Senator Alexander prepared remarks on Congressional Review Act
March 8, 2017

In 2015, 85 United States senators voted for the law fixing No Child Left Behind that reversed the trend to a National School Board and restored decisions to classroom teachers, local school boards, and states.

The Wall Street Journal said it was "the largest devolution of federal control to the states in a quarter-century."

The Department of Education regulation that this resolution seeks to overturn does exactly the reverse – it begins to restore the National School Board and it takes away responsibility from classroom teachers, local school boards and states. It does this in direct violation of the law that 85 senators voted for just 15 months ago.

So the question before us today is not only whether we believe in a National School Board or we believe in local school boards.

But more important perhaps is the question of who writes the law: Does Congress write the law, or does the Department of Education write the law?

Article 1 of the United States Constitution says the United States Congress, elected by the people, writes the law.

The purpose of this resolution is to overturn a regulation that in 7 cases directly violates the Every Student Succeeds Act law passed just 15 months ago. And in 16 other cases exceeds the authority allowed by that law.

This regulation says to states: Ignore the law that 85 senators just passed 15 months ago. Ignore the law that President Obama called a Christmas Miracle. Ignore the law that governors and teachers and school boards and superintendents all supported – and even ignore why they supported it – and listen instead to unelected bureaucrats at the U.S. Department of Education.

This regulation issued by the Department of Education specifically does things or requires states to do things that Congress said in our law fixing No Child Left Behind that the Department cannot do. It violates the law.

In this law, Congress said to the Department, 'You cannot tell states exactly what to do about fixing low-performing schools. That's a state decision.' But this regulation does that anyway. And Congress said to the Department, 'You cannot tell states exactly how to rate the public schools in your state,' but this regulation does that anyway.

This isn't a trivial matter.

The remarkable consensus that developed in 2015 in support of the bill fixing No Child Left Behind was to reverse the trend to a national school board and restore to states, classroom teachers, and parents decisions about what to do about their children in public schools. Teachers, governors, school boards all were fed up with Washington telling them so much about what to do about their children in 100,000 public schools.

So this regulation, which contravenes the law specifically, goes to the heart of the bill fixing No Child Left Behind, which received 85 votes here in the United States Senate.

It's very unusual in federal law to specifically prohibit a department from regulating on an issue. But that's what Congress did.

Here are 7 specific examples of how the regulation violates prohibitions Congress wrote into the law:

1. **The regulation prescribes the long-term goals and measurements of progress that states establish for student subgroups.**

The Law says, for example, that the Secretary may not tell a state that goals set for students of one race must improve their progress 20 percent better than the progress of a group of students of another race.
Yet the regulation says that States must establish goals and measurements for lower-performing subgroups that "require greater rates of improvement," which would necessarily mean that students of one race would have to do better than students of another race.

2. **The regulation requires federally-prescribed actions to be taken in schools that do not annually test at least 95% of students.**

The law says states must annually test not less than 95% of all students and each subgroup of students, but states determine how to hold schools accountable for ensuring that 95% of students participate on annual tests. The Secretary of Education may not prescribe "the way in which the State factors" the 95% testing requirement into their accountability system.
Yet the regulation prescribes 4 different ways that states must take action in schools that miss the 95 percent requirement.

3. **The regulation prescribes that schools with consistently underperforming subgroups of students be identified with a lower summative determination.**

The Law says states are required to identify schools for targeted support when a subgroup of students is "consistently underperforming" in a manner "as determined by the state." The secretary can't tell states how to identify the lowest-performing schools or what a school's rating should be.
Yet the regulation says states are required to "demonstrate that a school with a consistently underperforming subgroup…receives a lower summative determination…. Than it would have otherwise received." The Department of Education is meddling into the methodology of school ratings again.

4. **The regulation prescribes the timeline for identifying schools with consistently underperforming subgroups.**

The law says states are required to identify schools for targeted support when a subgroup of students is "consistently underperforming" in a manner "as determined by the state." The Secretary of Education may not impose new requirements or criteria on State accountability systems, such as a timeline for the identification of lowest-performing schools.
Yet the regulation prescribes an exact timeline of two years.

5. **The regulation requires States to resubmit their plans to the Secretary every 4 years.**

The Law says that each State plan "shall … be periodically reviewed and revised as necessary by the State educational agency."
Yet the regulation says states must review and revise their State plans "at least once every four years" and "submit its revisions to the Secretary for review and approval."

6. **The regulation dictates exactly how school districts with significant numbers of low-performing schools must measure resources for students.**

The law says states must "periodically review resource allocation to support school improvement" in districts that are serving a significant number of low-performing schools. The law says the secretary can't tell states what to review.
Yet the regulation says that in addressing resource inequities, States must review differences in rates of ineffective, out-of-field, or inexperienced teachers; access to advanced coursework; access to full-day kindergarten and preschool programs; access to specialized instructional support personnel; and per-pupil expenditures of federal, state, and local funds.

7. **The regulation tells states how to count students in subgroups**

The law says that each State decides the minimum number of students that should be included in the state's count of subgroups. So, a state might decide that for students to be included in the state's subgroup data, there need to be at least 35 students of a subgroup in a school. The law says the Secretary of Education may not impose new requirements or criteria on State accountability systems.
Yet the regulation says states must pick a number below 30 -- or you'll have to explain yourself to the secretary.

Here are 16 ways the regulation exceeds the authority of the U.S. Department of Education:

1. **The regulation limits how states measure school quality or student success.**

The law says states must include at least one measure of school quality or student success" that has to be "valid, reliable, comparable, and statewide."
The Secretary can't tell states what measures to use in their state accountability system.
Yet the regulation tells states they can only choose indicators that meet criteria the department came up with.

2. **The regulation limits how states measure school quality or student success, for indicators used specifically in high school.**

The law says states must include at least one measure of school quality or student success" specific to high schools, and that it has to be "valid, reliable, comparable, and statewide." The Secretary can't tell states what measures to use in their state accountability system.
Yet the regulation tells states they can only choose indicators that meet criteria the department came up with.

3. **The regulation tells schools marked as low-performing they will always be low-performing unless they improve on indicators the department has identified**

The law says that test and graduation rates have to count more in state accountability systems than indicators of school quality or student success. But the Secretary of Education may not prescribe "the weight of any measure or indicator used to identify or meaningfully differentiate schools."
The regulation says that a low performing school must continue to be identified as low-performing unless it improves on test and graduation rates, even if the school is making significant progress on other measures of school quality or student success, such as absenteeism or family engagement.

4. **The regulation requires school districts where schools aren't testing 95 percent of students to develop and implement a federal improvement plan.**

The law says states must annually test not less than 95% of all students and each subgroup of students. The law leaves it to states to determine what to do in school districts with schools that are failing to meet the participation requirement.
Yet the regulation tells states how to address school districts where schools aren't testing 95 percent of students. It invents out of whole cloth the idea of a federal improvement plan and then it mandates it.

5. The regulation requires schools that aren't testing 95 percent of students to develop and implement a federal improvement plan.

The law says states must annually test not less than 95% of all students and each subgroup of students. The law leaves it to states to determine what to do in schools that are failing to meet the participation requirement.
Yet the regulation tells states how to address schools that aren't testing 95 percent of students. It invents out of whole cloth the idea of a federal improvement plan – with regulation 4 federally prescribed elements -- and then it mandates it.

6. The regulation tells states how to measure high school graduation rates.

The Law says Each State will establish long term goals for "all students and each subgroup of students in the State," including the goal of high school graduation rates using either the "four-year adjusted cohort graduation rate" or "at the State's discretion, the extended-year adjusted cohort graduation rate."
Yet the regulation says states can only use the four-year adjusted cohort graduation rate to identify low-performing schools in their accountability systems.

***7.* The regulation requires each state to come up with a definition for an "ineffective teacher".**

The law says each State will describe how low-income and minority children enrolled in schools are not served at disproportionate rates by ineffective teachers.
Yet the regulation says states have to define "ineffective teacher." Well, how do you define and assess effectiveness? This is going to make it nearly impossible for states not to implement a teacher evaluation system.

***8.* The regulation requires each state to come up with a definition for an "out-of-field teacher".**

The law says each State will describe how low-income and minority children enrolled in schools are not served at disproportionate rates by out-of-field teachers.
Yet the regulation says states have to define "out of field teacher."

***9.* The regulation requires each state to come up with a definition for an "inexperienced teacher".**

The law says each State will describe how low-income and minority children enrolled in schools are not served at disproportionate rates by inexperienced teachers.
Yet the regulation says states have to define "inexperienced teacher."

10. The regulation tells states to report on the number and percentage of all students and subgroups of students who are not included in the state's accountability system.

The law says Each State will report "a clear and concise description of the State's accountability system, including the minimum number of students that the State determines are necessary to be included in each of the subgroups of students."
Yet the regulation requires States to provide new information outside the scope of what is required by the law.

11. The regulation tells States how to rate schools and that the State accountability system has to produce a single rating for each school.
The law says states must create a system of evaluating all public schools in the State. The Secretary of Education may not prescribe the specific methodology used by States to evaluate schools.
Yet the regulation – Tells States that the results must lead to a "single summative determination" for each school.

12. The regulation adds a requirement that a State's accountability system has to include at least three levels of performance.
The Law Says – States have the flexibility to establish a system of meaningful differentiation of schools without any parameters or federally prescribed methodology.
Yet the regulation – prescribes a requirement that States use at least three distinct levels of performance for schools.
13. The regulation prescribes when schools may exit from identification as the lowest performing.
The Law Says – States must establish statewide criteria for schools to exit from being identified as in need of improvement. The Secretary of Education may not prescribe what the exit criteria is. That is a decision left up to the States.
Yet the regulation – Narrows the States' ability to develop their own criteria for schools to no longer be identified as the lowest performing.

14. The regulation prescribes how States intervene in school districts with schools that are labeled as the lowest performing.
The Law Says – If a low-performing school does not meet a state's criteria for no longer being identified as lowest-performing, then the State must take a "more rigorous State-determined action." The Secretary of Education cannot prescribe any specific strategies to improve schools.
Yet the regulation – Requires the State to tell the school districts to take interventions the department has prescribed.

15. The regulation prescribes how school districts intervene in schools that are labeled as low performing.
The Law Says – If a low-performing school does not meet statewide criteria for no longer being identified as lowest-performing the State must take a "more rigorous State-determined action." The Secretary of Education cannot prescribe any specific strategies to improve schools.
Yet the regulation – Requires a school to take federally prescribed actions. We already tried federal "one size fits all" actions under the School Improvement Grant Program in No Child Left Behind and don't think Washington should be in the business of telling schools how to fix themselves.

16. The regulation limits how states award school improvement funding to school districts and schools.
The Law Says – States must establish the method they will use to award school improvement funding to school districts.
Yet the regulation – Dictates to States how much they have to award to low performing schools receiving school improvement funds.

What this resolution overturning the regulation does

This resolution ensures that the law is implemented as Congress wrote it.

The regulation violates the law and its clear prohibitions on the Secretary by prescribing new requirements through regulation or as a condition of state-plan approval.

In the law we passed, Congress reached agreement about requiring states to identify a certain number and types of schools that need to be improved, but we left it to the states to determine how to go about fixing those schools and how long they had to fix those schools.

The regulation prescribes how States and school districts intervene in and improve schools that do not improve.

This resolution restores state flexibility.

The regulation is in direct conflict with the intent of the law to allow states and school districts to have greater flexibility to implement the law, as Congress intended.

Congress reached agreement that there are some essential components of a state accountability system that need to be included in a state plan. But the other half of the agreement was that we left to the states the decisions about how to include these factors in to their accountability systems.

This is about Article I. Congress wrote the law with specific rules in mind. The Secretary of Education and his or her bureaucracy do not get to treat Congress as a minor impediment to the education system of their choosing. If they want to write the laws of the land, they should run for Congress, get elected, and draft a bill or an amendment, not wait for Congress to finish our work and then try to undo it through a simple regulation.

This resolution preserves local decision-making.

The Wall Street Journal said the Every Student Succeeds Act was the "the largest devolution of federal control to the states in a quarter-century."

The regulation tried to restore Washington, DC, decision-making with mandates that states comply with specific requirements instead of letting states determine how to best proceed.

This resolution scuttles new and burdensome reporting requirements

The regulation created new reporting requirements on States and local school districts that will drive up compliance costs and divert resources away from students and classrooms.

Facts about this Congressional Review Act resolution

There's been some misinformation about this resolution that I want to clear up.

FACT: This resolution ensures accountability for our public schools.

The law we passed in 2015 gave responsibility for accountability to states and local school boards, not a national school board.

The law also includes guardrails to ensure a quality, public education for all students, including:

- Requiring states to identify and provide support to low-performing schools (at least the lowest performing bottom 5% of each state's schools)
- Requiring academic and English language proficiency indicators to be included in each state's accountability system

The law's guardrails will shape how states design their accountability systems, because a state plan would not be following the law if the State fails to include accountability provisions in their plan.

The repeal of this regulation does not let states, the ones who are supposed to be addressing accountability, off the hook by any means. Repealing this regulation simply ensures that the individual states, and their governors, legislators, chief state school officers, local school boards, superintendents, principals, teachers, and parents are responsible for these decisions.

FACT: States will be able to implement the law on the existing timeline for states to submit their plans and have the Department review and approve state plans.

U.S. Education Secretary DeVos has said that she favors the current timeline. She said this at our confirmation hearing and she confirmed that again after taking office. I'd like to insert in the record her letter from February 10 to the chief state school officers.

So there is no confusion, let me state clearly that States should continue to:

- Submit state accountability plans by the April or September 2017 deadlines
- Implement a new State accountability system in the 2017-2018 school year.
- Identify the lowest-performing schools in needs of comprehensive support and improvement by the beginning of the 2018-2019 school year.

To write these plans, states need simply to consult the law.

The Every Student Succeeds Act requires the States to submit a State plan for peer review and approval by Secretary DeVos and the Education Department.

The Education Department is committed to working with States, providing technical assistance, and issuing non-regulatory guidance and other support materials.

The Education Department will continue to provide States with clarification on how to comply with the law through the use of:

- Non-regulatory guidance;
- Dear Colleague letters;
- Frequently-Asked-Questions documents;
- Webinars, phone calls, and in-person conferences.

FACT: This resolution does not in any way give the Education Secretary a path to creating a new federal voucher program.

Some of my friends on the other side of this debate are resorting to scare tactics and alleging that Secretary DeVos will use the opportunity to regulate into existence a mandate that states and local school districts adopt a school voucher program.

The Secretary of Education doesn't have that power. And this Secretary of Education doesn't want it.

Secretary DeVos has repeatedly affirmed her opposition to federally mandating school choice, saying that she does "not and will not advocate for any federal mandates requiring vouchers. States should determine the mechanism of choice, if any."

A school choice program cannot be unilaterally created by the Department of Education.

Only Congress could create a voucher program, and, unfortunately, Congress has rejected doing that. In 2015 I proposed Scholarships for Kids, to allow states to use existing federal dollars to follow the children of low-income families to the school of their parents' choice.

Only 45 senators voted for that proposal. If you're paying attention around here, you know that you usually need 60 votes to pass legislation.

Also, the 2015 law actually includes provisions that prohibit the Secretary from mandating, directing, or controlling a State, district, or school's allocation of State or local resources, and bars the Department of Education from requiring States and Districts to spend any funds or incur any costs not paid for under the law – for example, vouchers.

Now I agree that previous Secretaries of Education have imposed their own policy preferences on states and local school districts. I opposed such mandates and worked against them. Congress writes the law, not the Secretary and not the bureaucracy.

Instead of using this scare tactic to rile up teachers and parents around the country, misleading them and confusing them about what any Secretary could do, I would take that argument and turn it around.

If Congress takes a stand here and now, if Congress says that this regulation exceeds the authority that we delegated to the Secretary of Education because the Secretary imposed conditions on states not allowed by the law, then that means that any current or future Secretary of Education would be similarly prevented from imposing their own conditions on states.

So there could be no legal method of forcing states to adopt a voucher program, unless Congress passes a new law. There could be no legal method of reinterpreting the Every Student Succeeds Act to impose the next education idea, however well-intended, unless Congress acts.

FACT: These regulations aren't required by the law.

This law does not specifically call for accountability regulations.

The law allows for regulations – but "only to the extent that such regulations are necessary to ensure that there is compliance."

Congress wrote prohibitions on the secretary so that states wouldn't be faced with a bunch of new mandates that "add new requirements that are inconsistent with or outside the scope," or "add new criteria that are inconsistent with or outside the scope" or are "in excess of statutory authority granted to the Secretary."

In the law, Congress laid out requirements for state plans. States can simply follow the law.

FACT: Future secretaries will be able to write regulations on this subject.

Under the Congressional Review Act, if Congress overturns a regulation, the agency is prevented from making final a new regulation that is "substantially the same" to the overturned regulation – unless Congress passes a new law to create an opportunity for the new regulation.

But no court has defined "substantially the same."

The commonsense interpretation of that is the Department can't turn right around and do the same thing Congress has just overturned.

This is a question of whether we are going to restore the National School Board that 85 senators voted to reverse 15 months ago.

This is also a question of whether you believe that the United States Congress writes the law or the U.S. Department of Education writes the law.

I believe, under Article I of our Constitution, the United States Congress writes the law, and when it's signed by the President, then that's the law and that the regulations must stay within it — and that is especially true when Congress has written explicit prohibitions.

The remarkable consensus around the bill fixing No Child Left Behind was to reverse the trend to a national school board and restore to states, classroom teachers, and parents the decisions about what to do about their children in public schools. Teachers, governors, school boards all were fed up with Washington telling them so much about what to do about their children in 100,000 public schools.

So this regulation, which contravenes the law specifically, goes to the heart of the bill fixing No Child Left Behind, which received 85 votes here in the United States Senate.

And this resolution to overturn that regulation upholds the law that received "aye" votes from 85 United States Senators.

I encourage my colleagues to support this resolution. I urge you to vote "aye" one more time.

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