

**Written Testimony of
Kentucky Commissioner of Education Stephen L. Pruitt, Ph.D.
on
“ESSA Implementation: Perspectives from Education Stakeholders
on Proposed Regulations”**

**U.S. Senate Committee on Health, Education, Labor and Pensions
Thursday, July 14, 2016**

Chairman Alexander, Senator Murray, and Members of the Committee,

Thank you for inviting me to testify about the implementation of the Every Student Succeeds Act (ESSA).

I appreciate the support of the Senate in the passage of this law. It is important for Kentucky and other states to have a stable federal law that enables state and local decision-making so that we can effectively support our schools and districts in their efforts to educate all children.

In Kentucky, our Constitution mandates an efficient system of common schools throughout the state and ESSA supports that idea with a focus on the success of every student.

I believe we have both an ethical and moral responsibility to our children to provide them with a world-class education regardless of the color of their skin, their heritage, the language they speak, their family income, where they live, or whether they have a disability. We educate children – ALL CHILDREN – because it is the right thing to do for them, for our state and for these United States.

As the Chief State School Officer for the Commonwealth of Kentucky, I am excited about the future of education in our state under ESSA and the opportunity to build on the progress we have made to date.

Kentucky has a long history of taking action in the best interest of our children. We don't believe in doing what is easy. We believe in doing what is right for our students. We understand that also was the intent of Congress in passing the ESSA.

In Kentucky:

- We value **equity** so that all of our students will have the opportunity to graduate from high school with the education and skills they need to go to college or start a career of their choice.
- We value **high achievement** in academics as well as a well-rounded education for every student.
- We believe in **integrity** – being open, honest and transparent with our students and the adults who support them. Sugar-coating data so everyone feels good about themselves is a disservice to our children, our parents and our educators.
- And finally, we value **quality** in the programs and systems that support excellence in teaching and learning, support continuous improvement and support our schools and

districts in meeting our goal of every student graduating high school truly prepared to take the next step in life, whether that be college, a career or service in the military.

These values have served us well.

Not so many years ago, Kentucky ranked near the bottom of states on education indicators.

Today, by many measures, Kentucky has become a national leader in improving student achievement. We have climbed to 27th place overall according to the latest *Quality Counts* report from “Education Week.”

- Kentucky students outperform their peers at most levels in reading, mathematics and science on NAEP – the National Assessment of Educational Progress.
- While a wide achievement gap between low-income students and their wealthier counterparts exists in every state in the nation, according to the *Quality Counts* report, with 60 percent of Kentucky’s students being considered low income, the poverty gap is lower in Kentucky than in the majority of other states.
- Our graduation rate is among the top in the country. In fact, the *2015 Building a Grad Nation* report released annually by the Alliance for Excellent Education, America’s Promise Alliance, Civic Enterprises and the Everyone Graduates Center at Johns Hopkins University called Kentucky “a beacon to all other states.”
- According to the report, our graduation rate for low-income students is nearly identical to the graduation rate for middle/high-income students and well above the national rate for all students.
- And, we have seen significant increases over the past five years in our readiness rates for postsecondary education and the workforce.

Despite this progress, we readily acknowledge that we still have achievement gaps – all states do. That is why I am excited about the opportunity ESSA presents. I, like many of you, believe ESSA is both a civil rights law and an education law.

In Kentucky, we are working to determine the root cause of achievement gaps, which we believe stem from opportunity gaps and access to rigorous, high quality learning opportunities. Kentucky’s plan for closing gaps is to move all children up, but to do so faster for those at the lowest performance levels. We do not want to sacrifice the performance of any child for the sake of another. We believe all boats should rise and ALL children should perform at the highest levels. We will make changes to not only close the gaps, but eliminate them whenever possible.

In Kentucky, we seized the opportunity that ESSA presents. Before the U.S. Department of Education (USED) even released the proposed regulations, Kentucky started working to engage a broad spectrum of education shareholders, through a series of 11 face-to-face Town Hall meetings held across the state and one conducted virtually. More than 3,000 people participated. They told us what they value in their schools and how they define school success. We listened and are using those comments to shape the work ahead.

Also, we have been intentional in making sure we have representation from all shareholder groups at the table – on our steering committee and work groups – as we build a new accountability system under ESSA that will promote quality programs, school improvement, educational access and create more opportunities for low-income and minority students. I have assembled 166 diverse individuals and assigned them to work groups to examine the issues based on our goals and make recommendations on a new accountability system that will be a catalyst for improvement and every child succeeding.

We plan to go back out to the public for feedback on the new system, as well as to gather advice on the development of District and School Report Cards.

I assure you that Kentucky is invested in its young people and is up to the challenge and opportunity that comes with the reauthorization of the Elementary and Secondary Education Act.

Positive Aspects of ESSA Proposed Regulations

I commend the United States Department of Education (USED) for its quick response in drafting regulations on the implementation of ESSA and releasing them in a timely manner for public comment.

I am heartened by a number of items in the proposed regulations on accountability and state plans published in the Federal Register on May 31.

In regard to supporting all students and providing a well-rounded and supportive education and equitable access to such for students (*Section 299.19 (a) –p. 34620*), I am excited that career and technical education finally gets its due. Education and the economy are inextricably linked. For many of our students, career and technical education is a pathway to their future, and it is time we recognized it as such through challenging standards and rigorous coursework. The business community also is very enthusiastic about this as it will result in a better prepared workforce.

The folks who spoke during our town hall meetings or who submitted written comments will be very happy that the regulations recognize the importance of subjects beyond math, reading and science. They consistently told us how much they valued student participation in the visual and performing arts, along with the benefits of health and physical education. For many students, these are the areas that keep them engaged in school and persisting to graduation.

I wholeheartedly agree with Secretary King's prior statement on the proposed regulations that they "give educators room to reclaim for all of their students the joy and promise of a well-rounded educational experience."

I appreciate Senator Murray's assessment that the proposed regulations fulfill the federal obligation to protect and promote equity, ensuring that ESSA implementation will uphold the civil rights legacy of the Elementary and Secondary Education Act, as it was originally approved.

I further welcome the statutory provision and the congruent regulatory guidance on Subgroups of Students (*Section 200.16(b)(i) – p. 34600*) that maintains the inclusion of English Language

Learners in accountability up to 4 years to provide a more accurate picture of how schools are continuing to support these students.

Additionally, allowing students with alternate diplomas (*Section 200.34(a)(1)(ii)*, p. 34612) to be counted in the graduation rate is a much needed change. Formerly, only students graduating with a “regular” diploma counted in the graduation rate, which discounted the hard work of students participating in an alternate assessment who achieved the alternate diploma. We are happy to see that change reflected in the statute and the proposed regulation.

Concerns over ESSA Proposed Regulations

But, a law is only as good as its regulations and their implementation. No education initiative ever died in the visioning phase; it lives or dies dependent on its implementation.

As we saw under No Child Left Behind (NCLB), states do not achieve quality teaching and learning or improved student outcomes simply by checking a box that they complied with a law. There also must be fidelity in the implementation of the law, which is especially important with the autonomy that the ESSA provides states and local school districts.

However, in my opinion, the proposed regulations go beyond what statute intended. Instead of guardrails along a multi-lane highway, the proposed regulations are more like concrete barriers along a one lane road with so many restrictions and requirements, that state choices are severely limited. The proposed regulations stifle creativity, innovation and the sovereignty of states to govern their own education policies.

Additionally, the volume and complexity of these regulations are in direct opposition to Kentuckians’ desire for a system that is simple and yields clear, concise messages to the public and parents and provides a broad view of school performance.

I question, based on the proposed regulations, do states truly have the autonomy to develop an accountability system and state plans that reflect their goals and values and are in the best interest of children as was intended under ESSA? As the saying goes, the devil is in the details.

I am concerned about several issues that have emerged in the proposed regulations that could undermine our efforts to continue on a path to genuine improvement for all students and clearly communicate where on that path a school and district is. Certain of the proposed regulations simply do not seem to be consistent with the intent of Congress or Kentucky’s values.

As a preface, it is important for the record to reflect that Kentucky has no intention of backing off of accountability in any way during our transition to the new law. Accountability is important to ensure public dollars are spent wisely and that all students have equitable opportunities to achieve at high levels.

Point 1 – Identification of Schools in Need of Comprehensive Support and Improvement

Statutory Summary: *Section 5(e)(1)(B)* indicates that states which receive Title I funding must develop and implement a single, statewide state accountability system beginning with school year 2017–18. *Section 1111(c)(4)(D)* of the ESEA, as amended by the ESSA, requires states to

begin identifying schools in need of comprehensive support and improvement in the 2017-18 school year and to do so at least once every three years.

The proposed regulation would: Require states to use data available in 2016-17 that was generated under the current accountability system to identify schools for comprehensive and targeted support and improvement under the new system beginning in 2017-18. (Section 200.19(d)(1) – p.34603)

KY Reaction: Implementing a new accountability system in 2017-18 is already a monumental task on an aggressive timeline, and I have concern that states will be able to implement new systems that take full advantage of ESSA by the 2017-18 school year. Instead, states will be forced into continuing the status quo of their current systems or make only minor tweaks to existing systems.

I was heartened to hear the Secretary say recently that perhaps USED's timetable was a little optimistic. We wholeheartedly agree.

For example, instead of using data from our current accountability system to identify schools for comprehensive support and improvement under the new system as the proposed regulations suggest, we feel it would be prudent to wait until the end of the 2017-18 school year to identify schools based on the measures of the new system.

If states are forced to identify schools prior to the new system being approved by USED, schools might not be accurately identified under the new system. This means those schools that most need intensive help may be prohibited from getting it, while those not really needing additional resources could receive them.

In addition, misidentification can create confusion among educators, parents and students and erodes confidence in the accountability system. For example, when Kentucky transitioned to its current accountability model, one high school was identified as a Priority School under the former system. However, under the new system it has grown to be high performing and has continued to improve. Since there was no "reset" based on the measures of the new system, this school is simultaneously identified in the bottom 5 percent and the top 5 percent – sending mixed signals and creating distrust of the current accountability system. We do not want to repeat this problem in the transition to a new accountability system under ESSA.

Identifying schools for comprehensive support and improvement using data generated under the new accountability system would be fairer for our schools, allow a clean transition to the new system and eliminate an amalgam of the two systems during the transition year. In the meantime, we would continue to support our currently identified low performing schools.

I would implore the Secretary to commit to this timetable now and not wait until the regulations are finalized.

If we are forced to implement an accountability system that does not closely align with state policy priorities, it will strike a devastating blow against the integrity of this agency and our

state as a whole. Our schools will suffer and stay mired in compliance rather than accepting the shared responsibility for educating the students of the Commonwealth. I am a firm believer in accountability, but I will not allow the new system in our state to reflect anything other than Kentucky's values and what is best for our students.

Point 2 – Annual Differentiation of School Performance: Performance Levels and Summative Ratings

Summary of the Statutory Language: Section 1111(c)(4)(C) requires that a state, on an annual basis, meaningfully differentiate its schools using all the indicators in the state accountability system.

The proposed regulation would require that state accountability systems provide a single summative rating from multiple measures of school performance. (*Section 200.18 (4) – p 34601*)

KY Reaction: While the proposed regulations claim to replace NCLB's narrow definition of school success with a more comprehensive picture of school performance, the requirement of a single summative score seems to go well beyond what the statute calls for and would limit states' ability to leave data at a dashboard level, which is a broader, fairer and more accurate representation of school performance. While composite indices tie up school performance in a neat little package, reporting school performance as a single number – like reporting different student groups as one group – can mask true performance on the various indicators.

In Kentucky, we found that a summative score leads to ranking and creates an unhealthy sense of competition rather than collaboration and collegiality among our schools and districts. We also found that, in some instances, it takes the focus away from decisions based on what's best for students. Instead, it becomes more about adults chasing points and trying to “game” the system to manage the appearance of performance, rather than actual performance. This is not good for students and is diametrically opposed to Kentucky's desire to provide a transparent system that has integrity and on which people know they can count to get accurate information about school performance.

Furthermore, research¹ shows that use of a summative score does not spur improvement, whereas, quality feedback on multiple indicators leads to greater improvement.

Point 3 – Annual Differentiation of School Performance: Weighting of Indicators

Summary of the Statutory Language: Section 1111(c)(4)(B) requires state accountability systems to include certain indicators. Most of those are academic indicators (e.g., results on reading and math assessments, high school graduation rates), but states also are required to have one or more additional indicator(s) of school quality or student success. *Section 1111(c)(4)(C)(ii)* specifies that each academic indicator has to receive “substantial” weight in the state's accountability system, and that in the aggregate, “much greater weight” than the school quality indicators in the aggregate.

¹Lipnevich, A. A., and Smith, Jeffrey K. (2008, June). Response to assessment feedback: The effects of grades, praise, and source of information. Princeton, NJ: ETS.

The proposed regulation: Requires states to perform back-end checks to demonstrate their weighting systems meet the “substantial” and “much greater” standards required in the law, even though the regulations do not prescribe the weight or offer a range of weights states assign to each indicator, or the aggregate weights for the academic and school quality or student success indicators. (*Section 200.18 (6)(d)(1-3) – p 34602*) For example:

- A school that gets the lowest score on one of the academic indicators must get a different summative rating than a school performing at the highest level on every academic indicator.
- A school identified for statutorily-defined comprehensive support (bottom 5 percent, high schools with graduation rates below 67 percent, and schools with very low performing subgroups) or statutorily-defined targeted support (consistently underperforming subgroups) cannot be removed from those categories based on the performance on school quality or student success indicators unless significant forward progress is happening on one of the academic indicators. The proposal does not, however, define “significant forward progress,” thereby leaving that determination up to states.

KY Reaction: The regulation goes beyond the scope of the statute and adds additional provisions to what is supposed to be a state determination. The back-end checks negate a state’s ability to determine the impact that “substantial” and “much greater” weights have in the overall accountability system.

Point 4 – Identification of Schools – Schools identified for comprehensive support and improvement

Summary of the Statutory Language: Each state must create a methodology, based on a system of annual meaningful differentiation, for identifying certain public schools for comprehensive support and improvement and must include three types of schools:

- The lowest-performing 5 percent of all Title I schools in the state;
- Any public high school failing to graduate one-third or more of its students; and
- Title I schools with a consistently underperforming subgroup that, on its own, is performing as poorly as all students in the lowest-performing 5 percent of Title I schools and that has failed to improve after implementation of a targeted support and improvement plan.

The proposed regulations would: Reiterate the statutory requirement for identifying three specific types of schools for comprehensive or targeted support and improvement. They do not extend the authority of states to identify schools for improvement beyond what is in statute. The regulation should provide states further guidance on how they may be able to provide support to schools in need beyond those currently recognized. (*Section 200.19(a)(1-3) – p. 34602*)

KY Reaction: Currently states are able to identify schools for supports if they are Title I eligible; however, due to the prescriptive nature of the proposed regulations, states are no longer afforded that option. Since many, if not all, districts run out of Title I money before getting to high schools, the result would be there would be middle and high schools that would not receive assistance, in spite of really needing it.

Point 5 – Identification of schools – Methodology to identify consistently underperforming subgroups

Summary of the Statutory Language: Section 1111(c)(4)(C)(iii) provides that each state must establish and describe in its state plan a methodology to identify schools for targeted support and improvement and leaves the determination of consistently underperforming up to the state.

The proposed regulation would: Define consistently underperforming as failing to make progress for 2 years. (Section 200.19(c)(1) – p. 34602)

KY Reaction: The regulation oversteps the bounds of the statutory language which leaves the definition of consistently underperforming up to the states.

Point 6 – Resources to Support School Improvement

Summary of the Statutory Language: The statute authorizes the SEA to reserve 7 percent of the State’s Title I allocation to serve schools identified for Comprehensive or Targeted Support and Improvement. At least 95 percent of these funds must flow through to LEAs, unless the SEA and an LEA agree to have improvement activities carried out by the State or an outside provider. The statute provides other requirements regarding local applications and the targeting of these funds.

The proposed regulations would: Require that the SEA, in allocating funds, provide at least \$50,000 for each Targeted Support and Improvement school and at least \$500,000 for each Comprehensive Support and Improvement school, unless the SEA can conclude (based on a demonstration by the LEA in its application) that a smaller amount would suffice. (Section 200.24 (9)(c)(2)(ii) – p. 34608)

KY Reaction: With the proposed regulation setting an arbitrary minimum allocation of \$500,000 for Comprehensive Support and Improvement Schools, there is no consideration of student population. For small rural schools, this would likely be more than they need, but the state would have no discretion in awarding less unless the district requested and justified less, which few are likely to do. The result would be less money for schools that may have larger student populations and need more than the \$500,000 to effect comprehensive improvement, thus creating a funding inequity.

Furthermore, the state should not be forced through the onerous process of establishing a \$500,000 minimum, to have each LEA either apply for the \$500K or request and justify an exception, and then consider each such request on a case-by-case basis – all when the state knows from the beginning that \$500K will be more than needed in many cases.

By setting the minimum allocations in regulation, states do not have the autonomy to make decisions based on actual school needs.

Point 7 – Report Cards

Summary of the Statutory Language: The law requires that each LEA participating in Title I produce and disseminate a report card, containing information for the LEA as a whole and for each of its schools.

The proposed regulations would: Require that the local report card (for the LEA as a whole and for each school) begin with a clearly labeled and prominently displayed overview section, be developed with parental input, include certain information and be distributed to parents on a single piece of paper. (*Section 200.31 (3)(d)(2)(i) – p 34610*)

KY Reaction: With the volume and complexity of the reporting requirements, a single sheet of paper is not adequate if we are to use a font size that we expect parents and others will be able to read.

Point 8 – Contents of the Consolidated Plan and the Peer Review Process

Summary of the Statutory Language: Section 1111 (e)(1) prohibits the Secretary from adding new requirements and criteria outside the scope of the statute.

Section 9302 (b)(3) states that “the Secretary shall require only descriptions, information, assurances..., and other information that are absolutely necessary for the consideration of the consolidated state plan or consolidated state application.”

Section 1111(a)(4) provides that the Secretary establish a peer-review process to assist in the review of state plans. The purpose of peer review is to maximize collaboration with each state; promote effective implementation of the challenging state academic standards through state and local innovation; and to provide transparent, timely and objective feedback to states designed to strengthen the technical and overall quality of the state plans.

The proposed regulations would: Require states to undertake burdensome, time-consuming documentation not required in statute to provide detailed descriptions, reviews and evidences on multiple elements within the consolidated state plan – presumably to support the peer review process.

KY Reaction: We applaud the law’s intent to provide collaboration between state and federal education agencies through the peer review process and provide feedback designed to strengthen state plans. However, history has shown that the peer review process, as it currently operates, is subjective, secretive and often results in inconsistent interpretations of the law.

The documentation that states must provide under the proposed regulations on items such as challenging state academic standards, performance management systems, strategies, timelines and funding sources goes beyond the intent of the assurances required in statute. As such, we have a concern that though prohibited in law, the peer review process could be manipulated to allow the department to promote its agenda outside of the regulatory process.

Furthermore, the requirement to provide massive amounts of documentation, again presumably to support the peer review process, adds many additional staff hours and expense. Recently, the Kentucky Department of Education was required to spend more than \$500 and countless hours assembling boxes and boxes of hard copy documentation for the assessment peer review. This does not seem to support the collaborative process intended in the law and a trust in states to do the right things for their students.

Point 10 – Supplement, not Supplant: Section 1118(b)

Finally, while I understand the proposed regulations on assessments and “supplement, not supplant” will be forthcoming, based on what we have seen so far with the proposed regulations on accountability and state plans, I have concerns.

Kentucky is committed to supporting equitable educational opportunities for all students. I am concerned, however, that USED’s recent regulatory proposal on Title I’s Supplement, not Supplant (SNS) requirement exceeds the scope of the Every Student Succeeds Act (ESSA) and will promote harmful consequences for students.

SNS is a long-standing rule that requires Title I funds not be used to replace the state and local funds an LEA would have spent in a Title I school if it did not participate in Title I. ESSA retained the SNS rule, but changed how compliance is tested. ESSA prohibits USED from prescribing the specific methodology an LEA uses to allocate state and local funds.

ESSA also contains a “rule of construction” stating nothing in Title I shall be construed to mandate equalized spending per-pupil for a state, LEA, or school. USED’s proposed regulation on Supplement, not Supplant purports to permit each LEA to determine its own methodology for allocating state and local funds to schools, but would require that the methodology result in the LEA spending an equal or greater amount per-pupil in its Title I schools than the average amount it spends per-pupil in its non-Title I schools.

The Congressional Research Service recently released an analysis that found “a legal argument could be raised that USED will exceed its statutory authority if it promulgates the proposed SNS rules in their current form.”

In addition to exceeding the statutory scope of ESSA, the proposal that USED presented during negotiated rulemaking may require districts to force place teachers in schools to comply, place existing state and local initiatives to promote diverse public schools at risk of noncompliance, and penalize states and districts that use a weighted funding methodology.

When the Department publishes its forthcoming proposed rule on Supplement, not Supplant, I urge Congress to review it closely to ensure that it conforms to Congressional intent and avoids the unintended negative consequences promoted by the Department’s earlier proposals in this area.

There are many other smaller technical points in the proposed regulations that Kentucky will be addressing in its formal comments submitted through the Federal Register website. Individually they may seem benign, but collectively they add up to a very inflexible, prescriptive and authoritarian approach to school improvement – the very thing that doomed NCLB and the very thing ESSA was meant to avoid.

Conclusion

Now, more than ever what states need to implement ESSA is a common sense approach that

supports a quality system of assessments, accountability and school improvement measures that can be implemented with fidelity and will promote doing what is right for students.

States need honest two-way communication, consistency and to be trusted to make good decisions.

Let me share with you, however, an issue we recently encountered concerning Kentucky's current science assessments. On March 31, 2015, as part of the ESEA flexibility waiver renewal process, USED approved Kentucky's plan to give only a Norm Referenced Test (NRT) at the elementary and middle school levels in science, since the state had implemented new science standards and aligned assessments were in development, but not yet vetted and available for administration. The alternative, a delay in teaching the new, more rigorous science standards until a new test was complete, was not a decision Kentucky entertained, since it would not be in students' best interest.

This spring, despite Kentucky's approved ESEA waiver, USED staff informed the state that under a new interpretation by USED, the state was out of compliance, unless it gave a science test for which student performance levels could be assigned. USED staff suggested giving an old test, not aligned to the new science standards and for which student performance levels would not be an accurate reflection of what they were learning.

This would be a violation of *federal requirements* that assessments be aligned with the state's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards. In order to maintain the integrity of Kentucky's accountability system and to be honest with our students, parents and teachers, I could not in good conscience agree to USED demands.

Although informed that new high-quality science tests aligned with the new standards would be field tested in spring 2017 and implemented statewide in spring 2018, I received a letter that USED has placed a condition on Kentucky's Title I, Part A and IDEA Part B Federal Fiscal Year 2016 grant awards – all because we wanted to do what was right for students, and not waste money on a meaningless test.

In one of our many conversations with USED on this issue, I was told that if everyone took time off testing when new standards are implemented it would be a problem. My response was no, it would be a solution, because we would have time to develop high quality tests that assess student knowledge at a much deeper level and provide more meaningful feedback as a basis for improvement. We wouldn't just be giving tests for tests sake.

Kentucky is committed to fully realizing the Congressional intent of ESSA. If this law truly represents a new day for education in America, states must have the support to take action based on quality and what is best for their students and move away from a compliance mentality.

The word accountability ends with “ability,” which is what Kentucky is seeking in proposed regulations – the ability to put OUR students at the center of the decision-making process.

The Commonwealth of Kentucky looks forward to revised regulations that empower states with the freedom to plan, innovate, design and implement quality education systems that will ensure opportunity for all students and, in Kentucky, promote the pillars of equity, achievement and integrity in education policy.

Thank you for your time and consideration.

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