August 1, 2016

Secretary John B. King, Jr.
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Docket ID: ED-2016-OESE-0032

Dear Secretary King,

As the Commissioner of Education for Florida, I appreciate the flexibility afforded states by the Every Student Succeeds Act (ESSA) to establish a workable, student-centric system of statewide accountability focused on increasing student achievement. The accountability mechanisms established under ESSA are comprehensive and considered. As you know Florida's accountability system is based on decades of experience with standards, assessments, school grades, and school improvement systems, all of which have fostered performance increases for Florida's diverse student population. ESSA affords states the opportunity to refine accountability systems, in conformance with its provisions, and at the same time provides the flexibility needed by each state to build an accountability system that works for its unique population.

I appreciate the opportunity to comment on the proposed regulations. It is important to note that ESSA clearly prohibits regulations that add new requirements, provide definitions, or add new criteria that are inconsistent with or outside the scope of ESSA or are in excess of statutory authority. Regulations can only be issued by the Secretary "to the extent that such regulations are necessary to ensure there is compliance with the specific requirements and assurances required by this Act."

As an integral part of Florida's rulemaking process, I am aware of how difficult it can be to interpret the law and adopt rules to assist implementation. Please know that I admire your dedication to the rulemaking process and acknowledge the challenges you face. However, I do have significant concerns that specific portions of the proposed regulations are inconsistent with ESSA or go beyond the scope of what ESSA authorizes and may result in changes that are not in the best interests of Florida's diverse student population. Below please find a brief summary of some of our most significant concerns.

**ESSA Timeline (Section 200.12).** ESSA requires that the revised accountability requirements take effect *beginning* with the 2017-18 school year. The proposed regulation requires use of 2016-17 data to inform an ESSA-compliant accountability system for the 2017-18 school year. Section 200.19(d) requires that the 2016-17 data measure a school's performance on the *indicators* which then must be used to select schools for Comprehensive Support and Improvement. State plans describing the accountability systems

are not due to the United States Department of Education (USED) until either March 6th or July 3rd of 2017. USED then has 120 days to review plans, with additional time provided for revision and resubmission, if needed. The states would not use the accountability systems described in their plans until the plan is approved by USED. Accordingly, it would not be possible to calculate accountability ratings to identify schools for the 2017-18 school year. In addition, changes required by ESSA, any adopted regulations, and possibly certain plan provisions will require enacting new state law and adopting conforming rules – all of which would not occur until after the State plan is approved.

**Penalty Provisions, Failure to Test 95% (Section 200.15).** When measuring achievement, ESSA requires the number of students tested, or 95% of students, *whichever is greater*, be used as the denominator. No penalties are identified or authorized; ESSA has determined that increasing the denominator to the number of students that would make up 95% of students is sufficient incentive. Section 200.15(b)(2) and (c)(1) and (2) exceed ESSA authority by mandating specific penalties for noncompliance. We request that this language be removed from the rule because schools are already penalized by having the denominator increased which will lower the percentage of students that are proficient for the achievement indicators.

**Personally Identifiable Information (Section 200.17).** Section 1111(c)(3) and s. 1111(h)(1)(C), respectively, require that a State's accountability system and reporting system identify a minimum number of students necessary to carry out its function, which must be the same number for all students and for each subgroup, but that which number "is sufficient to not reveal any personally identifiable information." ESSA only requires protection against revealing personally identifiable information regarding students.

Section 200.17(b) adds that a State may not use disaggregated data for one or more subgroups to report required information under s. 1111(h); i.e., annual State and Local Educational Agency (LEA) Report Cards and annual report to the Secretary, "*if the results would reveal personally identifiable information about an individual student, teacher, principal, or other school leader*" – as determined by applying the Family Educational Rights and Privacy Act of 1974 (FERPA). FERPA protects certain student information, not staff information. It is not clear how this provision could be implemented as it relates to staff. For example, by assigning a rating to a school, the principal of that school will be associated with that rating and the components of that rating in a personally identifiable manner.

**Annual Meaningful Differentiation (Section 200.18).** Section 1111(c)(4)(C) requires each State to "establish a system of meaningfully differentiating, on an annual basis, all public schools in the State." This system must be based on all indicators for all students and for each subgroup and include differentiation of any school in which any subgroup of students is consistently underperforming, as determined by the State, based on all indicators. Section 200.18(b)(2) and (4) restricts ESSA's flexibility by mandating that each indicator, and the school's summative rating, be differentiated by at least three distinct levels. In Florida, differentiating each indicator by at least three distinct levels would actually reduce transparency to the public and make student performance data more difficult to understand. Florida's indicators are all based on percentages; for example, the percentage of students meeting English Language Arts proficiency standards. Translating those percentages into levels would disguise the meaning of the indicator. Furthermore, s. 200.18(d)(3) exceeds its authority by adding a requirement that based on all students' and each subgroup's performance, a school performing in the lowest performance

level *on any* of the indicators must receive a different summative rating than a school performing in the highest performance level on all indicators.

**Comprehensive Support and Improvement (Section 200.19).** ESSA requires identification of the following schools for Comprehensive Support and Improvement:

- Not less than the lowest-performing five percent of all schools receiving Title I funds,
- High schools failing to graduate one-third or more of their students, and
- Schools identified under subsection (d)(3)(A)(i)(II).

Subsection (d)(3)(A)(i)(II) schools are schools operating under a Targeted Support and Improvement plan with a subgroup that on its own would have led to identification of the school as in the "not less than the lowest-performing five percent of schools." In addition, such schools must have been identified for additional targeted support and failed to meet the State's exit criteria within the State-determined number of years.

Section 200.19(a) establishes a new requirement inconsistent with ESSA; i.e., identification, at a minimum, of the lowest-performing five percent of *elementary, middle, and high schools*. If ESSA intended to differentiate by grade span, it would have – as evidenced by ESSA's use of the term "grade span" when discussing the fifth indicator. Use of grade span would prove inequitable by not capturing all of the lowest-performing schools; e.g., if all elementary schools are performing well, the lowest five percent of those schools would be doing well whereas if most middle schools were performing poorly, five percent of that grade span might not capture all of the lowest-performing schools. This could leave low-performing schools out of Comprehensive Support and Improvement while higher-performing schools received these supports. If the language in the proposed regulation mirrored ESSA language by requiring the lowest-performing five percent of schools to be identified, then the issue would not occur.

Section 200.19(a)(3) tries to address ESSA (d)(3)(A)(i)(II) **schools** by coining and defining a new term "chronically low-performing **subgroup**," a term not used in ESSA. A school will be identified for Comprehensive Support and Improvement if it has a "chronically low-performing subgroup" that has not improved within three years of implementing a Targeted Support and Improvement plan.

Pursuant to the proposed regulation, a "chronically low-performing subgroup" is "a low-performing subgroup receiving additional targeted support." ESSA does not use the term low-performing subgroup; ESSA only uses the term "consistently underperforming" subgroup, the identification of which is strictly up to the State, and if so identified will result in the school being designated for Targeted Support and Improvement.

The proposed regulation adds requirements inconsistent with ESSA's (d)(3)(A)(i)(II) school requirements. For example, the proposed regulation caps the number of years (three) within which a school has to improve under a Targeted Support and Improvement plan before being identified for Comprehensive Support and Improvement; ESSA specifies that improvement under a Targeted Support and Improvement plan be within a **State-determined** number of years. Additionally, the proposed regulation defines a "low-performing subgroup receiving additional targeted support" as "any school in which one or more subgroups of students is performing at or below the summative level of performance

of all students in any school identified for Comprehensive Support and Improvement" [which means any Comprehensive Support and Improvement elementary, middle, or high school]. This requirement does not exist in ESSA and circumvents ESSA's requirements for states to identify Targeted Support and Improvement schools and (d)(3)(A)(i)(II) schools in need of additional targeted support. Florida would prefer to see the ESSA requirements prevail.

**Comprehensive Support and Improvement Plan Requirements (Section 200.21).** Section 200.21(d)(4) adds new criteria outside the scope of ESSA's Comprehensive Support and Improvement plan requirements. Florida believes that the ESSA requirements are sufficient to make sure low-income and minority students are not served disproportionately by ineffective, out-of-field, or inexperienced teachers.

More particularly, the proposed regulation requires the LEA to identify in the plan disproportionate rates of ineffective, out-of-field, or inexperienced teachers; **ESSA does not**. ESSA already requires that in order for an LEA to receive a subgrant, the LEA must submit a plan to the State Educational Agency (SEA) which must include, among other things, "how the [LEA] will identify and address, as required under State plans as described in s. 1111(g)(1)(B), any disparities that result in low-income students and minority students being taught at higher rates than other students by ineffective, inexperienced, or out-of-field teachers" [s. 1112(b)(2)]. In addition, s. 1111(g)(1)(B) requires the State plan to describe how low-income and minority children "are not served at disproportionate rates by ineffective, out-of-field, or inexperienced teachers, and the measures the [SEA] will use to evaluate and publicly report the progress of the [SEA] with respect to such description."

Section 200.21(d)(3)(ii) and (iii) and (f)(3)(iii)(C) exceeds its authority by adding additional, subjective elements to the "evidence-based" requirements for plan interventions: To the extent practicable, use a sample population that overlaps with the school's population and be the "strongest level of evidence" available and appropriate. Although the add-ons are "to the extent practicable," it requires an implementation that could be judged by others, arbitrarily, as insufficient or not strong enough. ESSA provides an in-depth, self-executing definition of "evidence-based" in s. 8101(21).

**Information Provided in Other Languages (Section 200.21).** Section 1111(h)(1)(B)(ii) and (h)(2)(B)(ii), regarding State and LEA annual report cards, respectively, require dissemination, "*to the extent practicable*, in a language parents can understand" – nothing more. There are other provisions in ESSA that provide "to the extent practicable, in a language parents can understand." The proposed regulations far exceed this requirement, with no statutory authority to do so. For example, s. 200.21(b) requires parental notice of schools identified for Comprehensive Support and Improvement, which must be, to the extent practicable, written in a language that parents can understand *or, if not practicable, orally translate to a parent with limited English proficiency*. In addition, upon request by a parent or guardian with a disability, the LEA must provide the notice "in an alternative format accessible to that parent." (Would this include Braille, audio, sign language?) Florida believes that the requirements in ESSA are sufficient without the requirements added in the rule which may not be feasible to implement because there are over 300 languages spoken by Florida parents.

In addition, the proposed regulations also require the same oral translations and alternative format for, in example, notifications regarding Targeted Support and Improvement schools [s. 200.22(b)]; disproportionate rates of ineffective, out-of-field, and inexperienced teachers [s. 299.18(c)(4)(v)]; and amended Comprehensive Support and Improvement plans [s. 200.21(f)(4)]. We recommend that the requirement for oral translations and alternate formats be required only to the extent practicable.

**Targeted Support and Improvement (Section 200.22).** Section 1111(d)(2)(A) requires the State to identify schools in need of Targeted Support and Improvement based upon whether any subgroup is "consistently underperforming as described in subsection (c)(4)(C)(iii)." Subsection (c)(4)(C)(iii) provides that **the State**, based on all indicators, determine consistently underperforming subgroups. In direct conflict with ESSA, s. 200.22(c)(4) requires a school's Targeted Support and Improvement plan to include interventions for the "lowest-performing students." Targeted Support and Improvement is only triggered pursuant to State identification of schools with consistently underperforming subgroups and the plan's purpose is to address those subgroups. Section 200.19(b) requires Targeted Support and Improvement identification of schools with a consistently underperforming subgroup "as defined in paragraph (c)" and a low-performing subgroup receiving additional targeted support. Paragraph (c) explicitly provides a methodology for identifying consistently underperforming subgroups – this contradicts ESSA, which clearly states that the identification of consistently underperforming subgroups must be State determined, based on all the indicators. Finally, the required inclusion in Targeted Support and Improvement of a school with a "low-performing subgroup receiving additional targeted support" does not comport with ESSA requirements regarding (d)(3)(A)(i)(II) schools or Targeted Support and Improvement requirements. Florida believes that the provisions of ESSA are appropriate and sufficient to support the lowest-performing students and identify schools that need targeted support and assistance to improve student performance.

**State and LEA Report Cards (Sections 200.30 and 200.31).** ESSA provides for large amounts of data to be included (or linked) in LEA and State report cards. The proposed regulations add substantial additional report card requirements beyond ESSA; e.g., s. 200.30(a)(2) requires the State report card to include an extensive comparison of charter school subgroup and academic performance with traditional schools from which the charter school draws a "significant portion" of its students. Frequently, charter schools draw from a unique subset of students whose performance, if compared to all students in a traditional public school, would be a misleading indicator of charter school performance.

Also, s. 200.31(d) adds LEA report card dissemination requirements that are outside the scope of ESSA requirements; i.e., providing parents of students in LEA schools directly with a copy of the report card through "regular mail or email, except that if an LEA does not have access to individual student addresses, it may provide information to each school for distribution to parents." ESSA does not differentiate between parents and the public and there is no requirement to send the report card by hard copy or email.

> A [LEA] that receives assistance under this part shall prepare and disseminate an annual [LEA] report card … . Each [LEA] report card shall be … accessible to the public, which shall include (I) placing such report card on the website of the [LEA]; and (II) in any case in which a [LEA] does not operate a website, providing the information to the public in *another manner determined by the LEA* [s. 1111(h)(2)].

First an LEA report card, pursuant to ESSA requirements, contains volumes of information not feasible for mass, hard copy distribution via mail or student backpack. Second, ESSA already sets forth very specific dissemination requirements without the proposed regulation.

**High School Graduation Rate (Section 200.34).** The proposed regulation prohibits the removal of a high school student from a cohort who has "transferred **to**" a prison or juvenile facility unless the student participates in an educational program that culminates in the award of a regular high school diploma, or State-defined alternate diploma for students with the most significant cognitive disabilities. ESSA only requires a regular high school diploma or alternate diploma for a high school student who "transferred **out**" to another school [s. 8101(25)(c)]. Neither an LEA nor the SEA is in control of the educational curriculum provided in State or Federal prisons.

> Cohort Removal.—To remove a student from a cohort, a school or [LEA] shall require documentation, or obtain documentation from the [SEA], to confirm that the student has **transferred out**, emigrated to another country, or **transferred to** a prison or juvenile facility, or is deceased [s. 8101(25)(B)].

**Per-Pupil Expenditures (Section 200.35).** Section 200.35 requires per pupil expenditures to be included on State and LEA report cards in a manner that will require additional programming to generate the data needed for such reporting. The proposed regulation requires the State to develop a single statewide procedure for calculating school-level expenditures per pupil which must use *student membership* rather than *full-time equivalent* (FTE) students as the denominator. FTE is used for all of Florida's standard district- and school-level cost reports. This difference in reporting will create confusion for the public because the same data will generate different amounts for per-pupil expenditures.

**Federal Civil Rights Obligations (Sections 299.13 and 299.19).** Section 299.13(c)(2) adds more required State assurances, one of which is that the State has established "procedures for removing the English learner designation from any student who was erroneously identified as an English learner, which must be consistent with *Federal civil rights obligations.*" Similarly, s. 299.19(c)(3) requires the SEA to describe in its State plan its standardized entrance and exit procedures for English learners, as required under s. 3113, and adds that such criteria must "be consistent with *Federal civil rights obligations*." It is not clear what these civil rights obligations are. This lack of specificity raises significant concerns, but is also unnecessary because ESSA has otherwise, very clearly addressed civil rights concerns.

Section 3126 provides: "Nothing in this part shall be construed in a manner inconsistent with any *Federal law guaranteeing a civil right.*" Section 8534 provides: "Nothing in this Act shall be construed to permit discrimination on the basis of race, color, religion, sex … national origin, or disability in any program funded under this Act." These ESSA provisions are very clear and all inclusive; yet, the proposed regulations seem to add additional obligations of which we are not aware. The Supplementary

Information provided by USED provides no insight as to what is meant by Federal civil rights obligations, which opens the door to interpretations that may not be anticipated.

**State Plan Requirements (Section 299.18 and 299.14).** State plans should meet ESSA requirements and present information in as streamlined and cogent manner as possible so that the general public can access information about how the state plans to meet ESSA's requirements. Adding requirements beyond what is required in ESSA makes the plan more cumbersome and less useful to the public's reading of the plan.

Section 299.18(c)(6) adds an unnecessary and onerous State plan requirement that makes an SEA, "that demonstrates" that low-income or minority students enrolled in schools receiving Title I are taught at disproportionate rates by ineffective, out-of-field, or inexperienced teachers, conduct a "root cause analysis" of factors causing or contributing to the situation. The root cause analysis must include strategies, including timelines and funding sources, to eliminate disproportionate rates. Since LEAs are charged by Florida law with evaluating, hiring, and firing teachers, it is overly prescriptive to require the State to do a root cause analysis. Schools and school districts are held accountable for their choices through receipt of a school grade, which is in large part based upon student academic performance.

Pursuant to ESSA, LEAs are already charged with identifying and addressing disparities; i.e., in order to receive a subgrant, an LEA must submit a plan to the SEA including, among other things, "how the [LEA] will identify *and address*, as required under State plans as described in s. 1111(g)(1)(B), any disparities that result in low-income students and minority students being taught at higher rates than other students by ineffective, inexperienced, or out-of-field teachers" [s. 1112(b)(2)]. Also, s. 1111(g)(1)(B) requires the State plan to describe how low-income and minority children "are not served at disproportionate rates by ineffective, out-of-field, or inexperienced teachers, and the measures the [SEA] will use to evaluate and publicly report the progress of the [SEA] with respect to such description."

Thank you again for the opportunity to provide input on the proposed regulations. If you have any questions regarding my comments or want additional explanation, please do not hesitate to contact me.

Sincerely,

Pam Stewart
Commissioner of Education