¹⁶⁶
 4. determine “high poverty” schools eligible for additional funding,¹⁶⁷
 5. support the enrollment, attendance, and success of homeless students,¹⁶⁸
 6. implement effective parent and family engagement,¹⁶⁹
 7. support, coordinate, and integrate early childhood education programs with schools and the district (whenever such programs exist in the district),¹⁷⁰
 8. work with teachers, school leaders, parents, administrators, paraprofessionals, and specialized instructional support personnel to identify students in target schools most in need of additional services,¹⁷¹

¹⁶¹ ESEA § 1112(b)(1)(A) (as amended by ESSA).

¹⁶² ESEA § 1112(b)(1)(B) (as amended by ESSA).

¹⁶³ ESEA § 1112(b)(1)(C) (as amended by ESSA).

¹⁶⁴ ESEA § 1112(b)(1)(D) (as amended by ESSA).

¹⁶⁵ ESEA § 1112(b)(2) (as amended by ESSA).

¹⁶⁶ ESEA § 1112(b)(3) (as amended by ESSA); *see also* ESEA § 1112(b)(5) (as amended by ESSA) (indicating that districts also must specify how they will implement schoolwide programs).

¹⁶⁷ ESEA § 1112(b)(4) (as amended by ESSA).

¹⁶⁸ ESEA § 1112(b)(6) (as amended by ESSA).

¹⁶⁹ ESEA § 1112(b)(7) (as amended by ESSA).

¹⁷⁰ ESEA § 1112(b)(8) (as amended by ESSA).

¹⁷¹ ESEA § 1112(b)(9) (as amended by ESSA).

9. ensure students transition to middle and high school rather than dropping out,¹⁷²
 10. reduce the overuse of discipline practices that remove students from the classroom,¹⁷³ and
 11. support technical education and work-based learning (if determined appropriate by the district);¹⁷⁴
- iv. provide assurances that the district will:
1. ensure eligible migratory children receive available services,¹⁷⁵
 2. provide services to eligible students in private schools,¹⁷⁶
 3. participate, if selected, in NAEP testing,¹⁷⁷
 4. coordinate across programs to eliminate duplication and increase effectiveness,¹⁷⁸
 5. provide a point of contact for child welfare agencies that indicate they have provided a point of contact for the district,¹⁷⁹
 6. develop and follow clear, written procedures for transporting foster children to ensure they can stay in their school of origin,¹⁸⁰
 7. ensure teachers and paraprofessionals working in Title I funded programs meet state certification and licensure requirements,¹⁸¹ and
 8. ensure early childhood education services provided to low-income children comply with obligations under ESSA and the Head Start Act.¹⁸²

¹⁷² ESEA § 1112(b)(10) (as amended by ESSA).

¹⁷³ ESEA § 1112(b)(11) (as amended by ESSA).

¹⁷⁴ ESEA § 1112(b)(12) (as amended by ESSA).

¹⁷⁵ ESEA § 1112(c)(1) (as amended by ESSA).

¹⁷⁶ ESEA § 1112(c)(2) (as amended by ESSA).

¹⁷⁷ ESEA § 1112(c)(3) (as amended by ESSA).

¹⁷⁸ ESEA § 1112(c)(4) (as amended by ESSA).

¹⁷⁹ ESEA § 1112(c)(5)(A) (as amended by ESSA).

¹⁸⁰ ESEA § 1112(c)(5)(B) (as amended by ESSA).

¹⁸¹ ESEA § 1112(c)(6) (as amended by ESSA).

¹⁸² ESEA § 1112(c)(7) (as amended by ESSA).

3. If ED Promulgates Its Proposed Regulations

- a. In developing and implementing plans, states must engage in broad, robust engagement with a diverse group of stakeholders,¹⁸³ including:
 - i. superintendents,
 - ii. educators,
 - iii. parents,
 - iv. community leaders,
 - v. civil rights organizations, and
 - vi. representatives of Indian tribes.
- b. States must specify in their plans how they will meet the needs of all learners (including foster children, homeless students, and English learners), and how they will provide access to a well-rounded education that incorporates rigorous coursework, such as STEM, history, foreign languages, music, and computer science.¹⁸⁴
- c. States must include “Educator Equity Plans” in their state plans, and describe how they will support and develop excellent educators, including how states will ensure that student subgroups have equitable access to effective, in-field, and experienced teachers, especially in the highest need schools.¹⁸⁵

F. Supplement, Not Supplant

1. During the Transition

- a. As they were before the transition, states are required to ensure that federal funds supplement, not supplant, state funds used in Title I schools.
 - i. ED and outside state auditors have used three tests¹⁸⁶ to assess whether states and districts were supplementing, not supplanting, federal funds. These tests required that Title I funds were not used to fund services:
 1. required by state law;

¹⁸³ ED Regulation Summary, *supra*, at 5.

¹⁸⁴ *Id.*

¹⁸⁵ ED Regulation Summary, *supra*, at 6.

¹⁸⁶ Andrew Ujjifusa, “Four Things to Ponder for Negotiations Over ESSA’s Funding Regulations,” Education Week, Mar. 9, 2016 (http://blogs.edweek.org/edweek/campaign-k-12/2016/03/essa_funding_regulations_four_things.html).

2. that were funded by state or local funds the previous year; and/or
3. that were previously provided to non-Title I students using state and local funds.

2. Under ESSA (2017-2018 School Year)

- a. States and school districts can only use federal funds to “supplement the funds that would, in the absence of [Title I of ESSA], be made available from [s]tate and local sources for the education of students participating in programs assisted under [Title I], and not to supplant such funds.”¹⁸⁷
- b. In order to demonstrate compliance with this requirement, states and districts must “demonstrate that the methodology used to allocate” state and local funds to each school “ensures that such school receives all of the [s]tate and local funds it would otherwise receive if it were not receiving” federal assistance under Title I.¹⁸⁸

3. If ED Promulgates Its Proposed Regulations

- a. The rule would require that “within a district receiving Title I funds, each Title I school – generally the highest poverty schools in the district – receives at least as much in State and local funding as the average non-Title I school in that district, so that Title I funds can provide truly supplemental support in Title I schools.”¹⁸⁹
- b. The proposed regulation has been the subject of intense debate.
 - i. Although the negotiations did not result in consensus on this issue, Secretary of Education John King has indicated that ED does not plan to alter this test.¹⁹⁰ Senators Elizabeth Warren and Chris

¹⁸⁷ ESEA § 1118(b)(1)(B) (as amended by ESSA).

¹⁸⁸ ESEA § 1118(b)(2) (as amended by ESSA).

¹⁸⁹ ESSA Negotiated Rulemaking Committee, “Session 2, Issue Paper on Supplement Not Supplant,” Apr. 1, 2016, at 2 (<http://www2.ed.gov/policy/elsec/leg/essa/session/issue-paper-supplement-not-supplant-2nd-session.pdf>); ESSA Negotiated Rulemaking Committee, “Session 3, Issue Paper on Supplement Not Supplant,” Apr. 18-19, 2016, at 2 (<http://www2.ed.gov/policy/elsec/leg/essa/session/issue-paper-supplement-not-supplant-3rd-session.docx>).

¹⁹⁰ Andrew Ujifusa, “Sen. Alexander to John King: Rethink Your Draft ESSA Spending Rules, Or Else,” Education Week, Apr. 12, 2016 (http://blogs.edweek.org/edweek/campaign-k-12/2016/04/alexander_king_essa_regulations_overturn_congress.html); see also Alyson Klein, “Ed.

Murphy also support this language.¹⁹¹ Senator Lamar Alexander, a key author of ESSA, has indicated that he believes this test directly contradicts ESSA’s prohibitions regarding ED’s powers and improperly encroaches on districts’ authority under the law.¹⁹² Senator Alexander went as far as to say that if ED promulgates this draft regulation, he would use the federal appropriations process to overrule the regulations and encourage a lawsuit against ED.¹⁹³

- ii. Some opponents of the regulatory language have argued that, because districts spend most of their budgets on personnel, in order to equalize funding, districts that have inadequate funds will have to move positions from one institution to another which could aggravate already high levels of teacher turnover.¹⁹⁴
 - iii. Other opponents have flatly rejected ED’s position that ESEA is a civil rights law, arguing that is an anti-poverty law that does not have a clear mission of overcoming racial achievement gaps.¹⁹⁵
- c. While there is disagreement regarding the form the regulation should take, negotiators agreed that clarity on this issue is lacking. According to the ESSA Negotiated Rulemaking Committee, ESSA’s language leaves key questions unanswered, such as:
- i. What does it mean to “ensure that a Title I school receives all of the state and local funds it would otherwise receive if it were not receiving assistance under this part”?¹⁹⁶
 - ii. What does it mean to have a “methodology for allocating state and local funds” in a district that allocates resources, such as staff

Sec. John King: Supplement-Not-Supplant Must Focus on Equity,” Education Week, Apr. 13, 2016 (http://blogs.edweek.org/edweek/campaign-k-12/2016/04/ed_sec_john_king_supplement-no.html).

¹⁹¹ Alyson Klein, “Ed. Sec. John King: Supplement-Not-Supplant Must Focus on Equity,” Education Week, Apr. 13, 2016 (http://blogs.edweek.org/edweek/campaign-k-12/2016/04/ed_sec_john_king_supplement-no.html).

¹⁹² Andrew Ujifusa, “Sen. Alexander to John King: Rethink Your Draft ESSA Spending Rules, Or Else,” Education Week, Apr. 12, 2016 (http://blogs.edweek.org/edweek/campaign-k-12/2016/04/alexander_king_essa_regulations_overturn_congress.html).

¹⁹³ *Id.*

¹⁹⁴ Nora Gordon, “Why the Education Department’s New Equity Rule Might Not Be So Equal,” The Atlantic, June 1, 2016 (<http://www.theatlantic.com/education/archive/2016/06/why-the-education-departments-new-equity-rule-might-not-be-so-equal/485012/>).

¹⁹⁵ Kevin Kosar, “Secretary King is wrong: ESEA was not a civil rights law,” Fordham Institute, June 6, 2016 (<http://edexcellence.net/articles/secretary-king-is-wrong-esea-was-not-a-civil-rights-law>).

¹⁹⁶ ESSA Negotiated Rulemaking Committee, “Issue Paper: Supplement Not Supplant” (hereinafter “ED Supplement not Supplant Issue Paper”) (<https://www2.ed.gov/policy/elsec/leg/essa/session/nrmissuespapers32016.pdf>).

positions, instead of dollars? In a district that allocates funds through a school-based budgeting system or weighted student funding system?¹⁹⁷

- iii. Should regulations implementing this statutory provision create certain allowances for flexibility, such as when a district has particularly small schools, or allow for different allocations among grade spans?¹⁹⁸
- iv. How should the new emphasis on allocation of funds apply to state and local funds retained at the district level?¹⁹⁹
- v. What does it mean to meet this requirement two years after the date of enactment, when the date of enactment is in the middle of a school year? Does a district need additional time to meaningfully implement a methodology that meets the statutory requirement?²⁰⁰
- vi. What enforcement action must a state take if it finds that a district has not complied with the requirement? What corrective actions should the district have to take?²⁰¹

G. Waivers

1. During the Transition

- a. As of the 2015-2016 School Year,
 - i. prior to the transition, under NCLB, states could apply for waivers to certain obligations, particularly the requirement to meet Adequate Yearly Progress (AYP) in student performance on standardized tests,
 - ii. through August 1, 2016, states can ask for additional waivers freeing them from meeting NCLB obligations if those obligations interfere with their performance of obligations under ESSA,²⁰² and

¹⁹⁷ ED Supplement not Supplant Issue Paper.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² ED, “Dear Colleague Letter,” Dec. 18, 2015, at 2

(<http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>). (“Through August 1, 2016, a State may continue to request amendments affecting activities required under the ESSA; ED will review these amendments and make a determination on their approval”).

- iii. all ESSA flexibility waivers will become null and void on August 1, 2016.²⁰³
- b. As of the 2016-2017 School Year,
 - i. “priority” and “focus” schools are required to implement interventions that were part of preexisting waiver agreements,²⁰⁴ but
 - ii. as they comply with these waiver provisions, states are not required to:
 1. reserve 95% of district funds for school improvement, corrective action, and restructuring,²⁰⁵
 2. limit the amount of funds districts can transfer between programs,²⁰⁶
 3. limit their implementation of schoolwide programs to schools that have a 40% or higher poverty rate,²⁰⁷
 4. permit districts that fail to make Adequate Yearly Progress (AYP) on state assessments to continue to participate in the Small, Rural School Achievement Program and to receive a grant under the Rural and Low Income School Program only if the district uses those funds to carry out ESEA Section 1116²⁰⁸ (which requires districts to review each of their schools’ progress towards achieving AYP, publicize the results of that review, identify schools failing to achieve AYP, and implement certain interventions in those schools),²⁰⁹ and
 5. rank and serve eligible schools according to their poverty rate.²¹⁰

²⁰³ ESSA Transition FAQ, *supra*, at 8.

²⁰⁴ *Id.*

²⁰⁵ ED, “Dear Colleague Letter,” Jan. 28, 2016, at 2

(<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ ESSA Transition FAQ, *supra*, at 9.

²⁰⁹ ESEA § 1116 (before ESSA).

²¹⁰ ED, “Dear Colleague Letter,” Jan. 28, 2016, at 2

(<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

2. Under ESSA (2017-2018 School Year)

- a. states no longer have these obligations and ED ends the waiver program,²¹¹
- b. ED no longer grants new waivers,²¹² and
- c. waivers ED previously granted lose their legal effect on August 1, 2016.²¹³

3. Authorized Appropriations

- a. Under NCLB, Congress authorized \$25 billion for Title I spending in fiscal year 2007.²¹⁴
- b. Under ESSA, Congress has authorized the following amounts in the following fiscal years for Title I programs:
 - i. FY2017 - \$15,012,317,605
 - ii. FY2018 - \$15,457,459,042
 - iii. FY2019 - \$15,897,371,442
 - iv. FY2020 - \$16,182,344,591²¹⁵

IV. Title II: Preparing, Training, and Recruiting High-Quality Teachers, Principals, or Other School Leaders

1. During the Transition

- a. During the 2015-2016 School Year,
 - i. districts are still required to develop an improvement plan and take certain actions if they do not make progress towards all teachers being highly qualified and do not make AYP in student test scores,²¹⁶ and

²¹¹ See ED, “Dear Colleague Letter,” Jan. 28, 2016 (<http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf>).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ ESEA § 1002(a)(6) (before ESSA).

²¹⁵ ESEA § 1002(a) (under ESSA).

²¹⁶ ESSA Transition FAQ, *supra*, at 14-15; see also ESEA § 2141 (before ESSA).

- ii. states are also still required to report highly qualified teacher information from 2015-2016 to ED as part of their Consolidated State Performance Report (CSPR).²¹⁷
- b. As of the 2016-2017 School Year,
- i. districts are no longer required to develop an improvement plan or take certain actions if they do not make progress towards all teachers being highly qualified or do not make AYP in student test scores;²¹⁸
 - ii. states are not required to report highly qualified teacher information from 2016-2017 to ED;²¹⁹
 - iii. states are no longer required to ensure that all teachers teaching core academic subjects are “highly qualified,”²²⁰ or notify parents if their child has been assigned to or taught by a teacher who is not “highly qualified” for four consecutive weeks;²²¹
 - iv. states are no longer required to ensure all special education teachers are “highly qualified,”²²² and instead must only ensure that each special education teacher:
 - 1. has obtained full certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the state’s special education teacher licensing examination and holds a license to teach in the state as a special education teacher,
 - 2. has not had their special education certification or licensure requirements waived on an emergency, temporary, or provisional basis, and
 - 3. holds at least a bachelor’s degree,²²³ and
 - v. states are able to hire paraprofessionals using Title I, Part A funds.²²⁴

²¹⁷ ESSA Transition FAQ, *supra*, at 15.

²¹⁸ *Id.* at 14-15.

²¹⁹ *Id.* 15.

²²⁰ *Id.* at 3.

²²¹ *Id.* at 8, 15.

²²² *Id.* at 14.

²²³ *Id.*

²²⁴ *Id.* at 15.

2. Under ESSA (2017-2018 School Year)

- a. States no longer have to evaluate teachers or ensure that a certain percentage of teachers are “highly qualified,” and
 - i. the Secretary is specifically forbidden from mandating specific teacher, principal, or other school leader evaluation systems or licensing standards.²²⁵
- b. However, ESSA authorizes the Secretary to award competitive grants for:
 - i. reforming teacher, principal, or other school leader certification, recertification, licensing, or tenure systems;²²⁶
 - ii. developing, reforming, and improving preparation and professional development programs;²²⁷
 - iii. evaluating teachers, principals, and other school leaders where such evaluations may include student growth and must include multiple measures of education performance, such as classroom observation rubrics;²²⁸
 - iv. improving equitable access to “effective” teachers;²²⁹
 - v. establishing, expanding, or improving on alternative routes for state certification;²³⁰
 - vi. recruiting and retaining teachers, principals, and other school leaders;²³¹ and
 - vii. implementing incentive programs, such as “performance-based” compensation.²³²
- c. In addition, to secure any Title II funding, states must submit plans that detail:
 - i. a state system of licensing teachers,²³³ and
 - ii. whether funds will be used to increase equitable access to high-quality teachers, and, if so, how funds will be so used.²³⁴

²²⁵ ESEA § 2101(e).

²²⁶ ESEA § 2101(c)(4)(B)(i) (as amended by ESSA).

²²⁷ *Id.*; ESEA § 2101(c)(4)(B)(viii)-(xx) (as amended by ESSA).

²²⁸ ESEA § 2101(c)(4)(B)(ii) (as amended by ESSA).

²²⁹ ESEA § 2101(c)(4)(B)(iii) (as amended by ESSA).

²³⁰ ESEA § 2101(c)(4)(B)(iv) (as amended by ESSA).

²³¹ ESEA § 2101(c)(4)(B)(v) (as amended by ESSA).

²³² ESEA § 2101(c)(4)(B)(vii) (as amended by ESSA).

²³³ ESEA § 2101(d)(2)(B) (as amended by ESSA).

- d. States must consult with teachers, principals, other school leaders, paraprofessionals, specialized instructional support personnel, charter school leaders, parents, and community partners in developing their plans.²³⁵
- e. As under NCLB, 95% of Title II funds must go to school districts.²³⁶
- f. ESSA authorizes \$2,295,830,000 annually from 2017-2020 for Title II funding to states and districts²³⁷ (as compared to the \$3,175,000,000 for fiscal year 2002 authorized under NCLB).²³⁸
- g. ESSA also authorizes the following amounts in the following fiscal years for national activities:
 - i. 2017: \$468,880,575
 - ii. 2018: \$468,880,575
 - iii. 2019: \$469,168,000
 - iv. 2020: \$489,168,000²³⁹
- h. Between 2017 and 2020, the percentage of Title II funds determined by the percentage of students in poverty grows steadily as described below:
 - i. In 2017, 65% of Title II funds are distributed to states based on the percentage of students in poverty they educate and 35% are allocated based on the percent of the overall student population they educate.²⁴⁰
 - ii. By 2020, 80% of funds are allocated based on students in poverty and 20% are allocated based on the overall percentage of students.²⁴¹

²³⁴ ESEA § 2101(d)(2)(E) (as amended by ESSA).

²³⁵ ESEA § 2101(d)(3) (as amended by ESSA).

²³⁶ ESEA § 2101(c)(1).

²³⁷ ESEA § 2003(a)-(b) (under ESSA).

²³⁸ ESEA § 2103(a) (before ESSA).

²³⁹ ESEA § 2003(a)-(b) (under ESSA).

²⁴⁰ ESEA § 2101(b)(2)(A)(i) (under ESSA).

²⁴¹ ESEA § 2101(b)(2)(A)(iv) (under ESSA).

V. Title III: Language Instruction for English Learners and Immigrant Students

1. During the Transition

a. As of the 2015-2016 School Year,

- i. states are required to report the number and target number of ELLs making progress and attaining proficiency on the state’s annual English language proficiency assessment;²⁴²
- ii. states and districts must continue to notify parents when students are designated as English learners within 30 days of the start of the school year (or within two weeks of their beginning school mid-year) and explain why students have been designated as ELLs;²⁴³
- iii. states are no longer required to develop AMOs related to ELLs;²⁴⁴ and
- iv. districts are no longer required to inform parents if they fail to meet AYP for ELLs.²⁴⁵

b. As of the 2016-2017 School Year,

- i. districts that were implementing an improvement plan under Section 3122(b)(4) of ESEA in 2015-2016 must continue to do so in 2016-2017, and states must continue to provide technical assistance to such districts.²⁴⁶

1. Section 3122(b)(4) requires that when a state determines that a district or school has failed to meet AMOs, the state must either:

- a. require the district or school to modify its curriculum, program, and method of instruction, or
- b. both

²⁴² ESSA Transition FAQ, *supra*, at 17.

²⁴³ *Id.* at 16.

²⁴⁴ *Id.* (indicating that states are no longer required to comply with ESEA § 3122(a) which required that each state “develop [AMOs] for limited English proficient children” (ESEA § 3122(a)(1) (before ESSA)).

²⁴⁵ *Id.* (indicating that districts are no longer responsible to inform parents if they fail their obligations under Section 3122(b), which states that states must hold districts “accountable for meeting . . . [AMOs] . . . including making adequate yearly progress for limited English proficient children” (ESEA § 3122(b)(1) (before ESSA)).

²⁴⁶ *Id.*

- i. determine whether to continue to fund the school or district, and
- ii. require the school or district to replace educational personnel relevant to its failure to meet AMOs.²⁴⁷

2. Under ESSA (2017-2018 School Year)

- a. To qualify for Title I funds, states must establish long-term, ambitious goals which include measurements of interim progress toward meeting those goals for ELLs, including “increases in the percentage of such students making progress in achieving English language proficiency.”²⁴⁸
- b. States must assess ELLs and provide appropriate accommodations during such assessments.²⁴⁹
- c. States must generally ensure that assessments can be disaggregated by subgroups, including English proficiency status,²⁵⁰ and must inform districts of all schools where ELLs are underperforming.²⁵¹
- d. Schools identified where ELLs (or members of any subgroup) are deemed to be underperforming, must develop and implement a school-level targeted support and improvement plan that:
 - i. is informed by student performance against long-term goals,
 - ii. includes evidence-based interventions,
 - iii. is approved by the district,
 - iv. is monitored by the district, and
 - v. results in additional action should implementation be unsuccessful.²⁵²
- e. States must demonstrate that districts will provide an annual assessment of English proficiency for all ELLs.²⁵³
- f. Where ELL students have arrived in the United States in the last 12 months, states can either:

²⁴⁷ ESEA § 3122(b)(4) (before ESSA).

²⁴⁸ ESEA § 1111(c)(4)(A)(ii) (as amended by ESSA).

²⁴⁹ ESEA § 1111(b)(2)(B)(vii)(III) (as amended by ESSA).

²⁵⁰ ESEA § 1111(b)(2)(B)(xi)(IV) (as amended by ESSA).

²⁵¹ ESEA § 1111(d)(2)(A)(i) (as amended by ESSA).

²⁵² ESEA § 1111(d)(2)(B) (as amended by ESSA).

²⁵³ ESEA § 1111(b)(2)(G) (as amended by ESSA).

- i. exclude them from one administration of reading, language arts, and mathematics assessments for the first year, or
 - ii. assess the student on reading, language arts, and mathematics, and report their performance but exclude their results from the state accountability system for the first year while including their performance for the purposes of assessing student growth in the second year and proficiency in their third year.²⁵⁴
- g. Congress has authorized the following appropriations in the following fiscal years for Title III activities:
 - i. 2017: \$756,332,450
 - ii. 2018: \$769,568,267
 - iii. 2019: \$784,959,633
 - iv. 2020: \$884,959,633²⁵⁵
- h. Some civil rights organizations have expressed concern that some states may not have the wherewithal or staff to carry out the new obligations under Title III.²⁵⁶ They have also expressed concern with the fact that, under ESSA, states can include former English learners among “ELLs” for reporting purposes for up to four years, which may lead to states masking ELL performance gaps.²⁵⁷

3. If ED Promulgates its Proposed Regulations

- a. States must measure at least one indicator of progress in achieving English language proficiency.²⁵⁸
- b. States must consider students’ initial English language proficiency in setting goals and measurements towards interim progress.²⁵⁹

²⁵⁴ ESEA § 1111(b)(3) (as amended by ESSA).

²⁵⁵ ESEA § 3001 (under ESSA).

²⁵⁶ Corey Mitchell, “ELL Advocates Hopeful and Wary of New Federal K-12 Law,” Education Week, Jan. 5, 2016 (<http://www.edweek.org/ew/articles/2016/01/06/ell-advocates-hopeful-and-wary-of-new.html>).

²⁵⁷ Corey Mitchell, “ELL Advocates Hopeful and Wary of New Federal K-12 Law,” Education Week, Jan. 5, 2016 (<http://www.edweek.org/ew/articles/2016/01/06/ell-advocates-hopeful-and-wary-of-new.html>).

²⁵⁸ ED Regulation Summary, *supra*, at 3.

²⁵⁹ *Id.*

VI. Title IX: Education for the Homeless

1. During the Transition

- a. ESSA amendments to the McKinney-Vento Act²⁶⁰ go into effect on October 1, 2016. Under the McKinney-Vento Act, as amended by ESSA:
 - i. states can access funding for school personnel to receive training to identify, enroll, and support homeless children and youth;²⁶¹
 - ii. a district must presume that a homeless student’s school of origin is the best educational environment for them;²⁶²
 - iii. states must immediately enroll homeless students in school:
 1. even these students have missed application or enrollment deadlines,²⁶³ and
 2. even if the students lack previous academic records, records of immunization, and other health records typically required for enrollment;²⁶⁴
 - iv. the enrolling school must immediately contact the previous school for any available records;²⁶⁵ and
 - v. states must designate local homelessness liaisons²⁶⁶ who will work to:
 1. identify homeless children through outreach and coordination activities with other entities and agencies,²⁶⁷
 2. ensure homeless children are enrolled in schools and are empowered to succeed academically,²⁶⁸

²⁶⁰ 42 U.S.C. § 11431 et seq.

²⁶¹ ESSA § 9102 (amending 42 U.S.C. § 11432(d) to read, “Grants under this section shall be used . . . [t]o provide services and activities to improve the identification of homeless children and youths (including preschool-aged homeless children) and enable such children and youths to enroll in, attend, and succeed in school, or, if appropriate, preschool programs . . . [and] [t]o develop and implement professional development programs for liaisons . . . to improve their identification of homeless children and youths . . .”); see also NAEHCY Press Release (<http://www.naehcy.org/educational-resources/essa-press-release>).

²⁶² ESSA § 9102(5) (amending 42 U.S.C. § 11432); AASA, “New Requirements in ESSA Impacting the Education of Homeless Students,” (hereinafter “AASA Memo on ESSA and Homeless Students”) (<http://www.aasa.org/content.aspx?id=39551>).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ ESSA § 9102(5) (amending 42 U.S.C. § 11432).

3. ensure homeless families and youth have access to and receive educational services (such as Head Start) for which they are eligible, and receive referrals for health services for which they are eligible,²⁶⁹
4. ensure parents of homeless children are informed about opportunities to get involved in their children’s education,²⁷⁰
5. disseminate public notices regarding the rights of homeless children,²⁷¹
6. ensure enrollment disputes are resolved consistent with ESSA,²⁷²
7. ensure school personnel providing services to homeless students receive professional development and support,²⁷³ and
8. inform homeless students seeking post-secondary education that they qualify as independent students for financial aid purposes and can obtain FASFA assistance.²⁷⁴

2. Under ESSA (2017-2018 School Year)

a. Homelessness

- i. States and districts must reserve Title I funds for programs for homeless children.²⁷⁵
- ii. State plans must indicate how states will provide support to districts in the identification, enrollment, attendance, and school stability of homeless children and youths.²⁷⁶
- iii. District plans must indicate how districts will support the enrollment, attendance, and success of homeless students.²⁷⁷

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*; see also AASA Memo on ESSA and Homeless Students.

²⁷⁵ AASA Memo on ESSA and Homeless Students.

²⁷⁶ ESEA § 1111(g)(1)(E) (as amended by ESSA).

²⁷⁷ ESEA § 1112(b)(6) (as amended by ESSA).

- iv. State Report Cards must include homeless students among subgroups.²⁷⁸
- v. ED provides increased funding in the form of \$85 million for fiscal years 2017 through 2020—an increase of over 20% per year—for school districts to educate homeless children.²⁷⁹
- vi. Districts have more flexibility to use additional federal funding streams to serve homeless children and youth.²⁸⁰

b. Foster Care

- i. State plans must indicate how states will collaborate with the state’s child welfare agency to ensure foster children enjoy educational stability.²⁸¹
- ii. State plans must provide assurances that states will:
 - 1. provide a point of contact for child welfare agencies (who must be distinct from the coordinator for homeless student services),²⁸² and
 - 2. allow foster children to remain in their school of origin unless a determination is made that attending said school is not in the child’s best interest,²⁸³ and, if such a determination is made, that:
 - a. the child is immediately enrolled in a new school, regardless of their ability to produce required records²⁸⁴ and
 - b. the enrolling school immediately contacts the prior school to obtain the child’s educational records;²⁸⁵ and
 - 3. designate an employee to serve as a point of contact for child welfare agencies and oversee the state’s obligations to foster children.²⁸⁶

²⁷⁸ National Association for Education of Homeless Children and Youth, “Press Release: Historic Gains for Homeless Children and Youth in New Education Law,” Dec. 10, 2015 (hereinafter “NAEHCY Press Release”).

²⁷⁹ NAEHCY Press Release; ESSA § 9106.

²⁸⁰ NAEHCY Press Release.

²⁸¹ ESEA § 1111(g)(1)(F) (as amended by ESSA).

²⁸² ESEA § 1111(g)(1)(D)(iv) (as amended by ESSA); see *also* AASA Memo on ESSA and Foster Care.

²⁸³ ESEA § 1111(g)(1)(E)(i) (as amended by ESSA).

²⁸⁴ ESEA § 1111(g)(1)(E)(ii) (as amended by ESSA).

²⁸⁵ ESEA § 1111(g)(1)(E)(iii) (as amended by ESSA).

- iii. Districts must provide assurances in district plans that they will provide a point of contact for child welfare agencies whenever an agency indicates that it has a point of contact for a student in the district.²⁸⁷
- iv. State Report Cards must report foster youth among their subgroups²⁸⁸ and must include foster student high school graduation rates.²⁸⁹

c. Preschools

- i. State plans must describe how states will provide assistance to districts and elementary schools to support early childhood education programs.²⁹⁰
- ii. ESSA sets aside \$250 million annually from 2017 to 2020 in competitive grant funding for states to fund preschool development.²⁹¹
 - 1. States receive priority if they have not previously received a preschool development grant.²⁹²

²⁸⁶ ESEA § 1111(g)(1)(E)(iv) (as amended by ESSA).

²⁸⁷ ESEA § 1112(c)(5)(A); see also AASA Memo on ESSA and Foster Care.

²⁸⁸ AASA, “New Requirements for Educating Students in Foster Care” (<http://www.aasa.org/content.aspx?id=39549>).

²⁸⁹ *Id.*

²⁹⁰ ESEA § 1111(g)(1)(1) (as amended by ESSA).

²⁹¹ ESSA § 9212(k).

²⁹² ESSA § 9212(e)(3).