Congress of the United States
Washington, DC 20510

August 1, 2016

The Honorable Dr. John King
Secretary of Education
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202

Attn: Meredith Miller

Re: Notice of Proposed Rulemaking Docket ID ED-2016-OESE-0032, Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State Plans

Dear Secretary King:

In negotiating the Every Student Succeeds Act (ESSA) with our colleagues, we fought to preserve the Department of Education's (Department) full regulatory authority to promulgate rules and issue guidance. We applaud the Department's notice of proposed rulemaking (NPRM) on 34 CFR parts 200 and 299 for balancing ESSA's strong and clearly articulated federal guardrails with the new law's flexibility for state and local decision-making.

The Department's unique role in upholding the civil rights legacy of this law is critical to ensure implementation honors Congressional intent that states and local educational agencies sufficiently support improving outcomes for the nation's disadvantaged students, including through improving equity of educational opportunity. While Congress replaced much of No Child Left Behind (NCLB) with new statutory requirements in ESSA, the new law maintains the historic and bipartisan focus of the Elementary and Secondary Education Act (ESEA) on improving educational outcomes for our nation's disadvantaged students, including low-income students, students of color, students with disabilities, and English learners. In putting forth the proposed regulations, the Department employed its regulatory authority to articulate parameters that will empower states and school districts to use the new flexibility that ESSA affords. In particular, we applaud the Department's efforts to clarify statutory requirements that will help states build new accountability systems that are focused on student learning and equity of educational opportunity and are transparent and actionable for educators, parents, and communities. Regulatory clarity of this nature will help ensure that additional resources reach high-need schools that need support to prepare all students for college and career.

The following is broken down into an addendum of draft regulatory provisions that we applaud and urge you to maintain in the final regulation, followed by draft provisions on which we seek additional clarity or correction to more closely align the final regulation with Congressional intent. Thank you for your attention to this matter and we look forward to continued partnership to ensure effective implementation of ESSA that honors Congressional intent to protect and

promote the right of every child to receive an education that prepares him or her for success in college and career.

Sincerely,

PATTY MURRAY
Ranking Member
U.S. Senate Committee on Health, Education Labor and Pensions

ROBERT C. "BOBBY" SCOTT
Ranking Member
U.S. House of Representatives Committee on Education and the Workforce

ADDENDUM

August 1, 2016

We applaud the Department's notice of proposed rulemaking (NPRM) on 34 CFR parts 200 and 299 in the following areas and request that your Department maintain each in the final rule.

Single Summative Rating: ESSA replaces NCLB's one-size-fits-all accountability system with a requirement for states to design multiple measure accountability systems that support closing the achievement gap and improving chronically struggling schools. In doing so, ESSA retains strong federal guardrails that ensure school identification is meaningful, based on a comprehensive examination of student learning and school quality, and understandable and actionable for parents, educators, and communities. Critically, ESSA requires that states identify schools for improvement based on "all indicators in the State's accountability system… for all students and for each subgroup of students" (section 1111(c)(4)(C)(i)). In addition, ESSA requires states to identify at least three statewide categories of schools: schools identified for comprehensive support and improvement, which includes at least the lowest-performing five percent of Title I schools in the state (section 1111(c)(4)(D)(i)(I)); schools receiving targeted support and interventions, which includes any school in which any subgroup of students is consistently underperforming (section 1111(c)(4)(C)(iii)); and all other schools. ESSA also allows the state, at its discretion, to identify additional statewide categories of schools. In drafting the totality of requirements contained within section 1111(c), it was our intent that the state provide all schools within the state with a "single summative rating" based on all the indicators (proposed § 200.18(c)).

We applaud the proposed regulation's clarity on this point, as a single summative rating is necessary to comply with the statutory requirements of the subsection that: (1) there be at least three statewide categories of schools, (2) each school's identification be based on all indicators used by the state, and (3) norms a school's performance relative to all other schools in the state to determine which low-performing Title I schools comprise at least the lowest-performing five percent of schools. Further, a single summative rating is understandable and actionable for parents, communities, and taxpayers, as it provides transparency on the decision-making concerning both school identification and the presence of additional supports to improve student learning and school quality. We recognize that previous rating systems that presented only a single summative rating often oversimplified the complex nature of multiple measures accountability; this is why nothing in the statutory text nor the draft regulation prevents states from presenting more detailed and diagnostic data beyond the school's single summative rating, via a dashboard or other innovative approach, so long as a single summative rating is also calculated for each school.

Indicator Quality: While ESSA requires states to use multiple measures in state accountability systems, including at least one measure of school quality, the statutory text clearly requires that schools must be identified for support and improvement based primarily on measures of student learning, as described in clauses (i) through (iv) of section 1111(c)(4)(B). In particular, ESSA requires that academic achievement, as measured by proficiency on statewide assessments in math and reading, high school graduation rates, the academic progress indicator at the

elementary and middle school level, and growth in English language proficiency are each of "substantial" weight (section 1111(c)(4)(C)(ii)(I)), and, in the aggregate, afforded "much greater weight" than the school quality or student success indicator or indicators required under section 1111(c)(4)(B)(v) (section 1111(c)(4)(C)(ii)(II)).

Taken together, the two requirements clearly demonstrate Congressional intent to both ensure that required indicators (i) through (iv) drive school identification and the distribution of federal resources for school improvement and also disallow the indicator or indicators of school quality to disproportionately influence a school's identification or lack thereof. We applaud the Department for clarifying that the school quality or student success indicator, which can be another academic indicator, must meet a high bar for quality (proposed § 200.14(c-e)). In addition, we appreciate the Department has provided states with significant flexibility regarding the weight of each individual indicator, while still ensuring compliance with statutory requirements contained in section 1111(c)(4)(C)(ii) that will result in states driving additional resources to those schools where students' learning outcomes need additional support to improve.

95 Percent Participation Threshold: The quality of a state's system for differentiated accountability rests on the integrity of its data. As such, ESSA preserves the federal requirement that at least 95 percent of all students and at least 95 percent of students in each subgroup of students participate in the annual state assessments. In repealing NCLB's requirements for adequate yearly progress (AYP), ESSA also repeals the federally-prescribed, school-level sanction for failure to meet the assessment participation threshold of 95 percent. The statute replaces the federally-prescribed sanction with a clear requirement that states meaningfully factor into their accountability systems whether or not schools have met this requirement.

It was the intent of Congress to replace AYP's federal prescription and application of school-level sanctions due to a school's failure to meet the participation rate requirement with school-level sanctions prescribed and applied by the state, as part of its accountability system. We recognize that the statute lacks the clarity needed to ensure compliance with this requirement, and we applaud the Department for delivering this much-needed clarity (proposed § 200.15) by preserving state flexibility to develop a school-level sanction of its choosing (proposed § 200.15(b)(2)(iv)) while also providing states with a clear menu of options that would fulfill the statutory requirement and ensure the integrity of the state's measure of student academic achievement.

Subgroup Accountability: ESSA disallows the use of so-called "super-subgroups" for the purpose of accountability, a practice previously allowed by the Department under ESEA flexibility by requiring that each individual subgroup's performance is included in state accountability systems (section 1111(c)(4)(B)) and disallowing combined subgroups or super-subgroups. We support the Department's proposed regulations reiterating that states may not rely exclusively on a combined subgroup or a super-subgroup of students (proposed § 200.16(a)) for the purpose of reporting or school accountability. Doing so will ensure that a state may not mask subgroup performance or conflate the unique needs of particular groups of students, and it will therefore help drive resources to the highest need students and schools.

Transparency for Charter Schools: We applaud the Department's efforts to improve transparency and accountability for public charter school authorizing. Proposed § 200.30(a)(2)(ii) requires that states provide important information for parents and community

members about the demographic makeup and academic achievement data for public charter schools by authorizer, empowering communities, parents, and taxpayers to hold public charter school authorizers accountable for their important role in ensuring charter school quality.

We are concerned about the Department's NPRM on 34 CFR parts 200 and 299 in the following areas, and request that your Department make the changes listed below in the final rule.

Consistent Underperformance: ESSA is clear that states must differentiate any school in which any subgroup of students is consistently underperforming (section 1111(c)(4)(C)(iii)) "based on all indicators" in the state accountability system and the system established to meaningfully differentiate schools. In drafting this language, we intended that states would analyze each subgroup's performance individually and make a summative determination of student performance based on all indicators to discern whether the group of students is consistently underperforming. The Department's proposed regulations under section § 200.19 would not meet the requirements of the law or adhere to congressional intent because states would be required to make determinations of consistent underperformance using only select indicators or flawed comparisons. For example, proposed § 200.19(c)(3)(ii) would allow states to make this determination based on only one indicator, and options § 200.19(c)(3)(iii) and § 200.19(c)(3)(iv) would allow states to compare an individual subgroup's performance to the average student performance in the state.

Allowing states to use these calculations would allow a subgroup's performance to decline for many years without invoking any action by the state to address underperformance. Additionally, the proposed regulation could result in a state judging student performance without taking into consideration the performance on each indicator, thus yielding a system of identification in clear violation of ESSA's statutory requirements to ensure an accountability system that uses multiple measures of student performance. We urge the Department to rectify this error by changing the options that do not meet the letter of the law and instead ensuring that identification of consistent underperformance is based on all the indicators of the accountability systems, consistent with statutory requirements on indicator weighting articulated in section 1111(c)(4)(C) and discussed above, and including whether or not subgroups have met the states' measurements of interim progress or long-term goals.

Number of Students in a Subgroup: While ESSA provides states with new flexibilities to include multiple measures in statewide accountability systems, it preserves focus on closing achievement gaps and pays particular attention to the achievement of our nation's most vulnerable students. In drafting ESSA, Congress recognized the importance of how states determine the minimum number of students within a subgroup (commonly referred to as n-size) in holding schools accountable for the performance of low-income students, students of color, English learners, and students with disabilities. As such, Congress required the Director of the Institute of Education Sciences to provide states with information on how to comply with statutory requirements of section 1111(c)(3) through the publication of a report within 90 days of enactment on best practices for determining a valid, reliable, and statistically sound n-size for the purposes of inclusion within a school accountability system (section 9209). While this statutory

requirement has not yet been fulfilled, previously published research from the Institute for Education Sciences' (IES) National Center for Education Statistics indicates that using an n-size of 5 or 10 protects student privacy and demonstrates statistical reliability. Moreover, IES found that an n-size of 30 failed to capture 21 percent of students with disabilities in 14 states alone.

The statute also requires states to describe the n-size they will use and justify such number (section 1111(c)(3)). The quality of a state's system for differentiated accountability rests on the integrity of its data. Congress intended for n-size to be set in a manner that captures as many students as possible and holds every school accountable for the performance of each subgroup. Doing so will ensure that subgroups' performance is appropriately accounted for in the statewide accountability system. We appreciate the proposed regulatory requirement that sets an upper threshold for state-determined n-sizes (§ 200.17) that states must demonstrate sufficient justification to exceed. However, in the final regulation, we urge the Department to lower the upper threshold for n-size to more accurately reflect research and best practice for appropriate n-sizes, which is consistent with the statutory requirements. Proposed § 200.17, which would allow for a state to set an n-size of 30 and require detailed justification for a state seeking to utilize an n-size above 30, could needlessly remove millions of students from state accountability systems, creating a powerful disincentive to provide these students targeted, high-quality supports they need to meet challenging state standards. We urge the Department to lower its proposed upper threshold for n-size to more closely align with research and best practice.

Timeline for Identification: Under ESSA, states must develop and implement a single statewide accountability system that meets ESSA's statutory requirements by the 2017-2018 school year (section 5(e)(1)(B)). While we recognize ambiguity in the statutory text, it was the intent of Congress to require that the statewide system be in place in time to collect school-level performance data on all accountability indicators for the 2017-2018 school year, with such data serving as a base year upon which meaningful differentiation and resulting school identification would be made before the start of the 2018-2019 school year. For many states, developing a new accountability system that meets the totality of statutory requirements contained in ESSA will require many substantive adjustments to current practice, necessitating the participation and input of diverse stakeholders.

We are encouraged by the collaboration taking place in states and believe that states should take advantage of this important opportunity to build strong multiple measures systems informed by ongoing community and stakeholder input. We are concerned, however, that proposed § 200.19(d) will stifle this progress and instead, require states to largely use the systems that they currently have in place to identify schools under the new law, despite Congressional intent that identification under ESSA be driven by student learning, and informed by multiple measures of student success and school quality. Many states, including our home states of Washington and Virginia, have expressed concerns that requiring states to identity schools for interventions beginning in the 2017-2018 school year will result in relying on faulty data and setting unclear expectations for stakeholders. We encourage the Department to modify § 200.19(d) to require identification of schools for comprehensive and targeted support and improvement before the start of the 2018-2019 school year and require states and school districts to continue implementing interventions in schools previously identified for improvement under NCLB or ESEA flexibility during both the 2016-2017 and 2017-2018 school years (section 5(e)(2)).

Academic Achievement Indicator: ESSA moves away from NCLB's narrow focus on meeting a proficiency cut score, and instead allows states to factor in student growth in state accountability systems. It was the intent of Congress to allow states to incorporate measurements of student growth within statewide accountability systems in two ways. A state may use a measure of student growth as the indicator for elementary and middle schools described in clause (ii) of section 1111(c)(4)(B)(ii). Additionally, a state may incorporate a measure of student growth as part of an index when calculating the required "academic achievement" indicator (section 1111(c)(4)(B)(i)). We recognize the ambiguity of the confluence of statutory requirements; however, Congressional intent in drafting this language was not to limit the use of student growth in the academic achievement indicator to high schools, but merely to explicitly allow for growth calculations in the high school proficiency measure since the indicator described in clause (ii) of the section applies only to elementary and middle schools. Furthermore, while the indicator described in clause (ii) can be solely a growth measure, the academic achievement indicator allows for a growth measurement as part of calculation that also incorporates proficiency. Unfortunately, the Department's proposed regulations under § 200.14(b)(1) would prevent states from using growth calculations in combination with proficiency in elementary and middle schools for the purpose of the academic achievement indicator described in section 1111(c)(4)(B)(i). We urge the Department to clarify in § 200.14(b)(1) that states may use a composite index that combines proficiency and student growth for the academic achievement indicator and also to set broad parameters around what constitutes student growth in order to ensure that these measurements are meaningful and reflect student learning.

Foster Care: ESSA makes numerous changes to improve academic achievement and school stability for children in foster care. In particular, section 1112(c)(5)(B) requires that local educational agencies and state or local child welfare agencies collaborate to develop and implement clear written procedures to ensure that children in foster care receive transportation to their school of origin if it is in their best interest. We believe the Department should reiterate that the clear written procedures developed between local educational agencies and state or local child welfare agencies are mandatory and must be developed collaboratively. State Education Agencies (SEAs) have an important role to play in ensuring that this collaboration occurs. We are concerned that proposed § 299.13(c)(1)(ii) may be misconstrued to require that local educational agencies must fund transportation in all cases, which could disincentivize cross-agency collaboration to better serve these vulnerable students and stifle the good work currently happening in states to ensure that children in foster care have school stability. We recognize that there will be situations in which school districts and child welfare agencies may not agree on which agency must incur the additional costs of transportation for children in foster care. In these cases, we urge the Department to require SEAs to have in place clearly articulated dispute resolution procedures that are in accordance with policies or mechanisms established by the SEA in collaboration with the State Child Welfare Agency. Further, we also urge the Department to reiterate its recent guidance, issued on June 23rd, 2016, concerning transportation for children in foster care during the pendency of disputes.

Alternative high schools: ESSA requires any high school with a graduation rate below 67 percent to be identified for comprehensive support and improvement (section 1111(c)(4)(D)(i)(II)). Recognizing that there is a small subset of schools within each state that serves students who are "returning to education after dropping out of high school or who, based

on their grade or age, are significantly off track to accumulate sufficient academic credits to meet high school graduation requirements," (as described in subclauses (I) and (II) of section 1111(d)(2)(C)(i)), Congress provided additional flexibility for "differentiated improvement activities that utilize evidence-based interventions" (section 1111(d)(1)(C)(i)) separate from statutory requirements for schools identified for comprehensive support and improvement. This flexibility was intended to be limited to only high schools identified under section 1111(c)(4)(D)(i)(II) that predominantly serve students described in subclauses (I) and (II) of section 1111(d)(1)(C)(i), not all high schools identified. We encourage the Department to correct proposed § 200.21(g), which allows any high school to use this flexibility, by clarifying that only schools that predominantly serve students that meet the statutory requirements described in subclauses (I) and (II) of section 1111(d)(1)(C)(i) should have this flexibility.

Resource Equity: ESSA replaces NCLB's federally prescribed punitive accountability system with federal requirements for state-developed and reciprocal accountability systems. Under systems now required by ESSA, not only are schools accountable for improving student learning, but states and school districts will also now be accountable for improving equity of educational opportunity to support school improvement. Key to this reciprocal accountability is the requirement that schools identified for comprehensive support and improvement and schools identified for additional targeted supports identify and address, with support from the state and the local educational agency as appropriate, resource inequities contributing to the school's identification in their improvement plans. It was the intent of Congress that school improvement plans address a wide array of resource inequities potentially contributing to low whole school or student subgroup performance. Unfortunately, proposed § 200.22(c)(7)(i) only requires these school-level plans to address two educational resources, which we fear would leave states and local educational agencies to ignore contributing factors to equity of educational opportunity. We urge the Department to expand its list of resource inequities that schools must address under § 200.22(c)(7)(i) to include, in addition to the resources described in clause (ii) of the draft, resources described in section 1111(h)(1)(C)(viii) of ESSA. Requiring interventions to take into account a broader base of educational resources will help rectify persistent resource inequities within and across schools serving vulnerable students and ultimately lead to improved student achievement and greater equity of educational opportunity.

Graduation Rate Calculations: We are pleased the Department, through use of a directed question in § 200.34, seeks feedback on whether or not additional regulatory clarity is needed to standardize the criteria for including certain subgroups of students, including homeless children, children in foster care, and students with disabilities, within the four year and, if used, the extended-year adjusted cohort graduation rate (§ 200.34). Homeless children and children in foster care are highly mobile, and often cycle in and out of homelessness and status as a child in foster care throughout their high school experience. Therefore, it is critical that regulations clarify that "homeless status" means a student who met the definition of homelessness in section 725 of Subtitle VII-B of the McKinney-Vento Act (42 U.S.C. 11434a) at any time during grades 9-12 and a "child in foster care" means any student who has spent any time as a "child in foster care" (defined as the proposed regulation under § 200.30(f)(1)(iii)) during grades 9-12. Doing so will ensure that graduation rate data is comparable across states.

School Improvement Funding: Dedicated school improvement funding provides critical resources to states and districts to improve low-performing schools. ESSA maintains language in NCLB that requires states to provide allotments to local educational agencies that are of

"sufficient size to enable a local educational agency to effectively implement selected strategies" (section 1003(b)(2)(A)(ii)). The Department's proposed regulation interprets this phrase to require a minimum award of $500,000 per year for schools identified for comprehensive support and improvement and a minimum award of $50,000 per year for schools identified for targeted support and improvement. The proposed minimum awards fail to take into account the unique nature of small and/or rural schools and may lead states to overextend support for schools identified for comprehensive support and improvement, leaving little or no funding available to support targeted support and improvement strategies. We urge the Department to replace the draft minimum award amounts with minimum award amounts based on total student enrollment (i.e. small, medium, large school), accompanied by an option for states to offer and justify minimum award sizes based on the unique nature of the state.

Stakeholder Engagement: ESSA requires a diverse group of stakeholders, including parents, teachers, organizations representing the civil rights community, students with disabilities, and English learners, administrators, and others, to participate in the state and local plan development processes. Earlier this year, we asked the Department to provide meaningful guidance and regulations concerning stakeholder involvement in ESSA. We applaud the Department's efforts to clarify the consultation and coordination requirements under § 299.13(b) by requiring the state educational agency to conduct certain activities to ensure that consultation is taking place. We encourage the Department to further strengthen its proposed requirements around stakeholder engagement by requiring collaboration efforts to be sustained and ongoing as the ESSA plan development and implementation process continues.

Private Funds: ESSA includes significant new requirements to improve transparency for parents, teachers, and taxpayers. In particular, ESSA requires states to report on per-pupil expenditures of federal, state, and local funds, including actual personnel expenditures and actual non-personnel expenditures of federal, state, and local funds, disaggregated by source of funds, for each local educational agency and each school (section 1111(h)(1)(C)(x)). While this information is useful, there are clear inequities in per-pupil expenditure due to supplemental educational funding from non-public sources. We urge the Department to clarify under § 200.35 that the regulatory requirements contained therein constitute only the minimum requirements for fiscal transparency. Further, we urge the Department's final regulation to encourage states and local educational agencies to also report on funds from private sources when reporting on per-pupil expenditure. This information will provide a more complete picture of per-pupil expenditures across states, districts, and schools.