

BACKGROUND

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School Rules: Lessons from the ESSA Regulatory Process

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Abstract

The most recent version of the Elementary and Secondary Education Act, called the Every Student Succeeds Act (ESSA), included in its design an attempt to scale back some of the burdensome federal regulatory interventions into state and local education created by the 2002 iteration, No Child Left Behind. Although it made some important reforms, ESSA fell short of genuinely returning education decision-making authority to states, localities, and parents. Regulations promulgated by the U.S. Department of Education magnify the shortcomings of ESSA, reinforcing what has become systemic overreach by the federal government into the area of education. The new Administration, along with Congress, should rescind these regulations, and policymakers should advance policies contained within the Academic Partnerships Lead Us to Success (A-PLUS) Act that would move the decision-making needle back toward the state and local levels and to those closest to the students—their parents—while easing the regulatory burdens currently hampering school systems, freeing schools and teachers to return their focus to educating children.

On December 10, 2015, President Barack Obama signed into law the Every Student Succeeds Act (ESSA), the eighth reauthorization of the Elementary and Secondary Education Act (ESEA) and most recent successor to No Child Left Behind (NCLB). Now, a little more than a year later and after significant critique of the U.S. Department of Education's regulations for their prescriptive nature and departure from the spirit of the law, the incoming Trump Administration has an opportunity to ease the burden of ESSA on states

KEY POINTS

- Although the recent Every Student Succeeds Act (ESSA) was touted as a corrective to some of the inflexibility of No Child Left Behind, shifting away from the unwieldy Adequate Yearly Progress mandates and Highly Qualified Teacher provisions, ESSA failed to advance reforms that genuinely restore state and local educational autonomy.
- The U.S. Department of Education's interpretation of ESSA magnifies the law's shortcomings, and its regulatory requirements further hamper state and local education through complex and burdensome demands.
- Rescinding those regulations and advancing additional legislative reforms such as the Academic Partnerships Lead Us to Success (A-PLUS) Act, which would allow states to fully exit ESSA, would restore the proper balance between state, local, and federal decision-making; free schools and teachers to focus on teaching; and help to return decision-making to those most affected: parents and their children.

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while also taking bold steps to restore state and local control of education.

The shortcomings of ESSA as enacted have been amplified by finalized regulations. Although it made some important reforms to the most onerous provisions of No Child Left Behind, many conservative priorities were absent from the ESSA bill that became law, such as the Academic Partnerships Lead Us to Success (A-PLUS) Act, which would have allowed states to opt out completely from federal programs. The shortcomings of ESSA were immediately magnified as the Department of Education engaged in a prescriptive regulatory process to define how states and school districts must meet their obligations under the new statute. The regulations now accompanying ESSA render it a heavy-handed federal law that dictates the day-to-day decisions of local schools while leaving little room for parents to direct their children's education.

The enactment of ESSA and its accompanying rulemaking process have made it clear that Congress still has significant work to do if conservative policymakers are to relieve states and school districts of the burdens of federal intervention in education. The Congressional Review Act (CRA) allows Congress to rescind regulations published within the past 60 legislative days. Using the CRA, Congress should rescind the ESSA regulations published on November 28, 2016, in order both to align the law's implementation more closely with the intention of its congressional authors and to provide some relief to states from federal interference in local school policy. In addition, the Trump Administration, along with Congress, should work to restore state and local control of education by moving toward policies contained within the A-PLUS proposal and by working to significantly reduce federal intervention in K-12 education. These actions would begin the important work of placing decisions about edu-

cation policies and spending closer to the students and families affected by those decisions.

From NCLB to ESSA

In late December 2015, when President Obama signed into law the Every Student Succeeds Act, he hailed it as “a Christmas miracle.”¹ ESSA, however, missed some crucial opportunities for reform.² Although the new law made some improvements in No Child Left Behind, which was widely criticized for its avalanche of sanctions linked to federally mandated assessment schedules, lawmakers did not include more robust provisions to allow states to fully opt out of federal programs, nor did they make certain federal funding streams portable, allowing the funds to follow students to schools of choice. Congress also failed to eliminate many of the law's duplicative and ineffective federal programs and associated spending.³

ESSA is the most recent reauthorization of the Elementary and Secondary Education Act (ESEA), which got its start in 1965 as an engine of “compensatory education,” providing limited federal dollars to low-income school districts, in President Lyndon Johnson's words, to “bridge the gap between helplessness and hope.”⁴ Through subsequent reauthorizations roughly every five years, ESEA quickly morphed into a vehicle for comprehensive, systemic reform efforts from Washington, with federal policymakers amending the law to go far beyond simply providing additional resources to needy districts. Instead, these new iterations sought to address issues ranging from teacher effectiveness and academic progress to physical education and women's educational equity.

By the time ESEA was reauthorized as No Child Left Behind and signed into law in 2002, the nation's largest federal education law included nearly \$24 billion in spending and some 80 federal programs.

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1. President Barack Obama, “Remarks by the President at Every Student Succeeds Act Signing Ceremony,” December 10, 2015, <https://www.whitehouse.gov/the-press-office/2015/12/10/remarks-president-every-student-succeeds-act-signing-ceremony> (accessed January 25, 2017).
 2. Lindsey M. Burke, “The Every Student Succeeds Act: More Programs and Federal Intervention in Pre-K and K-12 Education,” Heritage Foundation *Background* No. 3085, December 2, 2015, <http://www.heritage.org/research/reports/2015/12/the-every-student-succeeds-act-more-programs-and-federal-intervention-in-pre-k-and-k12-education>.
 3. *Ibid.*
 4. President Lyndon B. Johnson, “Johnson's Remarks on Signing the Elementary and Secondary Education Act,” April 11, 1965, <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/johnsons-remarks-on-signing-the-elementary-and-secondary-education-act> (accessed January 25, 2017).
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Not only did NCLB try to address perceived national education shortcomings through a “program for every problem”⁵ mentality, but it also set the federal government up as the monitor of educational progress. For the first time, NCLB established sanctions for states that failed to achieve universal student proficiency in mathematics and reading—a sharp departure from previous iterations of ESEA and, at the time, the high-water mark of federal intervention in local school policy.

The architects of ESSA argued that a rewrite of NCLB was necessary to address this misalignment, which policy experts blamed for causing some states to water down their definitions of “proficiency” in order to avoid federal sanctions for lack of student progress. Some programs were eliminated or consolidated, but new programs were added, and overall spending remains at historically high levels.

The significant policy shifts from NCLB to ESSA are really just three in number:

- Federal policies related to accountability,
- Teacher certification, and
- Program consolidation.

From AYP to State Accountability Plans. Throughout the 1990s and until the NCLB era, ESEA required that states have some form of accountability system in place, but it did not otherwise dictate the discrete parameters of those accountability systems. NCLB’s enactment marked the first time the federal government had dictated to states the frequency with which they would have to test students and penalized states through a system of “cascading remedies”⁶ if schools failed to make Adequate Yearly Progress (AYP) toward the law’s universal proficiency mandate. The crafters of ESSA sought to cor-

rect what they saw as untenable prescriptive federal proficiency mandates and accompanying sanctions by eliminating AYP language and replacing that mandate with a requirement that states establish accountability plans.

End of the Highly Qualified Teacher Mandate. In addition to new federal mandates on state testing schedules and proficiency benchmarks, NCLB required for the first time that by the 2005–2006 school year, all children would have to be taught by a “highly qualified teacher.” The law, however, established a definition of “highly qualified” that was highly problematic, conflating teacher quality largely with paper credentials. For teachers to be considered highly qualified, NCLB required that they be state certified or to have passed a state’s licensure exam, hold a bachelor’s degree, and have demonstrated knowledge of content matter. Many scholars have criticized the Highly Qualified Teacher (HQT) provision, arguing that certification has little correlation with teacher effectiveness.⁷

Program Consolidation. NCLB also included roughly 80 federal education programs and initiatives.⁸ ESSA reduced the number of authorized programs, largely through consolidation, and eliminated some programs outright. Lawmakers’ decision to favor consolidation of programs over elimination is evident in ESSA’s overall authorized spending level, which equals that of NCLB at roughly \$24 billion annually.

Although ESSA made some important changes in NCLB, such as eliminating the AYP and HQT mandates, it did not accomplish the important policy priorities of allowing states to make funding for Title I (which represents the bulk of spending under ESEA) portable, following low-income children to schools of choice; allowing states to opt out of ESSA through the A-PLUS provision; or recouping resources from programs and spending that have accumulated over

5. Dan Lips, “Reforming No Child Left Behind and Allowing States to Opt-Out: An A-PLUS for Federalism,” Heritage Foundation *Background* No. 2044, June 9, 2007, <http://www.heritage.org/research/reports/2007/06/reforming-no-child-left-behind-by-allowing-states-to-opt-out-an-a-plus-for-federalism>.

6. Frederick M. Hess and Michael J. Petrilli, *No Child Left Behind* (New York: Peter Lang Publishing, 2006), p. 42.

7. Robert Gordon, Thomas J. Kane, and Douglas O. Staiger, “Identifying Effective Teachers Using Performance on the Job,” Brookings Institution, Hamilton Project *White Paper* No. 2006-01, April 2006, https://www.dartmouth.edu/~dstaiger/Papers/200604hamilton_1.pdf (accessed January 26, 2017).

8. Bill Summary, “Setting New Priorities in Education Spending Act,” Committee on Education and the Workforce, U.S. House of Representatives, 2011, http://edworkforce.house.gov/uploadedfiles/summary_-_setting_new_priorities_in_education_spending_act.pdf (accessed January 26, 2017).

the decades. Instead of accomplishing conservative policy priorities, ESSA maintained significant federal intervention in local school policy for years to come.

Subsequent regulations have added to concerns that ESSA fails to limit federal intervention in education effectively. The Department of Education has granted itself wide latitude in interpreting the law so that the regulations magnify ESSA's failure to restore state and local control, adding significant prescription concerning states' obligations under the new law.

A Heavy-Handed Rulemaking Process

Of the rules that have been finalized, those concerning accountability under ESSA have been the most controversial. Based on feedback, the Department of Education made several changes in the proposed rules, but it did not substantially correct the prescriptive and overreaching nature of these regulations. These rules broadly address three topics:

- Establishing requirements for new statewide accountability systems;
- Establishing requirements for state, local education agency (LEA), and school report cards; and
- Establishing requirements for the consolidated state plans.⁹

Examination of these regulations suggests that the new accountability and reporting requirements, although less punitive than NCLB's, fail to reduce the regulatory burden on states and, in some respects, increase the burden. The regulations:

- Require that each school be assigned a single summative performance rating based on a complicated set of indicators,
- Dictate methods for intervention in struggling schools, and

- Place new demands on schools in the form of increased data collection and reporting.

In terms of state flexibility and autonomy, states are ostensibly given the freedom to build and report on a system of accountability that they design. Yet the regulations restrict state input to a single factor of negligible importance, ignoring statutory language and intent.

Statewide Accountability Systems. ESSA requires each state to develop a single statewide accountability system that is based on its academic standards and assessments and is designed to improve student academic achievement and school success.¹⁰ According to the statute, the statewide accountability system must include:¹¹

- Long-term goals and measurements of interim progress,
- Four distinct accountability indicators,
- Annual meaningful differentiation of schools,
- Identification of schools for comprehensive and targeted support,
- Improvement plans using evidence-based interventions, and
- A process for ensuring the development and implementation of the above plans.

A closer look at the four distinct accountability indicators and the annual meaningful differentiation of schools demonstrates the limited amount of latitude that states have in directing these systems. These sections also begin to illustrate the burden of data collection and reporting that is required in order to comply.

Accountability Indicators. ESSA requires that each state must develop an accountability system built around the four key accountability indicators of school success:

9. U.S. Department of Education, "Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans; Proposed Rule," *Federal Register*, Vol. 81, No. 104 (May 31, 2016), pp. 34540–34621, <https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12451.pdf> (accessed January 26, 2017).

10. S. 1177, Every Student Succeeds Act, 114th Cong., 1st Sess., Sec. 1111, <https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf> (accessed January 26, 2017).

11. *Ibid.*

- Academic achievement measured by proficiency on annual assessments;
- An indicator related to student progress (for high schools, the graduation rate, and for elementary and middle schools, a measure of student academic growth);
- Progress in English Language Learner proficiency; and
- An indicator of choice (state-selected) which denotes school quality or student success.

The statutory suggestions for this last state-selected indicator include (among others) student-teacher engagement, access to/completion of advanced coursework, postsecondary readiness, and school climate and safety.

ESSA states at the end of its description of the new accountability system that “Nothing in this Act shall be construed to authorize or permit the Secretary...[to] add new criteria that are inconsistent with or outside the scope of this part; or be in excess of statutory authority granted to the Secretary.”¹²

However, the final regulations add a requirement for the chosen indicator to be shown by research to affect student learning:

[The state-selected indicator must be] supported by research that high performance or improvement on such measures is likely to increase students’ learning (e.g., grade point average, credit accumulation, or performance in advanced coursework), or—for measures at the high school level—graduation rates, postsecondary enrollment, postsecondary persistence or completion, or career readiness.¹³

While this addition may seem innocuous, the requirement for research-supported indicators restricts state input considerably. Research often

relies heavily on quantifiable data, such as students’ test scores, to draw inferences about student learning. This regulatory addition to the language of the statute threatens the little freedom and customization that ESSA gives the states and could promote a continued emphasis on uniform state assessments.

Annual Meaningful Differentiation of School Performance and Identification of Schools.

Regulatory overreach is also at issue with regard to ESSA’s requirement for annual meaningful differentiation of school performance. ESSA states:

Nothing in this Act shall be construed to authorize or permit the Secretary—as a condition of approval of the State plan, or revisions or amendments to, the State plan, or approval of a waiver request submitted under section 8401, to—prescribe—the weight of any measure or indicator used to identify or meaningfully differentiate schools [or] the specific methodology used by States to meaningfully differentiate or identify schools.¹⁴

Despite the statutory prohibition, the Department of Education’s rules require states to assign to each school a single summative rating based on the school’s performance on the four indicators. The proposed regulations further contravene ESSA’s methodology prohibition by prescribing that the summative rating and each of the indicators must be broken into three possible performance levels. Schools must be ranked on one of these three levels for the indicators and the summative rating, an overreach that continues “to be one of the most controversial elements of the regulations.”¹⁵

In order to interpret performance on indicators, states are instructed to establish a weighting system of their choosing. The statute specifies that “substantial weight” must be given to academic achievement, graduation/growth rates, and progress in English Language Learner proficiency and that these indicators, in the aggregate, must

12. Ibid.

13. U.S. Department of Education, “Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act—Accountability and State Plans,” *Federal Register*, Vol. 81, No. 229 (November 29, 2016), pp. 86076–86248, <https://www.gpo.gov/fdsys/pkg/FR-2016-11-29/pdf/2016-27985.pdf> (accessed January 26, 2017).

14. S. 1177, Every Student Succeeds Act, Sec. 1111.

15. Andrew Ujifusa, “Here Are the Parts of the Draft ESSA Rules That Worry Members of Congress the Most,” *Education Week*, July 5, 2016, http://blogs.edweek.org/edweek/campaign-k-12/2016/07/ESSA_draft_accountability_concerns_congress.html (accessed January 26, 2017).

be afforded “much greater weight” than the state-selected indicator.¹⁶ However, the regulations go on to make abundantly clear that the state-selected indicator is more symbolic than substantial. As Michael J. Petrilli of the Thomas B. Fordham Institute expresses it, “the regulations set an arbitrary standard for the ‘other indicators of student success or school quality’—and then make sure those indicators won’t matter anyway.”¹⁷

To ensure that the balance of weighting is appropriate, the regulations require schools to show that performance on the state-selected indicator does not change the identity of schools that otherwise would have been flagged for comprehensive or targeted support and improvement—unless schools can also show that students are making demonstrable progress on an indicator that is given substantial weight. In other words, if a school were to receive a low rating based on performance on academic achievement, graduation rates, and English Language Learner proficiency, that school’s high performance on the state-selected indicator would not be enough to pull it out of underperformance status and change the fact that it had been flagged.

The specificity and prescription of the regulations continue with the identification of underperforming schools. Although the statutory language gives some discretion to states with respect to how they define, identify, and support consistently underperforming schools and subgroups, the regulations offer specific timelines and complicated definitions that dictate how states must identify schools.

Consolidated State Plans. ESSA states that:

[T]he Secretary shall require only descriptions, information, assurances (including assurances of compliance with applicable provisions regarding participation by private school children and teachers), and other materials that are *absolutely*

necessary for the consideration of the consolidated State plan or consolidated State application.¹⁸

Replacing the AYP requirements, the state plan is a comprehensive articulation of the plans and goals that each state must submit periodically for review by the Department of Education in order to receive federal funding. The statute makes clear that the state plan must include descriptions of standards and testing, the statewide accountability system, and the methods in place for supporting local education agencies in their work, but it leaves the minutiae of what must be reported to the states’ discretion.

By contrast, the regulations released by the Department of Education dive into the specifics of things like “performance management” systems and “root cause” analyses.

A performance management system includes a formal record of the state’s plan and the actionable processes of oversight for the plan. Each state is required to detail its system of performance management (including strategies, timelines, process of assisting LEAs, monitoring implementation of state and local plans, improving implementation of plans, and plans to provide technical assistance if necessary) for each required reporting element.¹⁹ Since there are approximately 40 categories that state agencies must record and report, both the Missouri Department of Elementary and Secondary Education and the Washington State Superintendent of Public Instruction calculated that this regulatory requirement of performance management systems for each reported element will result in “240 separate descriptions of their performance management systems, as well as additional performance information required under Sections 299.17(e) and 299.19(b). None of these descriptions are required under the statute.”²⁰

Root cause analyses are supposed to use subgroup data to determine precisely why disad-

16. S. 1177, Every Student Succeeds Act, Sec. 1111.

17. Michael J. Petrilli, “Proposed ESSA Regulations: Return of the Bureaucrats,” Thomas B. Fordham Institute *Flypaper*, May 26, 2016, <https://edexcellence.net/articles/the-proposed-essa-regulations-return-of-the-bureaucrats> (accessed January 26, 2017).

18. 20 U.S.C. § 7842(b)(3). Emphasis added.

19. U.S. Department of Education, “Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans; Proposed Rule.”

20. Letter from Randy I. Dorn, Washington State Superintendent of Public Instruction, to The Honorable Meredith Miller, U.S. Department of Education, “Docket ID: ED-2016-OESE-0032,” commenting on ESSA proposed rule, August 1, 2016, http://www.ccsso.org/Documents/2016/ESSA/Washington_Response_ESSA_Proposed_Regulations.pdf (accessed January 26, 2017).

vantaged students may consistently be receiving instruction from less experienced or less effective teachers if there is evidence of a discrepancy in teacher quality.²¹ While the goal of effective teachers for all students is appropriate, the specific regulatory demand for analyzing the distribution of teachers is not the way to achieve it. Not only is the reporting complex, but it also assumes that teachers with more experience or more certifications are automatically better teachers.

ESSA's statutory language already places new demands on states in terms of reporting on teacher quality and on how teachers are distributed across schools and districts. However, the regulations go further and require disaggregated data in multiple comparisons (statewide, within districts, between districts, within schools) if there is evidence that disadvantaged children have less access to experienced educators.²² While it is unclear whether these analyses will produce helpful insights for states, it is abundantly clear that the requirement *will* produce more burdensome and distracting paperwork for teachers and administrators. A better way to achieve effective teaching would be for states to remove state certification requirements, which have been shown to have little if any impact²³ on teaching effectiveness, and allow alternative routes into the classroom.

On the whole, the regulations governing the submission of consolidated state plans do little to clarify or simplify the complex structure of accountability and reporting that is demanded under ESSA's statutory requirements. Rather, they introduce new requirements that extend far beyond the bounds of what is "absolutely necessary" for consideration of the consolidated state plan or consolidated state application.

What Needs to Be Done

Although Department of Education officials claim that ESSA and its attendant regulations are more flexible than NCLB, primarily due to a shift away from a counterproductive system of Adequate Yearly Progress mandates and Highly Qualified Teacher

provisions, ESSA maintains a bloated federal system that works against state educational autonomy both by prescribing what denotes quality education and accountability and by encumbering districts and local school leaders with copious reporting requirements. In order to provide flexibility for states and districts under ESSA, Congress and the incoming Administration should:

- Use the Congressional Review Act to rescind the accountability regulations under ESSA that were finalized on November 28, 2016, and
- Advance legislative reforms in the near term, such as the A-PLUS Act, to enable states to exit ESSA entirely.

Provided the Trump Administration halts or reverses the regulatory policymaking of President Obama's Department of Education, school districts and states could receive some relief from this particular set of regulations. However, these regulations only add to existing concerns about ESSA's inability to restore state and local control of education. The Department of Education assumed wide latitude in interpreting the law in a way that magnifies ESSA's failure to limit federal intervention, adding significant prescription concerning states' obligations under the new law. ESSA itself does not do enough to empower parents, teachers, and local districts and limit federal programs and spending. Its complexity continues to distract states and local school leaders from the real work of educating children based on local preferences and parental input.

Lawmakers should also remember that the enactment of new proposals or a law's reauthorization is just the first step in eventual implementation. As Milton Friedman observed in *Free to Choose*:

Every act of [government] intervention establishes positions of power. How that power will be used, and for what purposes depends far more on the people who are in the best position to get control of that power and what their purposes are than on

21. U.S. Department of Education, "Elementary and Secondary Education Act of 1965, As Amended by the Every Student Succeeds Act—Accountability and State Plans; Proposed Rule."

22. Ibid.

23. Gordon, Kane, and Staiger, "Identifying Effective Teachers Using Performance on the Job."

the aims and objectives of the initial sponsors of the intervention.²⁴

The regulations that followed ESSA's enactment should serve as a cautionary tale for Members of Congress as they consider other education-related reauthorization proposals, such as a forthcoming reauthorization of the Higher Education Act (HEA).

Conclusion

In the hands of federal officials, the Every Student Succeeds Act could end up rivaling the prescription of No Child Left Behind if the regulatory apparatus remains in place. The incoming Administration, along with Congress, should rescind these regulations immediately. Even more important for the long term, policymakers should begin the critical work of allowing states to opt out of ESSA entirely, shifting the balance of power over K-12 education from federal authorities to local communities and parents.

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24. Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (New York: Houghton Mifflin Harcourt Publishing Company, 1980), p. 193.