

Testimony on:
ESSA Implementation: Perspectives from Education Stakeholders
Senate Committee on Health, Education, Labor and Pensions (HELP)
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Chairman Alexander, Ranking Member Murray and Members of the Committee thank you for inviting me to testify today on the implementation of the Every Student Succeeds Act (ESSA). I am Denise Marshall, executive director of the Council of Parent Attorneys and Advocates (COPAA). COPAA is a national non-profit peer-to-peer network of parents, attorneys, advocates, and related professionals who work to protect the civil rights and secure excellence in education on behalf of the 6.4 million children with disabilitiesⁱ attending public school across the United States. We are an important voice in our children's education and we stand strong and loud to say our kids count, they can achieve and they want an equal opportunity to succeed.

It is through your bipartisan partnership that the nation's general education law has successfully been updated. COPAA appreciates your leadership to accomplish this. Throughout the reauthorization process, COPAA worked closely in coalitions with the disability, civil rights and business communities – across lines that often divide us on public policy issues – to assure that ESSA included provisions we all believed were critical to assuring students for which the law is intended to support – would in fact do so. And yes, in the process, *none of the parties invested in ESSA's outcome secured everything they wanted*, however, COPAA believes ESSA does include the essential components that protect and support our most disadvantaged students.

These students are the: 7.7 million Black students; 13.1 million Hispanic students; 25 million students from low-income families; 6.4 million students with disabilities; and 4.5 million English Language Learnersⁱⁱ who attend our nation's public schools.

ESSA gained COPAA's support because, while it provides new flexibility for decisions to be made by States and districts, it does include several provisions that we believe are key to providing continued accountability for all students, including students with disabilities who, as you know, prior to the passage of No Child Left Behind (NCLB) had *never been included* in state assessments and in school, district or state accountability systems. While hard to imagine, it's true and while the performance of all student groups, including students with disabilities, has risen dramatically between 2000 and 2013,ⁱⁱⁱ the achievement gap is still far too large between White students and students of color. And, students with disabilities continue to lag far behind on substantive outcomes that we know predict future success, especially on key outcomes such as: grade level proficiency in reading and math; graduation from high school; matriculation into college and, becoming employed.^{iv} We do see improvement when districts and states take seriously the need to set high expectations for all students; to increase and sustain full access to the regular classroom staffed with trained and certified teachers; and, to provide the instructional support, interventions and accommodations that allow students with disabilities to succeed alongside their peers.

Through the eyes and ears of our network of members, we know the importance the law and its accompanying regulations to keep expectations high and change the trajectory of student lives. I'd like to share a few COPAA stories to remind us all of what the real possibilities are for real students.

Bruce, a 19 year-old from South Carolina struggled and suffered; bullied relentlessly, unable to keep up, suffered trauma and self-esteem issues from low expectations due to his inability to read. The fact is that Bruce is incredibly bright, and with persistence, relentless efforts of his parents and educators, and the right services and supports for his dyslexia – he graduated high school and is off to college in the Fall.

Mariano from California has an Individualized Education Program is working hard in high school to fulfill his goal to play and conduct for the New York Philharmonic Orchestra -- and to be a Music and History Professor.

Blair, a young woman from Pennsylvania, who with accommodations and the support of her service dog, graduated high school and is currently a sophomore at York College. She is a Public Relations major with a minor in Nonprofit Management.

Accountability: Why It Matters & What it Includes

Today, I'd like to focus on the important components of ESSA that are inherently linked to both creating public transparency in the data – which is a goal I know we all share – and giving school leaders and the public the information and requirements necessary to actually do something when the data show there is reason to do so. I'd also like to reiterate what we've said throughout the reauthorization and as I've shared through several stories: *real accountability for student subgroups matters and it matters to children right now*. Real accountability is not an esoteric exercise in reporting test scores and it is not about gaming the numbers so it appears as if schools are doing better than they really are, nor, as history has shown, is it setting standards so low that the diploma students receive is virtually worthless when they try to enter the military, matriculate into college or access career training only to find they are ill-prepared for the next phase of their life. Accountability is responsibility— and now that important responsibility lies squarely with the school, the district and the state.

ESSA assures that this shift in responsibility is still backed by core principles and important guardrails that we know can both guide educational decision making and protect resources and students. While ESSA no longer contains the mandates and consequences of its predecessor, it does include critical provisions intended to assure the adults responsible for the children do something when outcomes demand it.

A key function of a school accountability system is to communicate what is expected of schools both to the schools themselves and to the public. In order for school accountability systems to support improvement and gap closing, these expectations have to be both rigorous and focused on student outcomes. Schools and districts must be compelled by the important combination of data and accountability requirements to provide the instructional support, intervention and supports students need and in a timeframe that will actually impact struggling students. States must design systems that will strike this critical balance.

Unfortunately, past history shows that when left to their own devices, States often set expectations for their schools far too low. They typically do this because pressure from special interest groups makes setting rigorous goals too daunting. In fact, States have set graduation

goals as low as 60 percent and allowed as little as .1 percent of annual growth to count as progress against State goals. Recently, we've also seen how easily States can allow the focus of accountability to shift away from student learning. This is unacceptable.

Sarah a parent currently living in Maryland, whose husband is active military, knows firsthand from advocating across multiple states due to family moves, that academic expectations and allowed level of parent involvement vary greatly from state to state and from school to school. The fact is that one mile, whether it's a country mile or a city mile, can make a huge difference in educational opportunity and therefore in the life of a family and a child. While we respect State rights and autonomy, Sarah and so many other parents like her across our great country urge regulators to use all authority to put up guardrails in ESSA that ensure meaningful progress is realized towards closing the achievement gap for at risk children. We must have clear regulations for such areas as the definition of "consistently underperforming" and specifying timeframes for necessary intervention and action when subgroups of students are not achieving to ensure Sarah's children and all at-risk children do not slip through the cracks or experience multi-year delays in their educational progress.

We must stay focused on the purpose of ESSA which as stated in the statute is: *"To provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."* COPAA and the entire civil rights community has long recognized equal educational opportunity as central to our struggle to achieve equality for all Americans. Full ESSA implementation must not delay nor promote retreat.

Our children deserve better and require prompt action. So, we want an accountability system, designed by each State that will ensure:

- 1) the expectations for all student groups are rigorous;
- 2) the state-designed school ratings reflect the learning outcomes of all groups of students, and
- 3) meaningful action is taken whenever the school is underperforming for all students or for any student group.

In order to achieve these three important components of State accountability systems, we have encouraged ED, through forthcoming ESSA regulations on accountability to assure that:

- States explain their methodology for setting ambitious goals and interim performance targets that require significant progress toward closing achievement gaps.
- States fully understand and provide the [types of] clear evidence needed to demonstrate that their goals meet their system's criteria including alignment with state standards and levels of achievement as applicable.
- States provide a statistically valid summative rating based on their academic indicators and the additional school quality indicator(s) to annually provide meaningful differentiation between schools and determine how the school is doing in meeting the interim performance targets and ambitious goals.
- All school quality indicators are disaggregated by student group within each school as required in ESSA in a statistically valid manner.

- State systems maintain a strong focus on student achievement and attainment including that States have to demonstrate that the other indicator of school quality cannot be weighted such that it prevents a school from being identified for comprehensive support and improvement, targeted support and improvement, or additional targeted support and improvement if the school would have been identified as such based on the academic indicators.
- States base the definition of “consistently underperforming” on their statewide goals and interim performance targets for each group of students. The definition for consistently underperforming must not be based on the size of the achievement gaps within schools. States must publicly report their definition of “consistently underperforming,” including both the level and duration of underperformance required. Because ESSA requires States to ensure that their accountability systems clearly identify and require action in any school that is consistently underperforming for any group of students. The fact that both school identification and action are triggered by “consistent underperformance” the way this term is defined will be critical to ensuring that schools are held accountable for the performance of all groups of students. A lax definition could allow some students to languish for years in schools that are not serving them well.
- In alignment with the statute, States are prohibited from measuring the performance of a super-group of students in place of individual student groups. In recent years, as more and more States have been designing their own accountability systems, many have chosen to base their school ratings either solely on schoolwide average performance, or on schools’ performance for students overall and for a super-group of students. As a result, in most States, school ratings tell parents and community members little about how schools are performing for individual groups of students. Schools that are doing fairly well on average, but are performing poorly for, for example, their poor students, or their students with disabilities, are allowed to ignore this underperformance.
- School accountability [summative] ratings, or combination of ratings (be they letter grades, other labels, index values or rankings etc.) must reflect how each school is performing for each group of students that it serves, as well as whether the school is consistently underperforming for any student group. Ratings must be based on disaggregated results for each group of students, and differentiate schools that consistently underperform for any group.
- States demonstrate how their exit criteria for schools identified for comprehensive support and improvement, as well as for those requiring additional targeted support and improvement a) require meaningful, sustained improvement on the indicators in the system, and b) are related to the state’s long-term goals and interim progress targets. Exit criteria are public and States must describe how the school meet the criteria.
- States specify what constitutes ‘unsuccessful implementation’ of improvement plans in targeted support and improvement schools; timelines for escalated action in comprehensive support and improvement and additional targeted support and improvement schools; and, describe how they will ensure that their districts take action in targeted support and improvement schools within a reasonable timeframe. The law is not clear on what constitutes “unsuccessful implementation” – a term that is important both for setting clear improvement expectations and for preventing students from languishing

for an extended period of time in schools that are not serving them well. Also, States must intervene in schools receiving comprehensive support and improvement that do not meet exit criteria within a state-determined number of years (not to exceed four years per ESSA).

- States describe how they will determine the appropriate supports and interventions for comprehensive support and improvement schools and additional targeted support and intervention schools that do not meet state-determined exit criteria. In addition, States should be required to describe how they will ensure that their districts will take similarly meaningful action in targeted support and improvement schools that do not make necessary improvements.

In addition to the specific accountability provisions articulated above, COPAA has also advocated for Title I regulations that, in summary, support a strong accountability system and provide:

- clear requirements for identification, intervention and exit criteria for schools in each of the three categories identified in the law—the bottom 5 percent, schools with graduation rates below 67 percent and schools with consistently low performing groups of students; and assure evidence-based intervention systems focused on raising achievement are initiated whenever any school is underperforming for *all* students or for *any* student group so that students don't languish year after year without help;
- definitions and/or parameters set for new statutory terms – specifically for new terms: *'meaningful differentiation'*, *'substantial weight'* and *'much greater weight'*;
- specifications that the 95 percent participation requirement is included in the accountability system so the performance of students matters, provide federal guidance on options for doing so and define consequences for failure to meet the requirement;
- assurances for support to districts to reduce bullying, harassment, use of disciplinary practices (e.g. suspension and expulsion) and use of aversives (e.g. seclusion and restraint), all of which disproportionately impact students with disabilities and students of color;
- universal access in all data reporting; cross-tabulated data and expansion on the availability of data disaggregated by Asian American and Pacific Islander categories;
- clarity that supplement not supplant provisions presume and ensure an equal base of actual per-pupil funding before any federal funds are considered supplemental.

Accountability: Calculation and Reporting

The basis of a good accountability system is a reliable cell size, or N size. The minimum subgroup size, or “N” size, established by many States under NCLB resulted in seriously limiting accountability for students with disabilities. A 2013 report of subgroup sizes used in States found that across 40 States with relevant data for the 2008–09 school year, *slightly more than a third (35 percent) of public schools were accountable for the performance of the students with disabilities subgroup, representing just over half (58) percent of tested students with disabilities in those states.*^v

States must assure the subgroup data used as the basis of their accountability determinations and reporting truly reflect the students attending school while still protecting privacy. COPAA has also advocated that in addition to ED providing regulations that provide a range for statistically reliable and acceptable N sizes to States so that as many students are included in school, district and state accountability metrics as possible and that ED must also clarify that while subgroup size must be the same for all subgroups, subgroup size *may vary depending on the metric*, i.e., proficiency, participation and graduation rate.) While subgroup size for proficiency involves statistical reliability (the degree of confidence associated with the decision of whether or not enough students in a subgroup performed above the cut point for proficiency to meet the annual objective), test participation and graduation rate calculations are only tempered by the requirement to not reveal personally identifiable information (the inability to determine from the subgroup values reported how an individual student performed on an indicator).

Accountability for the outcome of each child's journey remains critically important and matters more than ever. We must not give into the belief and argument by some that all our struggling schools need is just more resources and more time. COPAA insists that accountability at the school and district level is often the only tool to assure action occurs when low income, minority, English learners and students with disabilities are in miserable need for more.

Rulemaking and Moving Toward Implementation

As we anticipate new regulations to be promulgated on ESSA's accountability provisions, COPAA supports ED's goal to assure such regulation provides clarity to States and districts as they strive to implement the new law. In previous testimony, COPAA said:

COPAA and its civil rights and business coalition partners are confident that the provisions [in ESSA] are specific and limited enough as to not erode the regulatory authority of ED. The statutory language acknowledges that regulations will be promulgated. In so doing, the Secretary of Education will issue regulations that clarify and interpret statutory provisions to help schools and districts in implementing the law and to protect the rights of all children – without exceeding the scope of the statute and without being inconsistent with the statute. This regulatory action is necessary and appropriate to fulfill the requirements of the law. It is clear that ED has the correct regulatory authority to develop regulations for implementation, as noted in the beginning of Section 1111(e)(1)(A). Prior to enactment of the ESSA, at no time has the Secretary of Education had the authority to promulgate regulations that are inconsistent with or outside the scope of federal law.

We know from past history regarding civil rights laws that we need regulations in order to ensure the law is implemented. The effect of no regulations means that courts must adjudicate the intent of the statute. An example is the turmoil that happened when the Section 504 statute of the Rehabilitation Act was passed in 1973 and there were no regulations issued. In order for this law to become effective, regulations had to be issued defining who was a 'person

with a disability' what did 'otherwise qualified' mean, what constituted 'discrimination' and 'nondiscrimination' in the context of disability etc. Enforcement timelines had to be developed as well as an administrative enforcement mechanism. The regulations would provide a consistent, coherent interpretation of 504's legal intent rather than leaving it up to any judge who heard a 504 case to interpret what the law meant. There was much delay; the disability community filed a lawsuit in federal court; the judge ruled that regulations must be issued but not when. After much back and forth with the Carter Administration, regulations were finally issued in 1977. History has taught us that the courts are not set up to be experts.

We also know that States' provisions that restrict entitlements established by federal statutes are void under the Supremacy Clause of the Constitution. The Supreme Court has applied this principle in cases regarding benefit programs in which the federal government provides funding to States on the condition that they comply with the terms of the federal program, the same arrangement that exists for special education under IDEA. The Court held that the state was not free to adopt a definition that restricted benefits in a way the federal statute did not specifically authorize.

In its simplest form, regulation allocates responsibility to implement statutory law. Our Founding Fathers were insightful in their separation of powers. The members of the Judicial Branch are experts in judging the law, Congress maintains the knowledge in making laws and the Executive Branch holds the expertise in implementing the laws. Where we get in trouble is where one branch tries to do the job of another.

The test of regulations, guidance, technical assistance and other implementation activities for ESSA must be *whether or not they advance educational equity and serve the interests of all students*. Low-income students, students of color, students with disabilities, English learners, and Native students deserve no less than robust and thorough regulation to close opportunity and achievement gaps.

COPAA is satisfied with the recent outcome of negotiated rulemaking on draft regulations focused on ESSA's assessment provisions. In our view, a delicate balance was struck to ensure that all students are fully included in state assessment systems and that students with disabilities in particular will have access to testing accommodations and assistive technology and be properly included in state guidelines as required when States develop alternate assessments on alternate academic achievement standards. We were also content with provisions included to guide ED in determining whether States can access annual waivers to exceed the cap on student participation at the state level on alternate assessments. Good statutory language helped support this thoughtful negotiation and we thank this Committee for your leadership and support in

protecting students with the most significant cognitive disabilities whose disabilities are often used as the sole reason to lower expectations and relegate such students to segregated settings thus limiting access to the regular classroom, to a regular diploma and to competitive employment.

We were disappointed however, that agreement was not reached to ensure funding equity in the Supplement Not Supplant provisions because Title I funding is critical to improving our most impoverished schools. Although students with disabilities are found in every school, the disability community is particularly concerned about the needs of students with disabilities in high-poverty schools and are likely to bear the brunt of weak instruction, insufficient supports and inadequate services which further stresses teaching staff who already have to do too much with too little and it perpetuates and widens the achievement gap for these students. Students of color who have disabilities are some of the most marginalized students in our schools today, they are more likely to be found in high-poverty schools than their White, nondisabled peers and are disproportionately impacted by harsh and exclusionary disciplinary practices. We cannot continue to deny these schools their fair share. Students with disabilities in high-poverty schools are the short-changed of the short-changed. These dollars mean more to them than just about anyone.

Conclusion

It is COPAA's hope that in State and district efforts to redesign and implement ESSA locally, that they will work with our families and others to use this as an opportunity to focus and target new policies and valuable resources on the serious and urgent needs of students. By doing so, COPAA believes ESSA implementation can support students in what is arguably the most important journey of their formative lives – their K-12 education. This new responsibility taken on by States can assure that the success of more students like Bruce Blair and Mariano are the reality for all of America's children. Thank you for this opportunity and I look forward to your questions.

ⁱ IDEA eligible students ages 3-21, (2012). NCES, U.S. Department of Education

ⁱⁱ National Center on Education Statistics at: <http://nces.ed.gov/fastfacts/#>

ⁱⁱⁱ National Center on Education Statistics, National Assessment of Educational Progress (NAEP), 2015, at <http://nces.ed.gov/nationsreportcard/pubs/main2013/2014451.aspx>

^{iv} 37 percent of 8th grade students with disabilities scored at or above basic in reading on the National Assessment of Educational Progress (NAEP), compared with 81 percent of students without disabilities; 63% of students with disabilities graduate from high school as compared to 82 percent of students without disabilities; and, 19.1% of people with disabilities are participating in the U.S. Labor force as compared to 68.2% of people without disabilities. See: National Center on Education Statistics, National Assessment of Educational Progress (NAEP), 2015, at <http://nces.ed.gov/nationsreportcard/pubs/main2013/2014451.aspx>; National Center on Education Statistics, 2013-2014, at http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp; U.S. Department of Labor, 2015 at www.dol.gov

^v 2013 *The Inclusion of Students with Disabilities in School Accountability Systems*, Institute for Education Sciences, U.S. Department of Education at: <http://ies.ed.gov/ncee/pubs/20134017/>