COLORADO
Department of Education
201 East Colfax Avenue
Denver, CO 80203-1799

July 27, 2016

Secretary John King
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary King,

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) on Accountability and State Plans under the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA). The Colorado Department of Education (CDE) appreciates that the stated intent of the proposed rules is to "provide clarity and support to State Educational Agencies (SEAs), Local Educational Agencies (LEAs), and schools as they implement the ESEA, as amended by the ESSA." The costs and benefits section of the NPRM further emphasizes that, "The Department believes that the benefits of this regulatory action...include a more flexible, less complex and less costly accountability framework for the implementation of the ESEA that respects State and local decision-making...." We hope to support the U.S. Department of Education (USDE) in creating regulations that meet the expressed intent of the NPRM, can feasibly be implemented by states, and permit stakeholder input and local decision-making, as intended by the ESSA.

As noted in the proposed rules, the purpose of the ESSA legislation is "to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." CDE has been and continues to be focused on implementing state and federal policy in a manner that offers opportunities for each and every student to graduate college and career ready. As such, we appreciate the flexibility afforded states in the ESSA and are concerned that some of the proposed rules, if finalized as currently written, will impede our ability to develop and implement a plan that is in the best interest of Colorado students, families, schools, and LEAs.

In preparing our comments on the NPRM to submit to the USDE, CDE compared each proposed rule to the affiliated statutory language. As part of the process, CDE noted the subsections that:

- are beneficial to students and families;
- provide support or clarification for SEAs, LEAs, and schools;
- are in alignment with ESSA; and
- maintain states' flexibility.

However, as a result of our analyses, CDE also identified a number of instances in which the rules limit the state flexibility intended under the ESSA, impose additional requirements and increase the administrative burden on SEA and LEAs, create unreasonable timelines, or lack statutory authority. In addition, although we appreciate the USDE's effort to delete obsolete or cumbersome rules in some areas, in too many cases the proposed regulations appear to be a carryover of the old No Child Left Behind (NCLB) and School Improvement Grant (SIG) rules that did little to benefit children in the first place. While there is overlap between NCLB and ESSA to be sure, the flexibility and responsibility afforded to states in the ESSA may warrant a different approach to developing new regulations. Instead of starting with all of the NCLB and SIG regulations and determining which ones can be eliminated, it would be more helpful to start from a place of no regulations and propose only those that are necessary to provide clarity and protect the civil rights of children. The overly prescriptive language in many of the proposed rules reduces state and local flexibility, stifles state and local innovation and limits the ability of states to meaningfully incorporate the input of parents and other stakeholders.

Although CDE will be submitting our comments via the ePortal, we want to share some of our concerns with you directly, and ask that you reconsider the rules as currently written. In many cases, we feel that what is being proposed as a rule, would be more supportive of states, schools, and children if it were disseminated as guidance. Below, please find a brief summary of some of Colorado's concerns regarding the proposed regulations and requests for reconsideration and revision.

I. ***The proposed regulations restrict states' flexibility that was intended under the ESSA and conflict with the prohibitions within the ESSA.***

When the ESSA was signed into law, the legislation was highlighted for the flexibility it provides SEAs in administering education policies. In fact, Section 1111(e)(1) of the ESSA contains prohibitions on the Secretary's authority "to promulgate any rules...that would add new requirements inconsistent with or outside the scope of..." the statutory sections on accountability and state plans. However, the proposed rules for Accountability and State Plans appear to diminish the intended state flexibility. For example, Section 1111(c)(4)(E)(iii) of the ESSA requires that states "provide a clear and understandable explanation of how the ***State*** will factor" (emphasis added) the 95 percent participation requirement in the statewide accountability system. This language implies that states may determine accountability outcomes for schools with low participation. Furthermore, under Section 1111(e)(1)(B)(iii)(XI) of the ESSA, the Secretary is explicitly prohibited from prescribing how states factor participation into their accountability systems.

Yet, Secction 200.15 of the proposed regulations specifies state actions for schools with low participation as: 1) assign the school a lower summative rating; 2) assign the school the lowest performance level on the state's Academic Achievement indicator; 3) identify the school for targeted support and improvement; or 4) another equally rigourous State-determined action that will result in a similar outcome for the school. Though this last action may give the appearance of flexibiity, it still requires outcomes similar to those identified in actions 1-3. The ESSA language does not specify any such state actions. As such, the proposed regulations limit states' flexibility in the application of the participation requirement in their accountability systems.

This is an area where knowledge of the local context is crucial in determining the most appropriate policy for implementation. Involving key stakeholders, including but not limited to students, families, state legislators, and state board members, in developing solutions and accountability outcomes for schools and LEAs in this particular area is vital. The proposed rules hinder Colorado's ability to consider the voice of all vested parties and appear to be in violation of the prohibitions stated in Secction 1111(e)(1) of the ESSA.

Request for Revision

Move suggestions of adequate outcomes for schools with low participation to guidance rather than regulations. Remove any rules that are prohibited under the ESSA.

In a few instances, the proposed rules change the intent of the law by using the word "must" in contrast to the ESSA statutory language that includes the word "may." For example, Section 1111(d)(3)(B) of the ESSA offers flexibility to states in how the SEA provides continued support to schools and LEAs by stating that the SEA "may...establish evidence-based, State-determined strategies." The statute permits SEAs to establish exit criteria for comphrensive schools and identify the consequences if the exit criteria are not met within a state determined timeline. <u>However, Section 200.21(f) of the proposed rules require that the "State must, at a minimum, require the LEA to conduct a new comprehensive needs assessment...."</u>

Several of the proposed rules add requirements where the ESSA statutory language allows SEAs and/or LEAs to take actions, determine criteria, or establish timelines. For example, the ESSA statutory language does not require the lowest performing 5 percent to be identified at the elementary, middle, and high school levels. However, section (a)(1) of proposed rule 200.19 specifies the breakdown at each level. Section 1111(d)(3)(A)(i)(II) of the ESSA states that, after a state-determined number of years, schools with consistently low-performing subgroup(s) must be identified for comprehensive support. However, proposed rule 200.19(a)(3) limits the number of years to no more than three years. Sections (b) and (c) of proposed rule 200.19 specify requirements for differentiating schools, which is also prohibited by section 1111(e)(1)(B)(iii)(V) of the ESSA.

In other examples, removing statutory language from the proposed rules limits flexibility. For example, Section 1111(c)(4)(A)(i)(I)(bb) of the ESSA allows states to use four-year graduation rates and "at the State's discretion, the extended-year adjusted cohort graduation rate..." Section 200.19(a) of the proposed rules, however, specifically state schools must be identified for comprehensive support based on low graduation using the four-year adjusted cohort graduation rate.

There are other examples of proposed rules that restrict states, where statutory language explicitly awards flexibility to states. We have attempted to identify all such examples in our formal comments.

Request for Revision
CDE requests that where the statutory language states the SEA "may" set requirements or take actions, or specifies that an item is to be "State-determined," the proposed rules honor the statutory language and the flexibility intended for states by not using "must" or defining items that were intended to be "State-determined."

<u>II. The proposed regulations impose additional requirements increasing SEA and/or LEA administrative burdens.</u>

Another area of concern for Colorado is that Sections 299.13 through 299.19 of the proposed rules on state plans significantly increase the administrative burden on SEAs and LEAs. Under former reauthorizations of ESEA, the consolidated state plan reduced administrative burden by allowing states to address the requirements across programs. Clearly, the intent of allowing consolidation is to streamline administration and allow for leveraging of supports and services for students across programs. The proposed rules add requirements beyond that which is "absolutely necessary" which exceeds the statutory authority granted to the USDE under the ESSA.

Request for Revision

Allow effective consolidation of plans by streamlining the requirements under consolidation. Limit the requirements to those which are absolutely necessary.

In several proposed rules, the addition of specific word(s) increases administrative burdens and further limits flexibility. For example, proposed Section 200.12(a)(1) adds the word "single" in front of statewide accountability system, a qualifying term that is not reflected in Section 1111(c)(1) of the ESSA. The intent of statute appears to have been on developing a statewide accountability system that allows for meaningful differentation of schools; not necessarily a single system requiring a union of state and federal requirements. In addition, by adding the word "each" in front of major racial and ethnic group, the proposed Section 200.16(a) require separate calculations and reporting by each group, as opposed to an aggregated minority group comprised of all major racial and ethnic groups. Finally, given the tremendous amount of information that is required to be included in LEA report cards, the requirement that they must be on a single piece of paper in proposed Section 200.20(b) unnecessarily increases the administrative burden for meeting reporting requirements.

Request for Revision

CDE requests that additional requirements be removed from proposed rules and be offered as guidance to support states, schools, and LEAs.

III. The regulations impose unreasonable timelines.

As other states have indicated, the timeline for identifying schools for support and assistance proposed in Section 200.19 is not achievable. Specifically, Section 200.19(d)(2) requires states to identify each type of school for comprehensive support and improvement "by the beginning of each school year, with the year of identification defined as the school year immediately following the most recent school year in which the state measured the school's performance." Moreover, Section 200.19(d)(1) requires this identification to begin in the 2017-2018 school year, with the exception of identification of schools with chronically low-performning subgroups. As a result, portions of Colorado's accountability system would need to be in place in the 2016-2017 school year.

In order to thoroughly investigate possible measures and possible unintended consequences, CDE needs to spend 2016-2017 meaningfully engaging stakeholders regarding our state's accountability system. If the proposed timeline is codified, schools and districts would be held accountable to measures for which they did not know they would be held accountable because of the time required to develop a plan, submit to the USDE and receive approval. To implement a fair and meaningful accountability system, schools and districts should be notified about the accountability measures by the beginning of the 2017-2018 school year and held accountable for those measures for the first time in the fall 2018 reports. This will allow for the greatest buy-in on the accountability measures, which is critical for using accountability to improve student outcomes.

The proposed reporting timelines are also unreasonable. Specifically, Colorado will not have the preceding year's data in time to meet a December 31st reporting deadline proposed in Seciton 200.30(e). Although LEAs are more likely to have data by that deadline, CDE believes this timeline would also impose an undue burden on some Colorado LEAs and schools.

Request for Revision
Allow SEAs to identify schools in 2017-2018 for plan implementation by fall of 2018. It is also requested that reporting deadlines be moved back to late spring for the preceding year's data.

IV. Some provisions impose requirements that are fiscally difficult and lack statutory authority.

The proposed regulations impose minimum funding requirements that are not feasible for Colorado given the number of schools that would be identified for comprehensive and targeted support under the ESSA and the proposed regulations. Colorado is currently projected to have 34 schools that are in the lowest performing 5 percent of Title I Schools and an additional 100 or more high schools that have a graduation rate below 67 percent—all of which will be identified for comprehensive support. In addition, although the criteria for identifying targeted schools are yet to be determined, a majority of Colorado Title I schools (over 660) with applicable disaggregated groups are projected to need targeted support.

Section 200.24(c)(2)(ii) of the proposed rules requires states to award at least $500,000 per year to each school identified for comprehensive support and improvement and $50,000 per year to each school identified for targeted support and improvement. Awarding this minimum amount for each type of school in Colorado will far exceed the State's estimated 7 percent Title I set-aside for comprehensive and targeted schools (approximately $10.5 million). In fact, applying the mimimum amounts required in the proposed regulations to Colorado's estimate for comprehensive schools would require an estimated $67 million – almost half of the total $150 million Title I allocaton for the State. Moreover section (4) of proposed rule 200.24(c) provides direction regarding states that encounter "insufficient school improvement funds," these additional requirements impose an unnecessary burden on SEAs and LEAs – including the requirement that SEAs prioritize funds based on an LEA's demonstration of need – that would not exist but for the creation of proposed rule 200.24. Further, this additional direction has no basis in statute.

Finally, it is worth noting that these minimums are not based in the statutory language of the ESSA. In fact, Section 1003(b)(2)(A) gives the SEA the authority to establish the method "the State will use to allocate funds to" LEAs under paragraph (a) of 1003. Based on CDE's experience implementing the 1003(a) and 1003(g) grants, we do not believe that it is in the best interest of students, schools, districts and taxpayers to provide such large, short-term grants. Many effective school turnaround strategies do not require such large sums of money and often times sustainability after the grant becomes an issue when effective strategies are funded with large sums within a short-period of time. We believe that states should have the flexibility to award the most effective amount of funding to ensure long-term success and sustainability for schools in order to improve student outcomes and close the achievement gap. Although the proposed rules do offer the option for SEAs to propose a lesser amount to the USDE for approval, requiring the SEA to defend lesser amounts based on LEA plans and proposals increases the burden on both SEAs and LEAS and appears to be in direct conflict with the ESSA statute.

Request for Revision
Move the recommended minimums to guidance instead of regulation. Allow states to determine the dollar amounts necessary to develop and implement effective evidence-based interventions and strategies that are most likely to meet the needs of and support students within identified schools. Do not place states in the position of having to justify a lower award amount.

Again, thanks to you and your staff for the time you have taken to compile the proposed regulations. I know it is a tremendous amount of work and that it is impossible to please everyone. It is our hope that this letter provides a cursory overview of Colorado's reaction to the proposed regulations as well as greater context for the formal comments that CDE will submit via the ePortal. I assure you that Colorado is committed to ensuring that all children receive a fair, equitable, and high quality education. I would welcome the opportunity to work more closely with you and your staff to develop revised ESSA rules that might lead to greater state, local, and student success toward that end.

Respectfully,

Katy Anthes

Katy Anthes, Ph.D.
Interim Commissioner
Colorado Department of Education
P (303) 866-6646
E anthes_k@cde.state.co.us

This letter is endorsed by the Colorado State Board of Education:

Steve Durham, Chairman, 5th Congressional District
Angelika Schroeder, Vice-Chairman, 2nd Congressional District
Val Flores, 1st Congressional District
Joyce Rankin, 3rd Congressional District
Pam Mazanec, 4th Congressional District
Jane Goff, 7th Congressional District
Debora Scheffel, 6th Congressional District