

**ESSA IMPLEMENTATION: UPDATE FROM THE U.S.  
SECRETARY OF EDUCATION ON PROPOSED  
REGULATIONS**

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**HEARING**  
OF THE  
**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FOURTEENTH CONGRESS**

SECOND SESSION

ON

EXAMINING EVERY STUDENT SUCCEEDS ACT IMPLEMENTATION, FO-  
CUSING ON AN UPDATE FROM THE SECRETARY OF EDUCATION ON  
PROPOSED REGULATIONS

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JUNE 29, 2016

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## ESSA IMPLEMENTATION: UPDATE FROM THE U.S. SECRETARY OF EDUCATION ON PRO- POSED REGULATIONS

WEDNESDAY, JUNE 29, 2016

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10 a.m., in room 430, Dirksen Senate Office Building, Hon. Lamar Alexander, chairman of the committee, presiding.

Present: Senators Alexander, Murray, Enzi, Burr, Isakson, Murkowski, Collins, Hatch, Roberts, Casey, Franken, Bennet, Whitehouse, Murphy, and Warren.

### OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

We have a vote at 10:30. We might have another one after that. But I think we can surely get through the opening statements, the Secretary's statement. And I think Senator Murray and I can get through our questions.

What I will do is I'll try to go vote early and then I'll come back, and in the meantime we'll continue the hearing so all Senators will have a chance to use their 5 minutes and ask their questions.

This morning we have a hearing on oversight of the Every Student Succeeds Act. Senator Murray and I will each have an opening statement, and then we'll introduce our witness, the U.S. Secretary of Education, John King.

Secretary King, welcome. We're glad that you're here.

This is our fourth oversight hearing on the Every Student Succeeds Act. Secretary King, you and I have had some debate on the meaning of words in the law, some discussion about it. It reminded me of Lewis Carroll's book, "Through the Looking Glass," when Humpty Dumpty said, "When I use a word, it means just what I choose it to mean, neither more nor less." Like Humpty Dumpty, we choose our words carefully, and we did when we wrote the law fixing No Child Left Behind.

We held 24 hearings between 2007 and 2014. In 2015, we had three hearings. There were 58 amendments, many other amendments. The words we used were debated, carefully and deliberately chosen. We meant for the words to mean what they say, nothing more, nothing less. That, of course, is our job. The Constitution settled that a long time ago. An elected Congress chooses the words

to make the laws. It's the Executive's job to implement the law in a way that's consistent with the meaning of those words.

Let me give you an example of doing that properly. When I had your job 25 years ago, in 1992, Congress did something I very much disagreed with. It passed legislation adopting a pilot direct loan program. I had argued that the Department of Education had no business being a bank for millions of students. There were far too many problems, risks and costs, but Congress disagreed. It passed the legislation. The President signed it and adopted a pilot direct loan program.

After the President signed the bill, I had about as much time left in my term as you do in yours this year, and it was my job to start implementing the law Congress passed with which I disagreed. So, I did it, and I faithfully followed the words, and I asked all the universities whether they would like to be a part of the pilot program, and over time eventually about 25 percent did. I implemented the law the way Congress wrote it.

Let me give you an example of how I think the Secretary of Education should not respond when implementing a law Congress has written. I'm not going to dwell on it because you and I have discussed it, and we did again this week. But it's the proposed "supplement, not supplant" regulation that was rejected by a negotiating rulemaking committee. It's a very simple provision. It simply says Federal title I dollars that go to local school districts are not meant to replace State and local dollars for schools. We give title I money to a school, a school district has to show the school is getting the same amount of State and local dollars it would receive without title I money.

One witness testified at the last hearing the law was so plain that there didn't even need to be a regulation, but you've come up with a proposal that forces school districts to show they essentially equalized spending of their State and local dollars among title I and non-title I schools, although the new law, in section 1605, explicitly prohibits exactly that. According to the Congressional Research Service, the proposed regulation "appears to go beyond what would be required under a plain language reading of the statute." The proposal is so far out of bounds—these are my words—that I'm assuming any regulation, if there even needs to be one, will bear no resemblance to the proposal you've drafted.

But let's talk today about the accountability rule that the Department proposed on May 31st. This goes to the heart of the law to fix No Child Left Behind. In our studies, we heard more about testing than any other subject. I even at first proposed we eliminate the federally mandated tests. But the more we got into it, the more we understood that it wasn't the federally required 17 tests that were the problem. It was having the U.S. Department of Education make all the decisions about what to do about the results of the tests, which is what we call the accountability system.

The Federal Government decided that math and reading test results would determine whether schools and teachers were succeeding or failing. And I believe that the reason we got 85 votes in the Senate is because so many were tired—and these were teachers, Governors, chief State school officers—of the United States Department of Education telling school boards and class-

room teachers in States so much about what to do with the children in their schools.

I want to make sure that any regulation that your Department proposes about accountability is consistent with the words we chose and the intent of the bill the President signed. You're receiving comments until August 1. You'll consider those comments. I look forward to working with you to continue the discussions we had this week to ensure that the regulations comport with the law.

Today I'll focus on two main concerns. I'll mention them just briefly.

One is, does the proposed accountability rule actually get the Federal Government back in the business of setting State academic standards? Senator Roberts asked you about this during your confirmation hearing. Under No Child Left Behind, the Department, in effect, mandated that States adopt Common Core standards. Thirty-eight out of 42 had to in order to receive waivers from No Child Left Behind. This new law repealed that effective mandate in at least five different specific prohibitions. There was nothing unequivocal about it. We also changed the law from requiring a State to demonstrate that they have adopted challenging standards to say all a State had to do was to assure the Secretary that it has adopted those standards. We chose our words carefully.

Your proposal in this regulation says a State must "provide evidence at such time and in such a manner specified by the Secretary" that it has adopted these standards. Wouldn't this give you the power to reject the standards by rejecting the evidence?

The second area that I want to mention is does the proposed accountability rule get the Federal Government back in the business of deciding which schools are succeeding or failing? It appears to re-institute the failed No Child Left Behind formula requiring that math and reading tests be the primary measure for deciding whether schools are succeeding or failing. You've invented out of whole cloth a so-called summative rating system that's nowhere in the law that would essentially require all States to come up with an A through F system for all their schools based primarily on test scores on federally mandated tests in math and reading.

The whole point of the law was to return to the States whether to do that or not. I know that New York City and Florida did that, but other States might not want to do it that way.

Senator Murray often talks about the law's guardrails, and we agree there should be some guardrails in this law in what States must and may not do. But again, we chose our words carefully. They were carefully and vigorously negotiated, and any regulation must stay within those words. In fact, the law also includes some very specific guardrails on the Secretary, specific prohibitions.

For the last 15 years, the Federal Government has gradually become, in effect, a national school board. Congress decided last year to reverse that trend. The President signed the bill. That should put an end to it.

On August 1, we really come to the end of an era. I call it the end of the "Mother, May I" era, an era when Governors and chief State school officers had to come to Washington to get permission to do a number of things about their schools. Those conditional waivers are gone. The following mandates are gone from No Child

Left Behind: the standards mandate, the adequate yearly progress mandate, the test-based accountability, the school turnaround models, the highly qualified teacher requirements, teacher evaluation mandates. Those responsibilities have now been restored to States and local school boards and classroom teachers.

Our hope is that this new flexibility will unleash a new era of innovation and excellence in student achievement, one that recognizes that the path to higher standards, better teaching and real accountability is classroom by classroom, community by community, and State by State, and not through Washington, DC.

Senator Murray.

#### OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thanks very much, Chairman Alexander.

Secretary King, thank you for being here today. I look forward to today's discussion.

We are here today, almost 7 months after the President signed the Every Student Succeeds Act into law, for another update on its implementation. As we have talked about before, No Child Left Behind was badly broken. This law fixes it in many critical ways. But a law is only as good as its implementation, so I'm really glad we're having this discussion today.

I want to kick this off by focusing on two areas, accountability and the need for a continued collaboration and inclusion as this process continues, and I will have questions on a few others.

First, as I have talked about since before we passed this law, ESSA is an extension of one of the most important goals of our country, ensuring civil rights and equality of opportunity for every child. In order to do that, we need to make sure schools and States are held accountable for providing a quality education to all of their students, no matter where they live or how they learn or how much money their parents make.

This is critical because we know what happens when we don't have true accountability. Inevitably, it's the kids from the low-income neighborhoods, kids of color, kids with disabilities, and kids learning English who too often fall through the cracks. We know we can do better as a country, but we also know we're not there yet.

Secretary King, I appreciate the work you've done here to prioritize the regulations focused on implementing the Federal guardrails in the law, and I'm very glad to see strong regulations coming out that make sure the law operates as it was intended and truly accomplishes the clear accountability goals we laid out. This is good news for students; I hope it continues.

I am concerned about a few provisions in the draft regulations that could derail those efforts; for example, allowing States to compare the performance of individual subgroups to the average performance of all students in the State. ESSA was clear: the performance of every single student in every single subgroup matters. But allowing States to measure subgroup performance by comparing to the average performance of all students could lower the expectation for students, because many students could be underperforming, driving down the average performance level within a State.



That's why instead, all student subgroups should be expected to meet State standards and academic goals established by the State regardless of how they compare to other students in the State. I'll have a question on this where we can go into more details, but this is something I'm taking a close look at, as well as other regulations from the Department for school interventions and supports.

Because the intent of the law is clear, it needs to actually help students succeed, and we need strong regulations flowing from that goal if we want this law to do what so many of us hoped that it will.

One other issue I want to touch on is the need for continued collaboration to encourage and ensure the voices of all stakeholders are heard throughout the ESSA implementation process. This is so important, but it won't happen on its own. It requires the Department to use every available opportunity to assist States and school districts, as well as breaking down barriers to ensure full participation.

I am pleased the Department sent a letter to States last week highlighting the importance of stakeholder engagement. The letter provides helpful suggestions to States to improve stakeholder engagement, including holding meetings at varying times during the day, providing accommodation and support to participants, and ensuring transparency in the process and timeline for engaging in the plan development process. Getting input from teachers, civil rights groups, parents, and many more will be essential in making sure the law works in the coming months and years, and that's something I feel very passionately about.

When we were working to pass this law, I worked hard to bring in voices of students and those who would be instrumental in implementing it, voices from teachers like Lyon Terry in Seattle, whose hard work to get his kids excited about coming to school was being labeled as failing under our previous broken education law; voices from parents like Duncan, whose son attends Highland Public Schools, where many of the kids in the school district struggle with poverty; and voices from high school principals like Laurie Wineberry from Spokane, who talked to me about the desperate need for commonsense policies for testing in her school. Those were important voices when we wrote the law; they are important voices as we implement it.

I'm very glad the Department is focused on true collaboration, and that needs to continue.

I'm also glad that last week the Department, in collaboration with HHS, provided clarity for how States, school districts, and child welfare agencies can implement the new foster care requirements under ESSA by working together to support foster children enhance their educational success.

This Administration has a little less than 7 months left in office, but that's still plenty of time to make progress on these and several other key areas, and I'm confident we can. I'm confident because all the people I just talked about, Lyon and Duncan and Laurie and so many others across this country, including many in this room today, who speak out for change and empower our Nation's students and schools, inspire me to keep fighting. I know this is a

priority, not just for the members of this committee and the Department but for our entire country.

Secretary King, thank you for being here today. I'm looking forward to this hearing to hear more from you and the steps you're taking to implement the law so that it works for all of our students and what all of us can do to help to make sure that happens. Thank you.

The CHAIRMAN. Thank you, Senator Murray.

Secretary King, you're welcome to make a statement. If you could keep it to about 5 minutes, we'd appreciate it. That would give the large number of Senators we have here today a chance to ask questions.

Mr. SECRETARY.

**STATEMENT OF JOHN KING, SECRETARY, U.S. DEPARTMENT OF EDUCATION**

Secretary KING. Thank you so much. Thank you, Chairman Alexander, Ranking Member Murray, and members of the committee. I appreciate the invitation to come back before the committee and testify today regarding how the Department of Education is moving forward with the implementation of the Every Student Succeeds Act, which the President signed into law on December 10, 2015. I am grateful that, thanks to the leadership of Chairman Alexander and Ranking Member Murray, as well as the members of this committee, Congress acted last year to reauthorize this critical piece of legislation.

Over the past 7½ years, thanks to hard-working educators supported by families, our schools and students have made tremendous strides. The high school graduation rate is at a record high, and schools in 49 States are helping students meet college-and-career-ready standards and assessing their progress. More States also are investing more money and helping to ensure children are ready to succeed when they enter kindergarten, increasing their spending on early learning by \$1.5 billion over the past 3 years. And yet, so much work remains.

Far too many students from every background still arrive at college needing remedial classes, and Black and Hispanic students continue to lag behind their White peers in achievement and graduation rates. The latest figures from our Civil Rights Data Collection illustrate in powerful and troubling ways the disparities in opportunity and experience for different groups of students in our schools.

Just a few statistics. Students with disabilities are more than twice as likely as students without disabilities to be suspended. Schools with high concentrations of Black and Latino students are less likely to offer advanced courses such as calculus and physics, which also are critical for success in college. One out of every five high school students who are English learners is chronically absent. These are the very children that the Elementary and Secondary Education Act of 1965, as most recently amended by ESSA, was designed to protect and serve.

The good news is that ESSA provides local communities and States a pathway toward excellence and equity for all students, as well as tools that will help them get there. Using the greater flexi-

bility in ESSA, States will be able to go beyond test scores in math and English by adding their own indicators of school quality and progress to ensure a rigorous, well-rounded education for every student.

We know that strong literacy and math skills are necessary for success in college, careers, and life, but they are not sufficient. Importantly, a rich, rigorous, well-rounded education helps our children make critical connections among what they're learning in school, their curiosities, their passions, and the skills they will need to become the sophisticated thinkers and leaders who will solve the most pressing challenges facing our communities, our country, and our world.

Understanding that this work requires all of us working together, States are expected to involve local educators, parents, civil rights groups, business leaders, tribal officials, and other stakeholders in choosing other indicators of quality such as decreases in chronic absenteeism or increases in the number of students taking and passing advanced classes.

The legislation also includes critical protections and provides additional resources for our traditionally underserved students such as students of color, students from low-income families, students with disabilities, students learning English, Native American students, foster and homeless youth, and migrant and seasonal farm worker children.

States must take meaningful action to improve schools where students or groups of students are struggling, and in high schools that have low graduation rates year after year. But the flexibility of the law also allows them to tailor these interventions to schools' specific needs. As with all legislation and policy, the quality and fidelity of their implementation are critical to success. Please allow me to update you quickly on our progress toward helping States implement this law fully and faithfully.

The first thing we did was listen. To date, we've convened over 200 meetings with stakeholders across the country. These included dozens of meetings with educators and school leaders in rural, urban, and suburban communities. We posted a notice seeking public comment on areas in need of regulation and requested feedback on areas in need of guidance. We received hundreds of comments.

In response, we prioritized accountability, including data reporting and State plans, assessments under title I, parts A and B, and title I's requirement that Federal dollars supplement, not supplant, State and local funds for education.

As you know, this past spring we engaged in negotiated rule-making. The negotiators were able to reach consensus on assessment, and we will move forward with publishing those regulations for comment. The negotiators were not able to reach consensus on supplement, not supplant, but we have gotten a lot of important feedback and will continue to listen to that feedback.

Last month we issued our proposed rulemaking on accountability, State plans, and data reporting. It was published in the Federal Register on May 31st, and we will continue to receive comment through August 1st. We encourage comment on these proposed regulations and look forward to responding to that comment.

Consistent with the strong civil rights legacy of the law, the proposed regulations ensure a focus on all students, including historically underserved subgroups of students and accountability decisions. They ensure that meaningful action is taken to improve the lowest-performing schools, with families, educators, and stakeholders playing an important role in the process. They also ensure that educators, students and families have an accurate picture of students' academic performance.

We've also committed to issue guidance in several key areas based on the feedback we've received. We already recently issued guidance around foster youth. We will soon issue guidance related to homeless youth, as well as English learners, and after that on title II, title IV, and early learning. As we issue that guidance, we are guided by the many comments we've received, looking for technical assistance and support, and we will continue to take comment from stakeholders in other areas where guidance may be helpful.

In conclusion, ESSA is a bipartisan achievement that provides the statutory foundation to close our remaining gaps and address our persistent inequities. I have appreciated hearing many of your thoughts on implementation of the law so far and look forward to hearing from you today. We take your feedback and all feedback we receive very seriously. I look forward to continuing to work with you to ensure high-quality implementation of this law supported by the Department that guarantees a world-class education for every child.

Thank you. I'm happy to take any questions you may have.  
[The prepared statement of Secretary King follows:]

PREPARED STATEMENT OF SECRETARY JOHN KING

Thank you Chairman Alexander, Ranking Member Murray, and members of the committee. I appreciate the invitation to come back before this committee and testify today regarding how the Department of Education is moving forward with the implementation of the Every Student Succeeds Act (ESSA), which the President signed into law on December 10, 2015. I am grateful that, thanks to the leadership of Chairman Alexander and Ranking Member Murray, and the members of this committee, Congress acted last year to reauthorize this critical piece of legislation.

Over the past 7 years, our schools and students have made tremendous strides. Our Nation's high school graduation rate is at a record high 82 percent, in part due to significant gains by historically underserved student groups. Forty-nine States and the District of Columbia have adopted and are implementing rigorous, college-and-career-ready standards and aligned assessments for all students. In the last 3 years alone, since the President's call to action on preschool for all, 38 States and the District of Columbia have increased their public pre-school investments for 4 year olds by more than \$1.5 billion. When the President made that call to action, 11 States did not offer preschool. Now all but four States do. Between 2008 and 2013, there was a nearly 30 percent reduction in the number of students who did not graduate on time and college enrollment for Black and Hispanic students is up by more than a million.

Yet so much work remains. Far too many students from every background still arrive at college needing remedial classes. And pernicious gaps remain for students who have been underserved for generations. Black and Hispanic students continue to lag behind their White peers in achievement and graduation rates. Our recent Civil Rights Data Collection (CRDC) release illustrates, in powerful and troubling ways, the disparities in opportunities and experiences that different groups of students have in our schools. Students with disabilities are more than twice as likely as students without disabilities to be suspended. Black and Latino students participate at lower rates in gifted and talented education programs. Schools with high concentrations of Black and Latino students are less likely to offer advanced courses, such as calculus and physics. One out of every five English Learner and more than a quarter of Native American high school students is chronically absent.

These are the very children that the Elementary and Secondary Education Act of 1965, as most recently amended by ESSA, was designed to protect and serve.

ESSA advances equity by upholding critical protections for America's disadvantaged students. The law maintains resources and supports for students from low-income families; students with disabilities; English Learners; Native American students; foster and homeless youth; neglected, delinquent, or at-risk youth; and migrant and seasonal farmworker children. ESSA requires that all students be taught to rigorous college-and-career-ready academic standards and that vital information about their progress and performance be shared with educators, families, students, and communities on an annual basis, through statewide assessments. For the first time, the law asks States to consider the progress of all of their English Learners toward English Language Acquisition in the context of their title I plans. ESSA also encourages a smarter approach to testing. Our Administration is pleased that ESSA includes provisions consistent with President Obama's Testing Action Plan, which put forward principles for reducing the amount of classroom time spent on unnecessary standardized testing, encouraging States to limit the amount of time devoted to these assessments and supporting efforts to audit, streamline and improve assessments at the State and local levels.

Through this law, Congress has reinforced the Federal commitment to holding ourselves accountable for the progress of all students while establishing a new, improved Federal-State partnership that moves away from the one-size-fits-all approach of No Child Left Behind (NCLB) and its overemphasis on testing as the only means of assessing how schools and students are doing. ESSA builds on the work already underway in States to develop their own strong State systems for school improvement. And it maintains the expectation of meaningful action to support students in schools where students or groups of students are struggling—and, in high schools that have low graduation rates year after year.

ESSA also provides local communities and States with a pathway toward equity and excellence for all students, by reclaiming the goal of a well-rounded education for all students. Using the greater flexibility in ESSA, States will be able to go beyond test scores in Mathematics and English Language Arts by adding their own indicators of school quality and progress, to ensure a rigorous, well-rounded education for every student. We know that strong math and literacy skills are necessary for success in college, careers, and life—but they are not sufficient. That may mean States measuring how students—particularly historically underrepresented subgroups of students—are doing in Advanced Placement and International Baccalaureate courses, or whether they have access to rigorous coursework like physics or computer science. It may mean States taking a closer look at chronic absenteeism, post-secondary enrollment, placement in remedial college coursework, or socioemotional development as additional measures of how schools are serving all students.

The possibilities are expansive, but their real-world impact for children will depend on implementation. A rich, well-rounded education helps our children make critical connections among what they're learning in school, and their curiosities, their passions, and the skills they will need to become the sophisticated thinkers and leaders who will solve the most pressing challenges facing our communities, our country, and the world.

As a parent of children in public school, and a former teacher, principal, and State education commissioner, I can tell you that the prospect of a new law of this magnitude is both exciting and daunting. There is an incredible amount of work to be done at all levels to implement the law. ESSA represents a significant departure from NCLB in many ways. There are new opportunities, such as the Innovative Assessment Demonstration Authority, and new requirements, including the requirement to publicly report per-pupil expenditure data. The law rightly shifts more authority to States and also expects more of them—from developing and incorporating new indicators beyond test scores and graduation rates into their accountability systems to building the infrastructure for meaningful stakeholder consultation and engagement.

Since the bill was signed into law, we have been listening to the many stakeholders who care about implementation. We met with teachers and principals and their representatives, State and school district leaders, tribal officials, parents, civil rights leaders, and many others to hear their questions and concerns and identify areas in which regulations, guidance, or technical assistance might be most needed. We posted a notice seeking public comment on areas in need of regulation in the *Federal Register*, and also requested feedback on areas in need of guidance. We received hundreds of comments. All told, we held over 200 meetings with stakeholders across the country. And our outreach continues.

In response to that feedback, we announced our intention to regulate in a few key areas: accountability (including data reporting) and State plans, assessments under title I, parts A and B, and title I's requirement that Federal dollars supplement, not supplant, State and local funds.

As required by statute, for the title I, part A assessment and supplement, not supplant regulations, we engaged in negotiated rulemaking in late March and early April. Through that process, we were able to gather a lot of good input and feedback, and reached consensus on assessments, but not supplement, not supplant. For title I, part A assessment regulations, the consensus-based language will be reflected in the notice of proposed rulemaking that we will publish later this year. For supplement, not supplant, we are considering how best to address the feedback we received from a wide variety of stakeholders and carefully considering how best to meet the objective behind this proposed regulation.

Our notice of proposed rulemaking (NPRM) on accountability, State plans, and data reporting was published in the *Federal Register* on May 31 for a 60-day public comment period concluding on August 1. We welcome comment from all quarters on these proposed regulations—including from members of this committee. In addition, the NPRM contains several directed questions on which the Department is seeking particular input. As always, we know the regulations will be improved through public input, and we look forward to receiving feedback.

One of our top priorities in the proposed regulations was to guarantee a meaningful role for stakeholders in the development of each State's vision for its educational system. It is important that the input and perspectives of parents, teachers, principals, civil rights and community leaders, and other State and local education and community leaders be reflected in both the initial development and the ongoing implementation of State plans under ESSA, especially as State and local leaders shape new school accountability systems under the law.

Our proposed regulations on accountability create flexibility for States to create their own vision of an excellent, well-rounded education, and add their own indicators of school quality or student success to include in their accountability systems, such as chronic absenteeism or access to and success in advanced courses. States have flexibility to choose these indicators, as long as they can be measured by subgroup, meaningfully differentiate among schools, and demonstrate that they are related to academic achievement or graduation rates.

Consistent with the strong civil rights legacy of the law, the proposed regulations ensure a focus on all students and historically underserved subgroups of students in accountability decisions, and provide safeguards to ensure that all students have an accurate measure of their academic performance, and that parents and communities are informed when students are falling behind. And the proposed regulations confirm that public charter schools must be included in State accountability systems.

The proposed regulations ensure that meaningful action is taken to improve student outcomes in the lowest-performing 5 percent of schools, in schools that fail to graduate at least two-thirds of their students, and in schools where a subgroup of students is consistently underperforming or chronically low-performing. At the same time, the regulations build on the new law's flexibility around school improvement and intervention and support locally designed solutions to improve struggling schools, and provide a clear role for parents, families, educators, and stakeholders to meaningfully participate in the implementation process. These strategies must be evidence-based and, as a part of determining how to improve their lowest-performing schools, districts must look at resource inequities.

The proposed regulations ensure that parents, educators, and community members have key information about how schools and students are performing and being supported, providing clear and transparent data on report cards on critical measures of student success, school quality, and resource equity—including per pupil expenditures, and enrollment in post-secondary education. And in order to ensure that parents and students have a clear sense of how their schools are performing, the proposed regulations require a comprehensive summative rating for each school based on the State-designed system of indicators.

Finally, the proposed regulations encourage States to think comprehensively across their programs about how to support student success, and streamline requirements, through their submission of consolidated State plans. As a former State chief, I know how important it is not to think about these programs as separate silos, and instead to think holistically about the best ways to spend Federal funds.

In April, I announced that the Department would be issuing non-regulatory guidance on several key topics: students in foster care, homeless students, and English Learners. Each of these topics was raised frequently in our stakeholder outreach. I am happy to report that last Thursday we released the first of those three—*Ensuring*

ing *Educational Stability for Children in Foster Care*—and plan to issue guidance to support homeless students and English Learners at the end of the summer or early fall. The Department is also working on guidance to support States and districts as they implement title II, title IV, and the provisions in ESSA around early learning. Our aim with these guidance documents will be to highlight examples and best practices as States and districts make use of some of the new funding opportunities in the law. These guidance documents are designed to help States and school districts understand their options and share what the Department has learned about what works across the country.

Last week's guidance addresses concerns specifically related to students in foster care, who are more likely to lag in academic achievement or be retained in grade, and less likely to graduate high school, than their peers. An important contributing factor is the high mobility of these children, which often causes unplanned school changes and slowed academic progress.

To address these concerns, ESSA added important new protections for children in foster care to promote greater educational stability and improved educational outcomes overall. Our guidance on these ESSA foster care provisions, released jointly with the Department of Health and Human Services, clarifies the new statutory requirements regarding children in foster care, promotes greater collaboration between State educational agencies, local educational agencies, and child welfare agencies, and highlights promising examples to help guide implementation. We hope that this guidance, developed with the input of a diverse group of stakeholders, will be a helpful tool that equips the field to successfully implement the new foster care provisions under ESSA and to improve supports for children in foster care more generally.

We are continuing to engage with stakeholders to identify additional areas where guidance and technical assistance may be useful. Our goal is a Federal-State partnership that will support local school districts and their schools in helping every student succeed.

As I noted at the beginning of my remarks, we have made incredible progress as a nation over the past several years, but there is more to be done. ESSA is a bipartisan achievement that provides the statutory foundation to close our remaining gaps and address our persistent inequities. I have appreciated hearing many committee members' thoughts on our implementation of the law so far, and look forward to hearing from you today. I take your feedback, and all the feedback we receive, very seriously. I look forward to continuing to work with you to ensure a high-quality implementation of this law, supported by the Department, so that we can ensure a world-class education for every child.

Thank you. I am happy to answer any questions that you have.

The CHAIRMAN. Thank you, Mr. Secretary.

We will begin a round of questions now.

Mr. Secretary, my goal would be that the country feels the same way about this new law at the end of this year as it did at the end of last year. I think there was a good deal of literal rejoicing that we had achieved a consensus in a complex area that affected so many millions of American families and brought some stability to elementary and secondary education policy. I'm hopeful that after the regulations are finally done, that we'll still feel the same way.

In that spirit, let me continue a conversation you and I were having, and I only have 5 minutes, so I want to get in two or three questions. When we wrote the law, we envisioned that States would have time to plan for the transition to the law. You've heard and we've heard some States say that your proposed regulation doesn't permit a State to do this.

Let me ask you if what I'm about to describe would be an appropriate timeline for a State, in your view, that States would develop and implement their new accountability systems during the school year that begins in 2017 and 2018. That's next year. That means they would be collecting data in that year. Then in the following year, 2018–19, they would be identifying new schools in need of improvement. That would leave the year coming up, 2016–17, as a transition year during which I would assume that States would

continue to work with their already identified schools, although some States might want to move more rapidly.

Does that schedule—would your proposed regulation allow that sort of schedule?

Secretary KING. I appreciate the question. Our goal is to make sure that as the committee has developed this law, that we focus on trying to expand the definition of educational excellence, giving States the opportunity to add indicators alongside English and math performance and graduation rates. We want States to move as quickly as they can on that.

The CHAIRMAN. Right.

Secretary KING. The timeline assumes that, yes, 2016–17 would be a transition year and that States would continue intervention in their previously identified schools.

The CHAIRMAN. Right.

Secretary KING. The timeline in the current draft regulations on which we are seeking comments anticipates that States would implement their new accountability system in 2017–18 and address the needs of schools identified in that accountability system in 2017–18. That said, we’ve heard feedback from States that some States would like the ability to carry over the schools in which they are intervening from 2016–17 into 2017–18. That’s feedback that we’re open to and will continue to listen closely to comment.

The CHAIRMAN. Just so I understand, what I said was that a State would collect the data and develop its new accountability system in 2017–18, and then begin to identify the schools in 2018–19.

Secretary KING. Yes, understood. Under the current regulations, that would not be. The interventions would begin in 2017–18. But as I said earlier this week and will emphasize again, we are open to comment on the timeline and open to adjusting that timeline.

The key question that States will need to address as they provide comment is in which schools will they provide additional support in 2017–18? Would that be the same schools as in 2016–17?

The CHAIRMAN. So I’ll have time for one more question, let me strongly urge you to make clear to schools as quickly as possible that if they choose to, they could implement their new accountability systems in 2017–18, and then they could identify new schools under that system in the following year, 2018–19, if they choose to do that.

May I move on to one other question? Your proposed regulation requires that all schools receive a single summative rating based on a State’s accountability system. An A to F rating system might be a good idea for some States, but in other States it’s been widely criticized. New York City is moving away from using an A to F system. And furthermore, the law prohibits the Secretary from “prescribing the specific methodology used by States to meaningfully differentiate or identify schools.”

I don’t see anywhere within the law the words “single summative rating,” and how do you justify a proposed regulation requiring such a rating in light of the prohibition that was specifically in the law that the President signed in December?

Secretary KING. The key is that parents, educators, communities have clear information about the performance of schools. We do not require in the regulations the use of an A through F rating.



The CHAIRMAN. A single summative rating.

Secretary KING. States could take a variety of approaches to a single summative rating. They could use an A through F system if they so chose. They could use a numerical index if they so chose. Or they could use a categorical system, which actually is required in the statute. States will have to identify schools for comprehensive improvement, comprehensive support. In order to do that, they will need a summative rating to achieve that status. Similarly, States will need to have schools that get targeted support. That, too, is a categorical rating. And then there would be schools that would get neither comprehensive nor targeted support, and that too is a categorical rating.

All we require is that they have some methodology by which they can identify those schools and clearly communicate about the performance of their schools with the public.

The CHAIRMAN. My time is up. But I would like you to think about where in the law you get the authority to provide for a single summative rating.

Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman.

The CHAIRMAN. May I—not taking time off of you, I think I will go vote, if I may, and leave you in charge of the committee, and I'll come right back.

Senator MURRAY [presiding]. OK, do that.

Mr. Chairman, before I begin my round of questions, I want to echo the concerns that were voiced about the timeline for identifying the schools for improvement.

Like the Chairman, I have heard from stakeholders that States may not have their new accountability systems in place by the beginning of the 2017–18 school year, and as a result States would have to identify schools based on old data from systems designed before ESSA was actually signed into law, and that's deeply concerning to teachers and parents in my State and around the country. I hope, as your Department works on the final regulation, you'll address that very real issue for our States and our schools.

On the questions, I really worked hard to make sure that ESSA requires schools to receive supports and interventions where any group of students is consistently underperforming. However, I'm very concerned that the draft rule weakens that requirement by allowing States to compare the performance of subgroups of students to other students who may also be underperforming rather than requiring States to ensure each individual subgroup of students makes sufficient academic progress on their own.

In practice, that could mean that a school could have a group of students—say, students with disabilities—missing their State-set goals for many years and not receiving the support which is so important that they need to improve, as required by ESSA. How do you square that proposal in the regulation with the requirements of the law?

Secretary KING. Yes. We think it's very important that States and districts are focused on their schools where subgroups are underperforming. The regulations create parameters for States to develop their systems for identifying those schools that need targeted support for underperforming subgroups and provides options

that States could use a system that relies on goals and targets. States could use a system that relies on the gap between subgroups and the highest achieving subgroup, for example. But States ultimately would have to identify those schools where they have struggling subgroups, and also would have to identify those schools where the struggling subgroups are struggling at a level that's consistent with the bottom 5 percent of schools as well.

But this is a place, again, where we're open to feedback, and certainly there are contrasting views on what the parameters for State subgroup, targeted subgroup identification should be, and we're open to feedback on that.

Senator MURRAY. OK. I just want to make sure they get the resources they need, and if we're not identifying them, they won't.

On another issue, I'm very concerned that my home State of Washington is facing a homelessness crisis. We have school districts like Everett where the number of homeless students has risen to almost 1,000. McKinney-Vento liaisons are struggling now to meet the increased needs of homeless children and families, and that has been a goal of mine for a very long time, to make sure we meet their needs.

ESSA makes a number of changes designed to increase the capacity of liaisons to identify and support homeless children so that they can succeed in school. How is your Department planning to make sure that these changes are implemented effectively?

Secretary KING. I share your commitment to addressing the needs of homeless students. We've been holding conversations with students who have been homeless with advocacy groups to try to develop our guidance to implement the provisions of the new law regarding homeless students, and we expect to issue that guidance shortly this summer.

Senator MURRAY. OK, I'll be looking for that.

I wanted to ask you about the preschool, which, as you know, is a priority of mine. ESSA includes new policies to encourage our States and districts and schools to use money for preschool programs. I'm very proud that my home State of Washington is leading the way when it comes to using this funding for preschool. Bremerton School District uses their title I money to raise the quality of child care so that kids are prepared to learn when they start kindergarten.

How is your administration planning to get the word out about these new provisions and help States leverage their ESSA funding to improve access to high-quality early learning?

Secretary KING. We think the commitment to preschool is one of the signature achievements of ESSA. We are working with Health and Human Services on an MOU around continued implementation of the Preschool Development Grant Program and its new form in ESSA, and we are working on guidance on early learning that will focus on best practices and examples of approaches just like the one you're describing, where States may use their title I dollars or school improvement dollars to focus on expanding access to preschool for students most in need.

Senator MURRAY. OK. And finally, I'm hearing a lot about teacher shortages in my State, particularly special education, teachers of English learners, STEM teachers. In ESSA, we rewrote title II

dealing with teachers to improve that. I wanted to ask you, how is the Department planning to make sure that States and districts know about the new tools in ESSA? Because we are facing this crisis.

Secretary KING. I'm proud to say States are doing, I think, some good work in this area through the equity plans that were developed under NCLB and that are continued under ESSA. There's an opportunity for States to refine those equity plans. We also are developing guidance on title II that we expect to issue later this year that will help point States toward the available resources and to some examples of best practice. And as you know, the President has also made additional proposals in the 2017 budget around these kinds of teacher shortage issues, including strengthening teacher loan forgiveness and the Best Job in the World initiative, which would focus on recruiting great teachers to high-need schools.

Senator MURRAY. OK, very much appreciate that.  
Senator Enzi.

#### STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Senator Murray. I appreciate this hearing, and thank you for being here, Mr. Secretary.

You and I had a phone conversation prior to your HELP Committee confirmation hearing in which you kind of conveyed to me that you didn't intend to follow the Every Student Succeeds Act as it's written. That led me to vote against your confirmation. An example is Section 8205 of the bipartisan law states that the Secretary must identify the Department of Education positions that are no longer required due to the elimination of programs and subsequent shift of authority back to the States. That law requires the Secretary to, not later than 1 year after such date of enactment, reduce the workforce of the Department by the number of full-time equivalent employees the Department identified.

When I asked you if you were on track to reduce the number of positions at the Department of Education within 1 year, you stated to me that you were going to move those positions to other areas within the Department. So I wrote you a letter after that conversation asking you to clarify your answer. I had to wait 3½ months for a response from you to that letter, and I only got it yesterday afternoon. I hope we don't have to have a hearing any time we want to get a late response from you, and I'd like to know if you're on track to reduce the number of positions within the Department of Education per the statutory requirements that none of us voted against and that was signed into law by President Obama.

We all agreed to reduce the size of the Department of Education. It's the law. Will you do so?

Secretary KING. To be clear, we will certainly follow the statute. The programs that we discussed in our call that existed in 2015 were funded through the appropriations process in 2016. Those programs continue, and the employees associated with those programs continue to do that work. As programs are phased out through the appropriations process and the close-out process is completed for those programs, yes, those positions would be eliminated. We talked about the individuals, the incumbents in those

positions, and I said I thought it was likely that some of those people would pursue other positions, available positions within the Department.

If there are programs that are eliminated, then those staff positions will not be needed. Virtually every program that existed in 2015 was funded through the appropriations process for 2016.

Senator ENZI. In the Senate there are distinctly different jobs. The appropriators get to set the maximum amount of money that you can do. The authorizers set what you can do. That law is very clear as it's written, and we worked on this reauthorization for many years, and I think we finally got it to where it needs to be. We're not rewriting it, and I expect that you won't do it as well. I'd encourage you to answer all congressional inquiries within a timely manner and actually have the inquiry come from you. I haven't gotten anything from you yet. I've gotten it from some assistants, and I had to wait over 3 months for a response to that letter I wrote allowing you an opportunity to clarify an answer that troubled me.

There are two other letters that were sent by Senator Alexander and I, and again those letters are answered by subordinates. I appreciate the response from your staff, but when I write to you, I expect to hear from you. Because we're doing a vote, I won't take a lot of time. I've got two more very important questions that I think are a part of the law that I will submit, so I yield the balance of my time.

Senator MURRAY. Senator Murphy. Senator Murphy, I believe Senator Alexander should be back by the time you finish as well.

#### STATEMENT OF SENATOR MURPHY

Senator MURPHY. OK. Thank you very much, Senator Murray.

Welcome back, Secretary King. Thank you very much for being so available to us, making frequent visits before the committee. I know how important this is to you, and you know how important it is to us.

I want to talk to you about the accountability regulations, and in particular I wanted to ask you two questions, one about the regulations around N size, which for members here that don't know is the terminology we use to determine the size of the subgroups that are counted for accountability purposes, then I want to ask you a second question on how we measure the performance of the subgroups.

As many of us have said over and over and over again, ESSA is fundamentally a civil rights law. There's no reason for the U.S. Congress to be involved in the business of local education unless we are in the business of making sure that this is a basket of civil rights protections. We made very clear in the law that we wanted schools to have specific, targeted interventions for what we call subgroups. These are populations of poor students or disabled students or minority students. But we also specifically said in the law that Congress wasn't going to dictate, nor was the Administration going to dictate, how big these subgroups would be. But clearly, there is a number that is in violation of both, I would argue, the spirit and the letter of the law. If you had a subgroup that was 100

students large and anything under 100 students didn't count as a subgroup, then you wouldn't be in compliance with the law.

Rightfully, the regulations, true to the law, not stating a particular number, say that if your number is 30 or higher, you have to explain why. And the reason for that is that if every State pegs their number at 30 or higher, then one out of every five disabled students, for instance, in this country won't be subject to any accountability standards.

I wanted to ask you about why you picked this number 30, because I think there's a lot of us who are concerned that that number is too high; that, in fact, there are 29 States today that have N sizes that are under 30 that under this regulation might consider moving that number up.

Just talk to me about this issue of why you picked 30. Many of us are very concerned that if that becomes the new normal and any minority student or poor student who is in a school and there's less than 30 of them, they won't be counted, that leaves a lot of kids outside of the accountability system. Talk to me about that.

Secretary KING. As you indicated, the law preserves the ability for States to set the N size, but we wanted to make sure that there were thoughtful parameters as States think about what N size to use. We require them, as you said, to provide a justification if they are going over 30. We did that based on research evidence. There was an IES study that showed that for students with disabilities, if you set the N size above 30, you would only get to about 32 percent of students with disabilities. But if you set it at 30 or lower, you would get to 79 percent of students with disabilities potentially being identified within subgroups in schools.

That's how we came up with 30. But the idea is that States would give their explanation in their State plan, and that would be subject to peer review.

Senator MURPHY. How about the second question about the accountability regimes? You've allowed for a multitude of factors to be built into accountability standards, but I'm concerned that there could be States that use standards that don't necessarily tell the true story about how students are performing.

For instance, in my State, we've got pretty high graduation rates, but we have pretty low proficiency rates in math and reading. For instance, 58 percent of African American high school students are proficient in reading, and yet they have a graduation rate of 80 percent. If you use graduation rates, then you're not really seeing the underlying story, in part because you've got things like social promotion that pushes kids out the door.

What are the tools at the Department's disposal to make sure that these accountability systems are actually capturing the true performance of students?

Secretary KING. The statute really gives States the responsibility to design their accountability systems, as you know, but also says that the academic indicators need to have substantial weight and much greater weight than the non-academic indicators. We've tried to structure the State plan process so that the peers will evaluate whether or not States have indeed complied with that substantial weight requirement and much greater weight requirement by ensuring that schools where students aren't making academic

progress continue to get the comprehensive support that they need to improve performance for students, that schools that are getting targeted support because of subgroup under-performance actually see meaningful improvement in the academic performance of those subgroups.

We've tried to balance both State flexibility with civil rights guardrails to make sure that States really are paying attention to the kids who are most at risk.

Senator MURPHY. I ask these questions to make the committee aware there are a lot of us that were very involved in these accountability regulations who frankly don't think they go far enough. To the extent that in this city you know you've done something right when both sides aren't happy, I know there are many that think some aspects of the regulations go too far, there are many of us who think that they could have gone much farther, and I appreciate you taking concerns from both sides.

Just a last thing, Mr. Chairman. Some of the data that I was referring to was in a study called *Ensuring Equity in ESSA: The Role of N-Size in Subgroup Accountability*, from the Alliance for Excellence in Education. I ask to enter this into the record.

The CHAIRMAN. [Presiding] Thank you. It will be, Senator Murphy.

Senator MURPHY. Thank you, Senator.

[The information referred to can be found in additional material, and online at <https://www.all4ed.org>.]

The CHAIRMAN. Senator Burr

#### STATEMENT OF SENATOR BURR

Senator BURR. Thank you.

Mr. Secretary, I'll be brief because of the vote.

Why does the Federal Department of Education not trust local schools to solve problems in their own school systems?

Secretary KING. We do trust State and local flexibility. At the same time, we know there's a long history in this country of States and districts not——

Senator BURR. So the fact that we passed legislation that reinforced their local flexibility, you don't buy that.

Secretary KING. We think that local flexibility is important, but we also think the law importantly preserves civil rights guardrails that are essential.

Senator BURR. Mr. Secretary, have you ever been to a school in North Carolina?

Secretary KING. I have visited schools in North Carolina, yes.

Senator BURR. Have you been there since you've been Secretary?

Secretary KING. I've not been to a school in North Carolina since I've been Secretary, no.

Senator BURR. You cite in this rule within the proposed regulation that you're forcing this new accountability regime on 90,000 schools. You point to research done in 2014 by the National Bureau of Economic Research on how NCLB accountability systems incentivize school label for sanctions improved in areas that led to their identification in the State's accountability system. That re-

search focused on North Carolina, and I took interest in this citation because of North Carolina.

What your rule doesn't mention in citing that research is that the authors of the research explicitly cautioned that given the limited breadth of the research finding, "one should not jump to the conclusion that No Child Left Behind-style sanctions regimes is an effective way to identify schools in need of change."

Simple question: Why would you continue to head down this destructive path?

Secretary KING. I think our regulations actually preserve State and local flexibility, advance State and local flexibility within the areas of defining educational excellence and defining the interventions in struggling schools. I agree that one of the problems in No Child Left Behind was an overly prescriptive set of responses to struggles in schools.

At the same time, we have to make sure that States and districts pay attention when their students of color or their low-income students or their English learners or their students with disabilities are not performing.

Senator BURR. In your comments back on this rule, have you had people supportive of this pathway that you're headed down?

Secretary KING. The proposed accountability regulations reflect much of the comment that we have received, and I anticipate that we will continue to get comment, particularly from parents' organizations, educator organizations, and civil rights organizations who worry that in the absence of the civil rights guardrails that the law puts in place—

Senator BURR. I would ask that you share with the committee that list of groups that have come out and said they're supportive of this pathway.

I thank the Chair.

The CHAIRMAN. Thank you, Senator Burr.

Senator Warren.

#### STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman.

Thank you for being here, Secretary King.

The Department of Education recently released its latest Civil Rights Data Collection Report, a survey of American public schools that looks at students' access to resources like advanced classes that prepare them for college.

But when I reviewed the data, I'm very concerned by what I see. Low-income students and students of color are disproportionately attending schools where they simply don't have access to the kinds of classes they need for our most competitive colleges and universities. I just want to highlight one example out of the report. According to your data, the clear majority of mostly White high schools offer calculus, which makes sense, because it is a prerequisite for most colleges. But only a third of mostly Black and Latino high schools offer calculus, which means that the kids attending two-thirds of mostly Black or Latino high schools are at a serious disadvantage in preparing themselves for college.

Secretary King, can you explain how the Department's implementation of ESSA and your proposed regulations will help close these critical opportunity gaps for our students?

Secretary KING. Certainly, our hope is that as States develop their accountability systems, that they will include indicators like access to advanced courses. You're exactly right about calculus. We see a similar pattern around chemistry, around physics, around access to advanced placement and international baccalaureate courses. States have the option to include that kind of indicator and then to act on it, we hope.

We also think it's important that States are transparent about equitable access to resources, and advanced course work could be a part of that.

We also think this goes to the heart of the supplement, not supplant question, that to the extent that schools serving high-need students can't offer these courses, it is often bound up with a lack of resources, and ensuring that the Federal resources are indeed supplemental is essential to making sure that kids have equitable access to these opportunities.

Senator WARREN. Thank you very much. I am glad that your proposed rules give us better data to shine light on these disparities. But we're also going to need to use those data to make clear to States that short-changing students based on where they live or their family incomes is just unacceptable, and I hope you'll continue to deliver the message loud and clear as you move forward with the accountability provisions in ESSA.

Now I want to turn to some other troubling data recently out of the Department. This time it's on the higher education side. New data from the Department's Student Loan Bank show that despite the availability of many repayment options to help students, we're still facing an avalanche of student loan defaults. When a student defaults, the bank hammers them, seizing wages, slamming their credit reports. But it seems that life isn't so hard for the servicers who get paid to manage those loans.

So here's my question, Secretary King. The Department announced a new competition for these servicing contracts, and I know you are looking to clean up these deals. Can you tell me what you're doing to make sure that the next round of negotiations creates some accountability for these companies so they actually help families who are struggling instead of just fattening their own bottom line?

Secretary KING. Yes. We are developing a new servicer contract and a new servicer structure that will involve a common platform with multiple servicers providing services through that platform. Borrowers will have a single entry point where they can get and submit information, but then servicers will compete on performance.

One of the key things that we've done in that servicer contract re-compete is built in a set of principles that implement the President's Student Bill of Rights, Student Borrowers Bill of Rights. Those principles were developed jointly with the Treasury Department and CFPB and we think represent what good servicing should look like.



This contract will proceed in several stages: first, identification of the platform provider, and then the identification of the servicers who will work on that platform. But we intend to ensure that servicers do a good job supporting students, and better than they've done.

Senator WARREN. Good. I'm very glad to hear this and this commitment on your part. Let me put a finer point on this. What role should the company's political influence here in Congress or their connections to officials inside the Student Loan Bank play in the selection process for these servicers?

Secretary KING. None.

Senator WARREN. Good. Thank you.

Three years ago the head of the Student Loan Bank testified in this committee that it was basically impossible to hold one of the biggest servicers accountable for breaking the rules because they were more or less too big to fail, and this has to stop. Past performance matters. If the Department grants another massive new contract to a company with a track record of harming students and members of the military, or if the company is facing State AG and Federal lawsuit investigations, then I think that's a serious problem. I know that you want real reform, and that means holding these student loan servicers accountable. I know that those companies have a lot of lobbyists right here on Capitol Hill, but the families and the students don't, and they need you.

Secretary KING. Absolutely.

Senator WARREN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Isakson.

#### STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Chairman Alexander, and thank you for your great work on ESSA, and thank you for calling in advance and asking what I was going to ask you so you had a week to prepare.

No. 1, I'm married to an IDEA teacher, speech and hearing, who worked with special education for years, have always had a quarrel with the 1 percent cap on cognitive disability for assessment purposes because I believe that the IEP ought to be required for every student in America's schools to determine the best educational plan given their ability, both exceedingly good or exceedingly bad.

With that said, what are you doing to help ensure that kids are identified for IDEA purposes in terms of their education, and what are you doing to give us the flexibility necessary to see to it a kid can be assessed on the mechanism that's best for their intellectual capability?

Secretary KING. This was one of the topics that was part of the negotiated rulemaking, and consensus was reached on the structure both for the requirements for the 1 percent cap and also the waiver process for the 1 percent cap. That consensus reflects the principle that we believe that all students with the right supports and accommodations can ultimately succeed, except there is an important need to pay attention to the needs of those with severe cognitive disabilities who may be unable to achieve at the same level.

So the negotiators tried to strike the right balance in both defining the cap and defining the requirements for the waiver.

Senator ISAKSON. I want to yield in favor of the child every single time with a disability. We need to make sure they're getting the appropriate assessment, and the arbitrary cap by government is not the right way to run that program.

Second, on what Ms. Warren was asking, Senator Warren was asking a minute ago, aren't all student loans now direct loans from the government?

Secretary KING. There are student loans that are taken through private lenders, but within the direct loan program we've tried to put in place repayment options that we think will help address some of the default problems that we have by allowing folks to cap the percentage of their income that goes to student loan repayment at 10 percent of their income.

Senator ISAKSON. The service agents are agents for the government, are they not?

Secretary KING. The servicers do work for us under contract, and unfortunately I think historically those contracts have not built in all the borrower protections that they should have, and we intend to ensure that they do going forward.

Senator ISAKSON. That would be our fault, not the servicer's fault. Is that not correct?

Secretary KING. At the end of the day, the servicers also have a responsibility to not try to read the contract to find loopholes to provide less than adequate service to students. And rather than focus on where we've been, we're focused on going forward and ensuring that the contracts build in the right protections for students.

Senator ISAKSON. The point I want to get to is this. One of the biggest things we need to do in education is teach our kids how to be responsible in managing their own money and learning the life skills that are necessary. Student loans are a good way for us to do that. I think the more we focus on teaching our students to borrow what they can repay and to understand repayment is an obligation, not just a promise, we'll be a lot better off. I just wanted to throw that in real quickly.

On the 95 percent assessment threshold—are you familiar with what I'm talking about?

Secretary KING. Yes.

Senator ISAKSON. We gave a lot of flexibility to the systems, and I gave them a lot of flexibility to allow students' parents to opt their child out of an assessment. Are you familiar with that provision?

Secretary KING. I am.

Senator ISAKSON. It's possible because of opt out and other anomalies that may happen, the system may fall below 95 percent. Is that not correct?

Secretary KING. Both NCLB and the Every Student Succeeds Act have a requirement that States would assess all students, and ESSA, as you know, has a specific requirement for State action when the participation falls below 95 percent.

Senator ISAKSON. That's my point. The 95 percent is a goal, and the State has the responsibility, if the State doesn't meet that goal, to execute a plan to get to that point. Is that not correct?

Secretary KING. In our regulations, we provide a set of options for States, including a State-determined option for how they would address being under the 95 percent participation, and ultimately getting to the all-student participation that's required by the statute.

Senator ISAKSON. Are you sure they're options, or are they mandates?

Secretary KING. They're a set of options, including a State-determined option.

Senator ISAKSON. Because I think our intention—Secretary Alexander, Chairman Alexander now, past Secretary Alexander, tried to get us to do, and we did a very good job of it, setting goals but leaving the administration, the punishment, the calculation and the goals, or the mechanisms to achieve those goals to the States, not to the Federal Government.

Secretary KING. This is a place where there will be State options, and the States would describe which option they had chosen in their State plan that would be subject to peer review.

Senator ISAKSON. I think the point is it's very important that we carry out not only the letter of the law but the spirit of the law, and the spirit of that law was to leave the determination to the local board of education or the State wherever possible to achieve and meet those goals.

Thank you, Mr. Chairman.

The CHAIRMAN. Thanks.

Mr. Secretary, I don't usually do this on the way to Senator Franken, but you have no authority in the law to prescribe specific options. That's the job of the Congress, and that's something we need to talk about as we go along. None whatsoever.

Secretary KING. Just to be clear—

The CHAIRMAN. None whatsoever.

Secretary KING [continuing]. We describe options, and then States choose, including—

The CHAIRMAN. But you do not have the authority to define what options States may choose. The State has the specific authority and flexibility under the law to do that. That's what No Child Left Behind kept doing, and that's what the problem is with this rule.

Secretary KING. One of the options is the State defines exactly what they will do, and then that is part of their State plan. So just to be clear, although we describe options, the State is determining their approach entirely.

The CHAIRMAN. That's helpful. Thank you for allowing me to clear that up.

Senator Franken.

#### STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

I want to talk about something that is of particular interest to me and that I was very glad we were able to get into ESSA, which is making sure that foster kids can stay in their school when they change foster parents. We had testimony, I think it was back in 2010, of a young lady named McKayla from Minnesota who ended up going to Hamlin and has done very well, a very impressive young lady. She had missed 4th grade entirely when she changed

parents. These kids, foster kids, have 10, 11 foster parents, routinely, and very often the only constant in their life is their school.

What has been going on is the kids who have a favorite subject, a teacher, an activity in their school that is the biggest constant in their life, friends, for goodness sake, in a school, suddenly change foster parents and they are forced to go to a different school. Everyone sort of agreed finally, we got this done. So basically the way we wrote it in ESSA is the school district and the public welfare agencies have to figure out how to pay for transportation. If the kid is moved outside the school district to get to school, somebody has to pay.

In your proposed regulation, school districts are ultimately responsible for providing and funding transportation for foster kids to their school of origin. Since it's the comment period on that regulation, I'd like to comment, and I'd rather you go with your guidance, because your guidance does not specify who is ultimately responsible. I'd like the school and the public welfare agencies in the State to be working together on this. I want to eliminate any kind of barrier to this happening. This makes such a difference to these kids, and these kids deserve to stay in their school. That's my comment.

Secretary KING. I appreciate that. We share the commitment around educational stability for foster youth, because kids are moving between schools is often the reason that kids miss school, do not make the academic progress they need to, are retained in grade, drop out.

What we try to do in the guidance is say that the child welfare agencies and the school districts should be working together, and we offer examples of best practice around the country, including best practice around dispute resolution when the child welfare agency and the LEA have different perspectives. It is true that in the regulations we try to offer a path for how those disputes would ultimately be resolved around transportation costs. But, yes, we are taking comment and we will consider all comment, including yours.

Senator FRANKEN. Thank you for including my comment. I'm a Senator. My goodness, I think all of you should be insulted.

[Laughter.]

I want to talk about something else that I worked for to get into this bill. Given that one in five youth between the ages of 13 to 18 have or will have a serious mental illness, I firmly believe that mental health is one of our country's most pressing unmet needs. I'm proud of the work that we've been able to accomplish on mental health, but we have a long way to go.

In ESSA, we include provisions that I've long championed to increase mental health services in schools. That's why I was very disappointed that the spending bill that passed out of the Senate Appropriations Committee did not provide adequate funding for ESSA student support and academic enrichment grants, which includes my mental health provisions and other critical programs that Americans really care about. That's really something that parents care about, and the schools care about, and I'm hopeful that we can increase the funding once this bill comes to the floor.

My question is what can the Department of Education do to support school districts that are trying to expand mental health services at the local level? Because I've seen this work in school districts that do this. I've had roundtables with parents who say it has changed their family, it has changed their kid's life, it has changed them.

Secretary KING. Yes. We share your disappointment with the proposed funding level for title IV. Certainly, the President proposed a significant increase around title IV, \$222 million in additional funding for title IV, because we'd like to see more access to mental health services, among other elements that are addressed in title IV.

We issued joint guidance earlier this year with Health and Human Services to help guide schools and districts on how they could take advantage of the Affordable Care Act to support school-based mental health services. We think there are existing dollars under ACA and Medicaid that could be used to support school-based mental health services, and we offer some examples of best practices in that joint guidance.

We also, through our Promise Neighborhood Grant program, are supporting efforts to match schools with community-based organizations and community-based health providers to try to get those mental health services to kids and to families, because often mental health issues in the family have an impact on children as well.

I share your commitment and would love to see the title IV funding higher.

Senator FRANKEN. OK, thank you.

Thank you, Mr. Chairman, and I hope that my colleagues share this commitment to mental health in schools so that we can maybe get a little bit more funding for that.

The CHAIRMAN. Thank you, Senator Franken.

Senator Roberts.

#### STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Thank you, Mr. Chairman.

As the distinguished chairman of the committee has said many times, the bill which we passed last year to reauthorize ESEA restores responsibility to States for their local schools by providing increased flexibility to design and implement their education programs. The key word here is "local." I'm very proud the bill includes my language to permanently end the Federal Government's ability to use any incentive or tool or coercion to force States to adopt Common Core. If they want Common Core, fine. If they don't, that's the intent.

In fact, just to be absolutely clear, here's what my language says:

"No officer or employee of the Federal Government, including the Secretary, shall attempt to influence, condition, incentivize, or coerce State adoption of the Common Core State standards, or any other academic standards common to a significant number of States or assessments tied to such standards."

Here's the problem. A high-ranking education leader in Kansas recently pointed out to me—and the fact that he wants to be anonymous is rather telling—

“It is not, in our opinion, that the new ESSA law, based on the current version of the proposed regulations, is giving States flexibility around developing a rigorous and accountable model. It appears that, once again we can only build something as long as it meets a strict Federal requirement.”

That certainly sounds like, to me at least, that the Department of Education is not following the spirit and intent of the Every Student Succeeds Act. As everyone is aware, ESSA has countless prohibitions explicitly stating that the Federal Government is prohibited from mandating, directing, controlling, coercing, or exercising any direction or supervision over academic standards that States develop or adopt, including Common Core State standards. The Administration is prohibited from influencing, incentivizing, or coercing States or school districts to adopt any specific academic standards.

Mr. Secretary, I would like specifically to bring your attention to Section 1005(b) of the Act, which states that,

“States shall provide an assurance”—a-s-s-u-r-a-n-c-e—“assurance that the State has adopted challenging academic content standards.” Let me repeat that. A State shall only provide an assurance that they have adopted academic standards.

Turning to proposed regulation 29916, which addresses the State plan requirements for challenging academic standards and academic assessments, this section would require each State education agency to provide evidence, evidence demonstrating that it has adopted changing academic content standards and aligned academic achievement standards.

My question: What is the evidence for? Who is the judge? Where is it going? What Federal involvement or requirement has now been reinstated regarding academic standards? This, to me, is an example of the Department of Education trying to influence State academic standards once again, and it is also contrary to your commitment to me with respect to the intent, as well as the explicit prohibitions in the law, during your nomination hearing. In my view, there is obviously a big difference between providing an assurance and providing evidence. This proposed regulation eviscerates the intent of Congress and ESSA.

Mr. Secretary, would you please explain what I think is a blatant violation of numerous prohibitions, and also the ESSA statute, that clearly says a State need only to provide an assurance that they have adopted academic standards, not evidence, to somebody within the dusty Common Core halls of the Department of Education?

Secretary KING. Let me say as clearly as possible that standards are determined by States. The law is clear on that point. We are clear on that point. I’ve been clear on that point, as you said, in our prior conversations.

The law also requires a process for ensuring that States have an assessment system that has been through peer review and that is fair to students and reliable. As part of that process, States provide evidence to peer reviewers, other States, and experts on assessment who participate in a process to ensure that the State has gone through a rigorous and reliable process of matching their

standards to their assessments. And as part of that process, that peer review process, which is underway——

Senator ROBERTS. We're doing a two-step here, not a one-step.

Secretary KING. This is unrelated to the content of the standard.

Senator ROBERTS [continuing]. The box and say we are assuring you that we're doing that with regards to your standards that are probably in writing so that they can understand what they are. But you're saying that there is a secondary step that they're going through with a whole bunch of folks who have to then say, OK, we are providing evidence. I don't know what that evidence is. I don't know what it means. Is it a lot of paperwork? Is it a rigorous test? What is it?

Secretary KING. The longstanding peer review process required under NCLB is still in place under ESSA, a peer review process to ensure that the assessment system that a State develops is a valid one. And as part of that process, the peer reviewers——

Senator ROBERTS. Who are the peer reviewers?

Secretary KING. Those are other States and would include experts on assessment who would participate in the peer review process.

Senator ROBERTS. What, the big 12? What are we doing here?

Secretary KING. These would be folks who work in other States and have worked on assessment systems across States who try to ensure that the assessments fairly reflect the law, are consistent with the law. So what States are doing is providing evidence of a process by which they have aligned their assessments with their standards.

Senator ROBERTS. But we said assurance. We said assurance. We didn't say—this is two different things. Now you've got peer review folks. Perhaps they're helpful. But again, they could just check the box with assurance, as opposed to providing evidence to—I don't know how many peer review groups you're talking about. But it seems to me we're going to have to have some further discussion about this, without any question. I appreciate your response.

Secretary KING. And we are open to feedback on how we can make absolutely clear in the regulations that standards are set by States. That is clearly a shared commitment.

Senator ROBERTS. I think that there's a peer review for my distinguished colleague from Massachusetts. In Kansas, perhaps that would not be received with open arms, and probably from Kansas to Massachusetts would be the same thing. I apologize to my colleague.

The CHAIRMAN. Thank you, Senator Roberts.

Senator Bennet.

#### STATEMENT OF SENATOR BENNET

Senator BENNET. Thank you, Mr. Chairman. Thank you very much for holding this hearing.

Mr. Secretary, it's great to see you again. Thank you for your leadership.

In Colorado last week a bunch of folks came together and had an ESSA summit there. There's a lot of excitement about the possibility of now being out from under No Child Left Behind. We're having conversations about how we use that flexibility, at the same

time make sure we've got the rigor that's needed. I know you yourself were a former principal of a school.

I wonder whether you could talk about what the Department is doing to ensure that the voices and the knowledge of the people that are working in our schools, our teachers and our principals, are being involved in ESSA implementation around the country.

Secretary KING. Thanks. That's been a priority for us, and also a priority that we have communicated to States around their process. We've held over 200 meetings around the country with educators, with parents, with community leaders as we've worked to develop regulations and guidance, and received comments from over 700 individuals and organizations.

At the State level we put out a Dear Colleague letter just last week to States laying out recommendations and best practices around stakeholder engagement. I think lots of States are doing a good job on this, but we worry some aren't. Some haven't worked with their districts to make sure that teachers or principals, for example, can get release time so that they can participate in this process. Some States have been slower than others to engage tribal leaders and civil rights organizations. We've been encouraging folks around the Council of Chief State School Officers, put out a guide to stakeholder engagement that they developed with a number of organizations, including civil rights organizations, and we've made clear in the regulations stakeholder engagement throughout the process is required.

Senator BENNET. One of the things that is certainly true of the change in the law is that we have devolved the responsibility for implementation back to the States in a fairly significant way. How do you expect over time we're going to be able to identify those places where they really are setting a rigorous standard for kids and demanding that standard for kids in places where it's a less rigorous standard, and what do you expect the conversation to be like?

Secretary KING. I think there are a number of protections around that. One is the peer review process at the outset that I was just talking with Senator Roberts about. There's also the transparency requirements that I think will help us understand where subgroups are not performing, and we'll be able to see are States making progress there.

But one of the things the Department is going to need to be vigilant about is the law provides a lot of flexibility for States around how to intervene in schools that are struggling or schools with low graduation rates or schools with struggling subgroups, but we've got to make sure that those interventions actually translate into progress and that States respond when that progress isn't made.

Senator BENNET. Could you talk also a little bit—it's often been said up here that this law is a civil rights law, and I agree with that. I think there's not really any other reason for the Federal Government to be involved in education other than that at the K-12 level. Could you talk about what you're doing, the Department is doing to ensure that as we go forward that spirit is maintained, and the commitment to equity that I think everybody up here shares to one degree or another is also maintained?



Secretary KING. Yes. We tried throughout the accountability regulations to preserve the important civil rights guardrails, making clear that States need to provide disaggregated data for all subgroups, not just at the summative level but for each of the accountability indicators that they put in place; that States need to have a clear process in place for identifying schools that have consistently underperforming subgroups, and then have meaningful intervention in those schools to improve subgroup performance; that there's clear data disaggregation around equitable access to resources so that we can ensure that schools are providing opportunity on an equitable basis to our students of color, our low-income students, our English learners, our students with disabilities.

This work is going to require continued vigilance on the part not only of the Federal Government but of States and districts to make sure that we don't let kids fall through the cracks.

Senator BENNET. My time is almost up, Mr. Secretary. I wanted to get in one last question. There are no more Federal models for escalating consequences as there were in No Child Left Behind. That's now left to the States and local districts to figure out, to research and design these, and I just wonder whether you've thought that through a little bit, about how people are going to have the research they need in order to implement targeted school improvement strategies in this new world.

Secretary KING. Yes. It's very important that folks do that informed by evidence about what works, and certainly in efforts like the Education Innovation and Research Fund, the work of IES will help to provide that evidence base. We try in the regulations to talk about how States can, as they move progressively forward in more intense interventions if schools aren't making progress, they need to rely on stronger evidence of effectiveness as they move through those levels of intervention, because we do have some good evidence around interventions that work. We know that in schools with struggling English learners, professional development for teachers around working with English learners using dual language strategies has a strong evidence base, and we want to make sure that folks are thinking about that as they plan their interventions.

Senator BENNET. Thank you, Mr. Secretary.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Bennet.

Senator Collins.

#### STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman. Mr. Chairman, as I've listened to the debate at this hearing today, I am reminded of a provision that I wrote that was included in the Dodd-Frank Act that was known as the Collins Amendment. I had a longstanding battle with Federal regulators on the implementation of that amendment, and finally the Banking Committee actually held a hearing on what was the intent of the Collins Amendment. And needless to say, I was the lead-off witness. I started off by pointing out that I was Collins, I am Collins, I'm still around, and I know what my intent is.

I would say to you, Mr. Secretary, hearing the debate today, that Senator Alexander and Senator Murray, who are the authors of this rewrite of the Elementary and Secondary Education Act, are still here. They know what their intent is. They were careful in drafting the bill. And that's why there is this frustration that many of us are feeling.

I want to talk about the reporting requirements that are included in your proposed regulations. I think all of us can agree that transparency is essential, but reporting requirements should not be so onerous that small school systems in rural States have difficulty in complying unless they are specifically authorized by the Every Student Succeeds Act. We want to make sure the reporting requirements give parents and communities the information about their State accountability systems, but the proposed regulations establish many more reporting requirements than required by the law.

They include, among other things, how States calculate and report data on the report cards, additional data for charter school students, and procedures for calculating reporting district and school expenditures.

Two questions. Can you point to specific authority in ESSA that you believe allows the Department to propose these additional reporting requirements, which appear to me to be contrary to the intent of the law? And second, how does the Department square these additional reporting requirements with the mandate in the law that report cards be concise, understandable, and accessible?

Secretary KING. We believe the reporting requirements in the draft regulations are consistent with the statute. We certainly are open to feedback on the reporting requirements, as we are to the entire regulation, look forward to feedback from stakeholders. There are places in the statute where, in order to fulfill the requirement of the statute, additional data will be necessary for States. But again, we are open to feedback on the proposed regulations, and if there are places where folks think there is already, for example, an existing data report that addresses something, we're open to consolidating those. So this is a place where we look forward to stakeholder feedback.

Senator COLLINS. To me it's obvious in the law what is required, so I hope you'll take a look.

I want to second the comments made by the Chairman about the summative rating from three rating categories for each school. The Act requires that States evaluate their schools on academic and non-academic factors, but it does not require that each school be given a single rating. So, here we go. We seem to be going in the proposed regulations away from the new innovative educational approaches in favor of maintaining the status quo and the inflexible requirements of No Child Left Behind that were discouraging to teachers, to parents, to administrators, and students alike.

How does a summative rating, which essentially reduces a school to a single number or letter grade, support the goal of State flexibility, which was a fundamental premise of the rewrite of this law?

Secretary KING. The summative rating language in the regulation does not require the use of a letter grade or a numerical index. A State could use those, but a State could also use a categorical system consistent with the statute. The statute requires that

States identify schools for comprehensive support, that States identify schools for targeted support, and then there will be schools that are in neither of those categories. The statute envisions a categorical system, at a minimum. That's consistent with our summative rating approach.

Also, to identify the bottom 5 percent of schools that will get that comprehensive support, States will need to have a methodology to identify those schools that will require relative comparison of school performance, exactly what's intended by the summative rating language.

We think that the summative rating is exactly consistent with the statute.

Senator COLLINS. I would beg to differ, but my time has expired.

The CHAIRMAN. Thank you, Senator Collins.

Senator Casey.

#### STATEMENT OF SENATOR CASEY

Senator CASEY. Thank you, Mr. Chairman.

Mr. Secretary, thanks for being here today and for your testimony. We all want to make sure that we're making the right investments and making the right decisions with regard to children. I've often said that if kids learn more now, they'll earn more later, and that's not just a rhyme, it's literally the truth. We know that. That starts certainly with great teachers at the core of that process of learning more so they can earn more later.

I want to ask you two basic questions about teachers. First on the question of professional development, we know that in ESSA part of my legislation, the so-called BEST Act, was included to make sure that States and districts, school districts, implement evidence-based activities to strengthen the teaching profession and keep great teachers in the classroom.

Could you describe the work that your Department is doing to support districts in providing effective professional development? And then I have a second question about teachers.

Secretary KING. Yes. We certainly believe professional development can be key to improving academic outcomes, and also improving teachers' ability to serve particularly at-risk populations of students, English learners, students with disabilities. We plan to issue guidance on title II, and we have some examples of best practice around the use of title II dollars to support high-quality professional development. We also are supporting States as they implement their equity plans around equitable access to effective teaching. Many of those equity plans rely heavily on quality professional development.

We also have a number of professional development programs that are part of the Education Innovation and Research, or i3 program, and as those evaluations come back, we will have even a broader evidence base around effective professional development strategies that States and districts will be able to access.

Senator CASEY. I appreciate that because we can't seek to have great teachers in classrooms if we don't have great professional development.

I wanted to ask you as well—it's an issue that I think Senator Bennet raised earlier, and I want to expand upon it a little bit.

This question of engagement by stakeholders, which is always the intent that we have educators, teachers, and other education professionals, parents and community leaders involved, and I know there's been a fairly robust and significant engagement. But I wanted you to give us a sense of how do you measure that, how do you demonstrate that there's been that kind of engagement, because I know that you sent a letter to State leaders highlighting the importance of that kind of engagement. I know and I would applaud what Senator Murray and Representative Scott have done in raising this issue. But I want to get your sense of where we are with engaging all of those critically important stakeholders.

Secretary KING. Yes. There are some encouraging signs. The Council of Chief State School Officers issued a guide to stakeholder engagement, pointing out best practices, and they did that in partnership with over 30 organizations, civil rights organizations, educator organizations. I think that was an important step, an important resource for States.

As I've talked with State chiefs, I've heard about efforts to do statewide tours, to hold public hearings, the effort to reach out to tribal leaders and civil rights organizations, parent groups, particularly parents of students who have been historically underserved, like students with disabilities and English learners.

But there is certainly a range, and one of the reasons we issued the Dear Colleague letter is because of a concern that in some States they've been slower to do that stakeholder engagement, and in some States they've had a challenge around teachers and principals in particular getting the time that they need, the release time from their districts to participate in these activities. We wanted to try to encourage States to be very active in getting their districts to make sure educators can participate fully.

We also in the regulations set out a requirement for frequent, consistent engagement of stakeholders. I think the success of the law is partly bound up with how effectively States mobilize a diverse cross-section of stakeholders in this work.

Senator CASEY. I appreciate that. We just want to hear all those voices, especially the voices of educators.

I'll submit for the record a question on the work on suspensions and expulsions, trying to reduce the use of those practices. We'll submit that in writing. Thanks very much.

Secretary KING. Thank you.

The CHAIRMAN. Thank you, Senator Casey.

Senator Murkowski.

#### STATEMENT OF SENATOR MURKOWSKI

Senator MURKOWSKI. Thank you, Mr. Chairman.

Secretary, I wanted to followup from a conversation that we had last time you were before the committee, and that relates to the cancellation in the State of Alaska of the Alaska Measures of Progress, the AMP assessment. As you know, we were compelled to cancel that statewide assessment because we had significant widespread, totally unexplained and unfixed technical problems that prevented students from being able to complete the AMP, a lot of frustration there, as I mentioned to you. You received a letter last week that outlines the Federal law requires assessments to

provide valid, reliable data that informs instruction, and it has to be of adequate technical quality and consistent with national recognized testing standards.

The State Department of Education has requested a waiver from the requirement to assess during the 2015–16 school year. The question to you this morning is will you approve the State's waiver?

Secretary KING. As you know, we've been in close communication with leadership in Alaska. I think we're awaiting the submission of some materials describing some of what took place as part of their waiver application. We will certainly review those when they come in.

Senator MURKOWSKI. How much time do you figure you're going to need to make this determination? Because this is obviously very, very important to the State of Alaska.

Secretary KING. Yes. In the past in these situations it's been a matter of weeks that we've needed to review the material submitted by the State, including the State's plan to make sure that they have a system in place to ensure that they're——

Senator MURKOWSKI. You've had it for some time now, but you're saying that you're requiring additional information from the State?

Secretary KING. We can followup on the details. I know there's information that we are awaiting from the State on the events that occurred, and also their plans to ensure that next year they'll be able to implement assessments consistent with the law.

Senator MURKOWSKI. As we've had the conversation, it's not as if they want to avoid assessment. But again, when you have things totally beyond your control, when Kansas basically goes dark, if you will, and you cannot complete the testing, it really is a situation that calls out for review and for waiver. So we would ask you to move on that very quickly.

You have indicated that you are waiting for some information from the State. I am still waiting for some information from your offices. When you were before the committee in April, you committed to make sure that my office was looped in as the Department and the State worked through the assessment vendor. I'm told that we are still waiting for answers to some 13 different questions that we sent to you. Can you commit to me that you will get these questions answered to me by the end of the week? Can you look into that for me?

Secretary KING. I can certainly look into it. I don't know if some of the answers to those questions are tied to the materials that we're awaiting, but certainly I can followup with you on that.

Senator MURKOWSKI. I would like your diligence on that. I appreciate it.

I would ask you about a proposal—this is this diversity proposal, or diversity priority, excuse me, that you have proposed to add for all of the Department's K–12 and post-secondary competitive grants. This priority would require all applicants to seek to increase schools' racial and socioeconomic diversity, and I understand that schools and campuses can satisfy the requirement by investigating the barriers to diversity, changing school assignment policies, creating or expanding school choice, or changing how funds are allocated to schools. I think we would all recognize that in-

creasing diversity in our schools is a worthy goal. I also understand the concerns about outcomes of students that are enrolled in some of our Nation's very high-poverty schools.

We've got a different situation in Alaska, and I hope that you recognize that we have some very, very isolated regions in the State. These are regions that are bigger than most other States. Poverty is high. The population in most of these is almost entirely Alaska Native. There are no roads. Eighty percent of the communities in Alaska are not accessible by road. Oftentimes where you do have roads, it's very dangerous to transit in the winter.

We know the barriers. We know the barriers very well. Many of the schools are barely able to sustain a K-12 school, so school choice is not an issue here. Then allocating funds is not going to change the facts on the ground. It is still a very small school, very isolated, geographically islanded.

The proposal, as we look at it, could essentially prevent many, many rural Alaskan school districts, and even some of the University of Alaska campuses, from qualifying for any competitive grants from the Department. Of course, these are just exactly the grants that are designed to help the schools serve these students better.

I would ask if you would look at this proposal and either redraft it so that schools in places like Alaska that are so remote and so unique are either exempt from this proposal or rescind it altogether. I think it is an issue where, again, we can't change the facts on the ground. We can't move that village into a place where it's on a road system. What do I do?

Secretary KING. That's understood. This priority would be one that would not be automatically applied to all grant programs. The inclusion of the——

Senator MURKOWSKI. But then wouldn't we be left out of funding opportunities?

Secretary KING. As we develop grant programs, this is one of the considerations that we would have, whether it is feasible for all of the grant applicants to pursue this particular priority. Many of our grants, as you know, have priorities around serving rural schools and rural communities. We would certainly take into account issues of geographic isolation as we assemble a grant application.

Senator MURKOWSKI. OK. I've raised it to you, and I would ask for your due consideration, either that Alaska be exempt as other States that are similarly situated or, again, redrafting. But if you could look at that, I would appreciate it.

Thank you, Mr. Chairman.

Thank you, Mr. Secretary.

The CHAIRMAN. Thank you, Senator Murkowski.

Senator Whitehouse.

#### STATEMENT OF SENATOR WHITEHOUSE

Senator WHITEHOUSE. Thanks, Chairman.

Thank you, Secretary King. Two topics from me.

One, as you know, there was a middle schools element in ESSA. We understand that you do not intend to propose any regulations in that area. We are working with the middle schools groups to try to get a consolidated view that we can work with you on for guidance, a letter of guidance with respect to the middle school require-

ments. That's a preview of coming attractions, and I'm not going to hold you to anything until we've done our homework with the middle school groups.

The second issue has to do with the provision of the bill related to innovation schools. As you know, if you are a very, very big, fancy foundation with a lot of money and you have an innovation idea, you have a very strong capacity to push that idea into and through the multiple layers of education bureaucracy. The concern that led to the innovation schools element in the bill was that if you're a school and you want to innovate in a certain way and you don't have a foundation or some big group that has adopted you, you just want to do what you think is best for the kids, you look out at multiple layers of forest. You look out first at the layer of forest of the municipal education oversight, then if you can get through that, then there's the second layer of the State education oversight apparatus, and how am I going to be able to get through that? If you can get through both of those, then there's the third problem of what do you do with the Federal education oversight apparatus.

My concern was that unless there was a path of some kind that was illuminated through those forests, we lost an enormous amount of innovation from journeys that were never begun because at the very get-go, at the principal level of the school level, they took a look at the multiple-layered bureaucratic forest in front of them and said, you know what, not worth our effort, I have no idea how this could possibly turn out in our favor.

To me at least, and to the groups that worked with me on this, to be able to move innovation out of just big intellectual centers and foundations and so forth and actually have it happen in schools is a really important thing. I wasn't in the conference, and so I can't vouch for what happened to this in conference. You and I have talked about what I've been told about who was the adversary of this provision in conference, but I would very much like to hear from you now as you look at the innovation schools piece what your intentions are, how seriously you think you take this, and whether you think there actually is a role for innovation at the school developed level rather than waiting around for big foundations to be the champions.

Secretary KING. Yes.

Senator WHITEHOUSE. And they're great, by the way. I've got nothing against the big foundations. They're important champions. I just don't think they're the only ones.

Secretary KING. That's right. First on middle schools, let me say I share your commitment on middle schools. I was a middle school principal. Now I'm a middle school parent. I think middle schools have a crucial role to play in students' long-term success, so I look forward to working together on that.

On the innovation schools, I think the way that ESSA and the regulations work together creates significantly more space for school-based innovation, and we've been careful to think about that as we've been drafting the regulations. Certainly eliminating the one-size-fits-all school intervention approach of No Child Left Behind I think creates a lot of new space for States and districts to innovate in those schools that need to improve their performance.

Senator WHITEHOUSE. That obviously only applies to schools that have fallen into that pit and now need to try to extricate themselves. For a school that's performing relatively well but simply wants to do something innovative, unless you can tell me something else, you do need a path like the innovation schools pathway because at the local school level they have no way of knowing, nor do they have the administrative resources to attempt how they'd get through that multiple set of bureaucratic obstacles, hurdles and approvals all required in front of them.

Secretary KING. I think the way we've approached the regulations creates quite a bit of space in terms of the Federal role. There's no obstacle in the regulations to States creating a similar path through some of the existing State constraints. But I'm certainly happy to continue to talk about ways that we can encourage that.

Senator WHITEHOUSE. The principle of this is that there can be a process of alignment where the municipality, the Federal Government agrees that it will step out and let innovation happen if the State and the municipality have all done the same thing, and if certain requirements have been met at the school level from the get-go to show that this is a community-supported, stakeholder-supported, teacher-supported, well-developed effort. To say that we're not going to stop the State government from doing it is a little bit different than saying we'll accept that there should be a path that is lit for schools that want to do this so that they can know that if they follow this path, they can get to a result rather than just, like I said, a lot of these journeys were never begun, and who knows what the price was for the children from the journeys never begun?

Secretary KING. I think that's right, and this is the spirit behind our Teach to Lead work, where we've worked all over the country to bring together teacher leaders to develop innovative projects in their schools and districts. Certainly as we think about the guidance we'll put out around title II, we will highlight the kinds of flexibility at the State and local level that have helped those Teach to Lead projects to thrive.

But certainly I'm open to continuing to talk about ways that we can further encourage that kind of State and local space for innovation. It's a shared commitment.

Senator WHITEHOUSE. Thank you, Chairman.

The CHAIRMAN. Thank you, Senator Whitehouse.

Senator Murray, do you have any concluding remarks?

Senator MURRAY. Thank you, Mr. Chairman. I just want to comment on the summative rating, and you answered the question. I know there's been some discussion about that.

Under our bill, States are actually required to develop accountability systems that hold schools accountable using multiple measures to judge school performance. States are required to do that because we wanted to make sure that we have better information to help States determine which schools are high performing and which ones need supporting, and to provide that information to parents as well. The bill also requires States to identify their lowest performing 5 percent of schools, high schools with graduation



rates at or below 67 percent, and schools with consistently underperforming subgroups. I did want to just clarify that.

I do appreciate your response to that. I think we want to make sure this bill works. We want to make sure parents have information, schools have information, and the resources flow in the direction that we need them to go to. I appreciate your response.

Secretary KING. Thanks.

The CHAIRMAN. Thank you, Senator Murray.

I'd like to put in the record a letter from the Network for Public Education.

"Dear Senator Alexander, when the Every Student Succeeds Act was proposed, our organization gave it qualified support. We would have preferred the elimination of mandated annual testing. We believed that under ESSA, parents, citizens and teachers would have a greater voice in the creation of their State school accountability system. We are, therefore, deeply disappointed in the proposed regulations put forth by Secretary King. It is apparent that he is seeking through regulation to maintain Federal control of State accountability systems despite the clear intent of the law. We believe that he is attempting to rewrite the law and extend Federal overreach, in some cases even beyond what was under No Child Left Behind."

We'll include this in the record with specific items.

[The information referred to was unavailable at time of print.]

The CHAIRMAN. Mr. Secretary, I thank you for coming and listening. I think that, if I understood you correctly about the timeline that Senator Murray mentioned, that I mentioned, that States can expect to have more flexibility in terms of a transition year, then a year of implementation, and then a year of identifying schools that the regulation would appear to offer. If that is the case, I hope you'll make that clear to States soon. I think if you do that, that will be seen as a welcome demonstration of flexibility and the fact that you're actually listening to the feedback that you're getting in comments on the regulation. Would you expect that before long you would make that clear? You think you just did.

Secretary KING. I think I have, but I will say that the key question that I hope States will comment on is in the schools that they are providing additional support in 2017–18, how they will identify those schools. Will that be carrying over the schools from 2016–17? Will that be schools that are newly identified using the existing system, or schools that are identified using the new indicators, if they are available?

This is a place where we've made clear to State chiefs and to others that we are eager for folks' feedback and look forward to responding to that comment in the final regulation.

The CHAIRMAN. One other just general thought, and let me use Common Core as an example, as Senator Roberts was talking. Sometimes when I say we repeal the Common Core mandate, some people have said to me, well, there really wasn't a Common Core mandate. And the answer to that is, well, there really was, in effect, because while you didn't say every State has to adopt Common Core, you said, the Secretary said at the time in order to get a waiver from the requirements of No Child Left Behind, you've got to adopt challenging standards that are common to a significant

number of States or get your State university system to do it, and, in effect, about the only way to meet that requirement was to adopt Common Core, and that's what 30 of the 42 States who got their waivers did.

I would caution you against any attempt in the regulation to do as Senator Roberts was saying, a two-step. You were saying very clearly, just as the law says, States set their own academic standards. But if the regulation makes it look like that you could reject the evidence, and by rejecting the evidence reject the standard, then that goes around the barn door. Do you envision that, that you would say to Kansas that you may set your standard but we don't like the evidence you used to set it, so therefore we're going to reject the standard?

Secretary KING. No. What we're trying to do in the regulation is describe the longstanding peer review process around States having high-quality assessments that align with their standards. Certainly if there's any lack of clarity around States' prerogative to set their standards, we want to emphasize that, and we're open to adding language that makes that even more clear.

The CHAIRMAN. I would appreciate that. One place to look might be to look at the use of the word "demonstrate" as opposed to the word "assure." That word was carefully chosen. "Assure" means let you know we've done it. "Demonstrate" means prove it to us that you did it. Those are different words. I appreciate your response. I think that's a constructive response.

I think this has been a good hearing and I appreciate your coming. This is the fourth hearing we've had on the implementation of this Act, and I'll conclude it the way I started.

We want this Act to succeed, we'd like for you to succeed, and we'd like for the teachers and the school board members and the parents around the country to have the same feeling about this law at the end of this year that they did at the end of last year, which was one that they were pleased to see that Senator Murray and others, as well as the Republicans on the committee came to a consensus, resolved our differences, created a period of stability, and restored more responsibility to people closest to the children. If we could end the year with that same sort of feeling, why, you'll have done a really good job. So would the President, so will we, and we can step back and let the teachers and the school boards and the States have this new era of innovation.

Thank you very much for coming.

Secretary KING. Thank you.

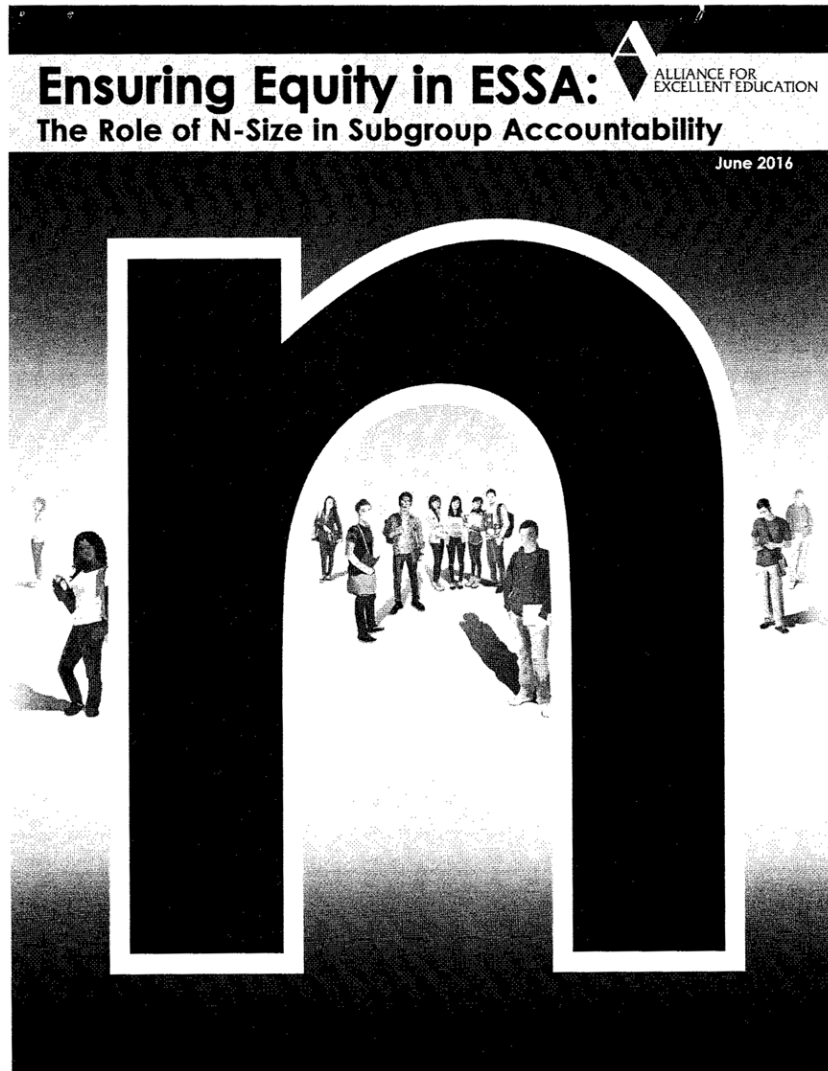
The CHAIRMAN. I look forward to continuing the conversation.

The hearing record will remain open for 10 business days. Members may submit additional information and questions to our witnesses for the record within that time, if they would like. That would be you.

Thank you for being here today.

The committee will stand adjourned.

[Additional material follows.]



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## Abstract

States are responsible for setting the minimum number of students needed to form a student subgroup for federal reporting and accountability purposes. This required student subgroup size is commonly referred to as the state-set “n-size.” States should set this number as low as possible to maximize the number of student subgroups created. This will ensure that states identify student subgroups with low academic performance and/or low high school graduation rates and provide targeted interventions to support the schools those students attend. Specifically, states should not require a subgroup to include more than ten students to include that subgroup for reporting and accountability purposes.

## Acknowledgments

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### What Is “N-Size” and Why Does It Matter?

At its core, the Elementary and Secondary Education Act (ESEA) is a civil rights law with the primary purpose of ensuring that historically underserved students have equitable access to the educational opportunities they need to reach their full potential. Knowing the achievement level of individual students is fundamental to knowing whether the purpose of this law is being fulfilled.



During its time, the No Child Left Behind Act (NCLB), the previous bill to reauthorize ESEA, required states to report on the performance of historically underserved students—including students of color, students from low-income families, and students with disabilities—and held them accountable for gaps in performance. While NCLB's approach to addressing those performance gaps was misguided, its requirement to reveal how these students were performing was a critical first step to ensuring equity.

Prior to NCLB, the overall performance of a school often masked the performance of student subgroups, hiding gaps in academic achievement and high school graduation rates for historically underserved students. The recently passed Every Student Succeeds Act (ESSA) of 2015 requires states, districts, and schools

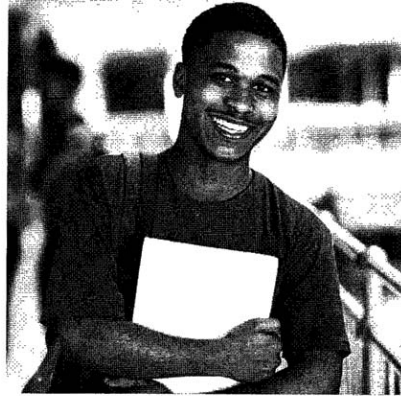
to identify low-performing subgroups of students, report on their progress, and provide targeted intervention and support when they consistently demonstrate low performance.

The key term in this requirement is “subgroups” of students, which refers to student groups based on race/ethnic status, socioeconomic status, English-language ability, and disability status. Under ESSA, as under NCLB, states set the minimum number of students required to create a subgroup of students at the school, district, and state levels. This state-set number, commonly referred to as the “n-size,” must not reveal personally identifiable information about the student and must yield statistically reliable information.<sup>1</sup> However, a significant number of states set their n-size higher than necessary to meet the requirements originally set under NCLB and maintained under ESSA.

Additionally, setting the n-size too high interferes with a state's ability to meet the student subgroup accountability requirements<sup>3</sup> under ESSA. ESSA requires states to identify schools with consistently underperforming subgroups of students and implement evidence-based, targeted intervention in these schools.

However, if a school does not have enough students from a particular subgroup to reach the state-set n-size, then the school does not have to report the academic performance or high school graduation rates of students in that subgroup and ESSA does not require interventions and support for those students. For example, if a state sets the n-size at 30 students and a high school has only twenty-nine African American students in the twelfth-grade class, that subgroup of African American students essentially does not exist for reporting and accountability purposes. The individual students would count in the high school's overall graduation rate, but the school would not report any gaps between the graduation rate of African American students and their white peers in that particular high school, nor would the school receive any intervention and support to address those gaps.

If states set the n-size higher than necessary to be statistically sound and protect student privacy, they are less likely to reveal the low performance of student subgroups. Consequently, they are more likely to overlook a number of student subgroups for both reporting and accountability purposes and underidentify schools needing and receiving targeted intervention and support.



### Consistency and Comparability of Data

Consistency across states in terms of comparable data is also an important goal to ensure accurate cross-state comparisons of gaps in student subgroup performance. Currently, significant variation exists across states regarding the minimum number of students needed for a student subgroup to exist for federal reporting and accountability and improvement purposes. As table 1 shows, for federal accountability and improvement purposes

- thirteen states set an n-size of 10 or fewer students;<sup>4</sup>
- nine states and California's *CORE Data*<sup>5</sup> set the n-size between 11 and 20 students;<sup>6</sup> and
- twenty-eight states and the District of Columbia set the n-size at 21 or more students<sup>7</sup> (eight of those states set it at 31 or more students<sup>8</sup>).

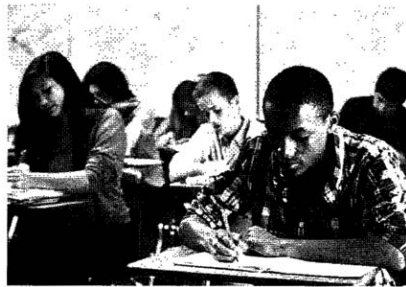




TABLE 1: State N-Size

 States with N-Size of 10 or Less

 States with N-Size Between 11 and 20

 States with N-Size of 21 or More

STATE	N-Size for Federal Accountability and Improvement Purposes	N-Size for Reporting Academic Performance and High School Graduation Rates
Alaska <sup>a</sup>	5	5
Maryland <sup>10</sup>	5	5
Wyoming <sup>11</sup>	6	6
Florida <sup>12</sup>	10	10
Iowa <sup>13</sup>	10	10
Maine <sup>14</sup>	10	10
Mississippi <sup>15</sup>	10	10
Nebraska <sup>16</sup>	10	10
North Dakota <sup>17</sup>	10	10
Oklahoma <sup>18</sup>	10	10
South Dakota <sup>19</sup>	10	10
Utah <sup>20</sup>	10	10
West Virginia <sup>21</sup>	10	10
New Hampshire <sup>22</sup>	11	11
Georgia <sup>23</sup>	15	10
Alabama <sup>24</sup>	20	10
Colorado <sup>25</sup>	16/20 <sup>a</sup>	No minimum set
Connecticut <sup>26</sup>	20	20
CORE Districts (California) <sup>27</sup>	20	20
Massachusetts <sup>28</sup>	20	6/10 <sup>b</sup>
Minnesota <sup>29</sup>	20	10
Rhode Island <sup>30</sup>	20	20
Wisconsin <sup>31</sup>	20	20
Arkansas <sup>32</sup>	25	25
District of Columbia <sup>33</sup>	25	10
Idaho <sup>34</sup>	25	25
Kentucky <sup>35</sup>	25/10 <sup>c</sup>	10

(continued)




**Notes:** N-size refers to the minimum number of students needed within a specific subgroup to create that subgroup for federal reporting and accountability purposes.

<sup>a</sup> Colorado uses an n-size of 16 students for the academic achievement and high school graduation rates of student subgroups and an n-size of 20 students for growth in academic achievement for student subgroups.

<sup>b</sup> Massachusetts uses an n-size of 10 students for reporting the academic performance of student subgroups and 6 students for reporting high school graduation rates of student subgroups on school report cards.

<sup>c</sup> Kentucky uses an n-size of 25 students to identify the bottom 5 percent of student subgroups and an n-size of 10 students for the "non-duplicated student gap group." See Kentucky Department of Education, ESEA Flexibility Request, <http://www2.ed.gov/policy/esea/flex/approved-requests/ky39a32013.doc>.

TABLE 1: State N-Size (continued)

 States with N-Size of 10 or Less
  States with N-Size Between 11 and 20
  States with N-Size of 21 or More

STATE	N-Size for Federal Accountability and Improvement Purposes	N-Size for Reporting Academic Performance and High School Graduation Rates
Nevada <sup>36</sup>	25	10
Texas <sup>37</sup>	25	25
Delaware <sup>38</sup>	30	30
Indiana <sup>39</sup>	30	10
Kansas <sup>40</sup>	30	30
Michigan <sup>41</sup>	30	30
Missouri <sup>42</sup>	30	30
Montana <sup>43</sup>	30/10 <sup>a</sup>	6
New Jersey <sup>44</sup>	30	10
New York <sup>45</sup>	30	5
North Carolina <sup>46</sup>	30	10
Ohio <sup>47</sup>	30	30
Pennsylvania <sup>48</sup>	30	30
South Carolina <sup>49</sup>	30	30
Tennessee <sup>50</sup>	30	10
Virginia <sup>51</sup>	30	30
Washington <sup>52</sup>	30	10
Arizona <sup>53</sup>	40	10
Hawaii <sup>54</sup>	40	40
Louisiana <sup>55</sup>	40/10 <sup>a</sup>	10
New Mexico <sup>56</sup>	40	10
Oregon <sup>57</sup>	40/30/20 <sup>c</sup>	40/30/20
Vermont <sup>58</sup>	40	11
Illinois <sup>59</sup>	45	10
California <sup>60</sup>	50	50

**Notes:** N-size refers to the minimum number of students needed within a specific subgroup to create that subgroup for federal reporting and accountability purposes.

<sup>a</sup> Montana uses an n-size of 30 students for federal accountability purposes. For small schools that test fewer than thirty students overall, which account for approximately 40 percent of the state's schools, Montana uses an n-size of 10 students for federal accountability purposes.

<sup>a</sup> Louisiana uses an n-size of 40 students for high school graduation rates and an n-size of 10 students for performance on assessments for federal accountability purposes.

<sup>c</sup> Oregon uses an n-size of 30 students for the overall growth in student academic achievement and the growth in academic achievement for student subgroups and an n-size of 40 students for the overall high school graduation rate and student subgroup high school graduation rate. However, Oregon uses two years of data when reporting student performance and high school graduation rates and uses four years of data for small schools. So while 40 students is the minimum n-size for reporting high school graduation rates, this is forty students over two consecutive cohorts combined. This means that each student subgroup cohort must average twenty students per year (and only ten students per year in small schools) to be included for federal accountability purposes.



This extreme variation makes cross-state comparisons of student subgroup performance difficult. For example, Maryland currently has an n-size of 5 students, while Louisiana has an n-size of 40 students. The National Center for Education Statistics (NCES) notes that setting a maximum n-size that allows for less varying extremes creates greater “uniformity in reporting practices across states in order to facilitate cross-state comparisons.”<sup>41</sup> Further, when states set an unnecessarily high n-size, it increases the likelihood that they will underreport the number of schools with gaps in the performance of student subgroups, limiting their ability to provide additional support to a significant number of historically underserved students.

Additionally, the U.S. Department of Education’s (ED’s) Office of Special Education and Rehabilitative Services (OSERS) recommends that states set a consistent n-size of 10 for the purpose of determining whether “significant disproportionality” exists among racial/ethnic groups in the rates at which students with disabilities within each racial/ethnic group are disciplined.<sup>42</sup> According to the proposed rules from OSERS, wide variations exist across states in the n-size they use to create the racial/ethnic groups to determine whether students with disabilities within these groups are disciplined at varying rates based on race. For this purpose, nine states set the n-size at 10 students, while four states set the n-size at 30 students, for example. If a school does not have enough students from a particular racial/ethnic subgroup to reach the n-size, then the school does not have to examine whether students with disabilities within that racial/ethnic group are disciplined at disproportionate rates.

ED notes that when states set a higher n-size, they eliminate more student subgroups, and school districts, from the analysis, thereby limiting the number of students states can identify for additional support. When states set an unnecessarily high n-size for the purpose of determining “significant disproportionality” they undermine accountability in the same way that high n-sizes undermine ESSA’s reporting and accountability provisions. ED proposes setting the maximum n-size of 10 students to address these concerns and “ensure that States examine as many racial and ethnic groups for significant disproportionality in as many [districts] as possible,” according to the proposed rules.<sup>43</sup>

## Protecting Student Privacy and Ensuring Statistical Reliability

Under the Family Educational Rights and Privacy Act,<sup>44</sup> state reporting of disaggregated student data, such as student subgroups, may not be published if the results would yield personally identifiable information<sup>45</sup> about an individual student. In addition, ESSA requires<sup>46</sup> states to set an n-size that protects student privacy and is sufficient to yield statistically reliable information. According to a report by NCES,<sup>47</sup> a state can set an n-size of 10 students, and even as low as 5 students, and fully meet the requirement for statistical reliability and also fully protect student privacy. The NCES report also describes several statistical methods states are using to protect student privacy. For example, some states use “various forms of [data] suppression, top and bottom coding of values at the ends of a [data] distribution, and limiting the amount of detail reported for the underlying [number of students]” to provide statistically reliable information that protects individual student privacy.<sup>48</sup>



## Strengthening Student Subgroup Accountability

A number of states have demonstrated that by lowering their n-size, they are able to identify and support substantially more schools and students:

- Massachusetts was able to include 100 additional schools in its system of school accountability and support by lowering its n-size from 40 to 30 students.<sup>69</sup>
- The California CORE Districts chose to use an n-size of 20 students, which is lower than the state-set n-size of 50 students and, collectively, were able to include 150,000 additional students in their accountability and support systems.<sup>70</sup>
- Mississippi lowered its n-size from 40 to 30 students and the number of schools accountable for students with disabilities increased from 234 to 872. Similarly, the number of schools accountable for English language learners increased from 15 to 447.<sup>71</sup>
- Virginia lowered its n-size from 50 to 30 students. Consequently, the approximate number of schools accountable for African American students increased from 353 to 451 and those accountable for Latino students increased from 122 to 183. The number of schools accountable for students with disabilities increased from 105 to 396, for English language learners from 104 to 139, and for students eligible for free or reduced-price lunch from 672 to 717.<sup>72</sup>
- Sixteen states and the CORE Districts in California lowered their n-sizes within the last two years.<sup>73</sup>

More states should follow these examples and structure their accountability and support systems to expand, rather than limit, the number of student subgroups included within those systems.



## Policy Recommendations

### Federal Recommendations

ED should issue regulations under ESSA that prohibit states from setting an n-size above 10 students for reporting and accountability purposes unless the state demonstrates that setting a higher number would not exclude a significant number of students and schools. Under this regulation, states still would maintain the flexibility to set an n-size below 10 students.

ED has the authority to place these parameters around the state determination of n-size to ensure that states meet reporting and accountability requirements under ESSA. Although under ESSA,<sup>74</sup> the U.S. Secretary of Education is prohibited from setting a *minimum* number of students needed to form a subgroup, there is no language within ESSA prohibiting the Secretary from setting a *maximum* n-size or a cap.

The Secretary has the authority to ensure that states meet subgroup accountability requirements. In addition, more accurate cross-state comparisons can be made when there is less variation in state-set n-sizes. Further, this would allow for consistency with the maximum n-size that OSERS proposes.

### State and Local Recommendations

As states consider changes to their accountability and improvement systems, they should set their n-size at 10 or fewer students to ensure they capture the greatest number of student subgroups for reporting, accountability, and improvement purposes under ESSA. When states include these schools in their accountability and improvement systems, the schools become eligible for school improvement funding and direct student services under the law. In addition, states may choose to target other federal and state resources to these schools, such as professional development funding under Title II of ESSA. States and districts should prioritize schools with the greatest numbers and percentages of low-performing students as measured by student achievement and high school graduation rates.

There are a number of evidence-based interventions and strategies that these schools can implement to help close gaps in achievement and high school graduation rates including personalization, early-warning identification and intervention systems, and expanded access to rigorous and advanced course work, among others. (See the sidebar on the next page, "Closing Achievement Gaps with Evidence-Based Interventions," for additional information and examples.)

### Conclusion

The ability of state and school accountability systems to identify and support student subgroups inherently depends upon the existence of those individual subgroups within a state's accountability system. States must accurately determine and report the performance of all student subgroups in order to thoroughly identify gaps in student performance, prioritize and target resources, and ensure that the schools serving these students receive the support they need to help close these gaps.

An n-size set higher than necessary to protect student information and be statistically sound is counterproductive to identifying and closing those gaps. The promise of ESSA to ensure that every student succeeds will never be fulfilled unless states structure their accountability and improvement systems to be as inclusive as possible. By setting an n-size of 10 or fewer students, state accountability systems effectively can identify and support the nation's underserved students and realize the civil rights imperative inherent within the law.



## Closing Achievement Gaps with Evidence-Based Reform and Interventions

### Personalization

MDRC conducted an evaluation<sup>15</sup> of New York City's "small schools of choice," which implemented a number of strategies, including an increased focus on personalization. As a result of these reform efforts, the overall high school graduation rates have increased from 60.9 percent to 70.4 percent—9.5 percentage points overall; 13.5 percentage points for African American males and 10.3 percentage points for Latino females.<sup>16</sup> The increase in four-year high school graduation rates is equivalent to nearly half of the gap in graduation rates between white students and students of color in New York City. In addition, this initiative has led to an overall increase in college enrollment of 8 percentage points and an increase in college enrollment for African American males of 11 percentage points, a 36 percent increase relative to their peers.<sup>17</sup> Principals and teachers at these schools with the strongest evidence of effectiveness strongly believe that academic rigor and personal relationships account for the effectiveness of their schools.

The Chicago Public School System effectively uses data to provide students with personalized intervention and support. In Chicago, the city's high school graduation rate rose from 47 percent in 1999 to 69 percent in 2013. This progress resulted from a focused effort to keep Chicago's ninth-grade students on track toward graduation by using data to individualize instruction. The University of Chicago Urban Education Institute predicts that Chicago's graduation rate will exceed 80 percent within the next few years.<sup>18</sup>

### Early-Warning Identification and Intervention Systems

Early-warning identification and intervention systems are based on a broad body of research supporting their use in secondary schools. For example, Diplomas Now partners with the school community and works with administrators and teachers to improve student attendance, behavior, and course performance. They develop a strategic plan, implement an early-warning system to identify struggling students, and regularly review data to foster continuous improvement. For these students, Diplomas Now provides additional academic support in areas of identified need and forms support groups and connects them with community resources, such as counseling, health care, housing, food, and clothing.<sup>19</sup> MDRC recently conducted a first-year process evaluation<sup>20</sup> of Diplomas Now and reports impressive results. For School Year 2013–14, Diplomas Now reports a 62 percent reduction in student suspension, a 58 percent reduction in students failing English, and a 54 percent reduction in students failing math.

### Advanced Placement and International Baccalaureate Programs

Research demonstrates that Advanced Placement (AP) students are more likely to enroll in a four-year college, perform better in college, return for a second year in college, and graduate from college than their non-AP peers.<sup>21</sup> Students—including women and underrepresented students—who take AP math or science exams are more likely to major in STEM (science, technology, mathematics, and engineering) fields.<sup>22</sup> Further, a recent study on students completing the International Baccalaureate (IB) program demonstrates postsecondary education outcomes for students from low-income families. Specifically, students from Title I schools in the IB Diploma Program (DP) enroll in college at the same rate as IB DP students from public schools generally, a rate of 82 percent.<sup>23</sup> Further, IB DP students from low-income families enroll in postsecondary education at a rate of 79 percent compared to the national average for students from low-income families, which is 46 percent.<sup>24</sup>

### Early College/Dual-Enrollment Programs

Research shows that participation in dual-enrollment courses, which allow students to earn high school and college credit simultaneously, can increase high school graduation rates and increase college enrollment and persistence. In [early college, high schools](#), where students can earn both a high school diploma and an associate's degree or up to two years of credit toward a bachelor's degree, 90 percent of students graduate from high school and 30 percent earn an associate's degree or other postsecondary credential while in high school.<sup>25</sup>

### Linked Learning

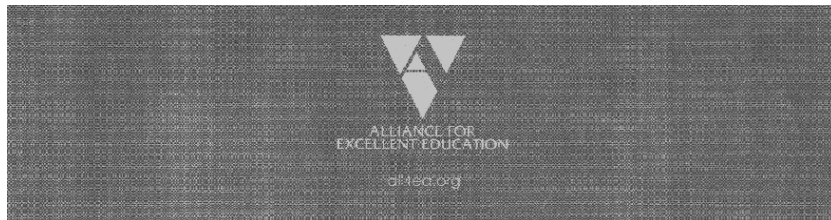
[Linked Learning](#) is an approach to high school redesign being implemented in California that integrates rigorous academics, career-based learning in the classroom, work-based learning in professional settings, and integrated student supports. [Research](#) from SRI International assessing the effect of Linked Learning on students' high school outcomes finds that students enrolled in high-quality Linked Learning pathways are more likely to graduate from high school than other students.

## Endnotes

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- <sup>4</sup> The states are Alaska, Florida, Iowa, Maine, Maryland, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, West Virginia, and Wyoming.
- <sup>5</sup> CORE represents nine member school districts in California, including Fresno, Garden Grove, Long Beach, Los Angeles, Oakland, Sacramento, San Francisco, Sanger, and Santa Ana Unified. Combined, these districts serve more than 1 million students.
- <sup>6</sup> The states are Alabama, Colorado, Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, Rhode Island, and Wisconsin.
- <sup>7</sup> The states are Arizona, Arkansas, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, and Washington.
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RESPONSE BY SECRETARY JOHN KING TO QUESTIONS OF SENATOR ALEXANDER,  
SENATOR ENZI, SENATOR COLLINS, SENATOR HATCH, AND SENATOR SANDERS

SENATOR ALEXANDER

*Question.* Your proposed regulation basically says that once a State identifies a school as needing improvement, the school is always going to be identified as in need of improvement unless it shows "significant progress" on federally mandated math and reading tests or other academic measures like graduation rates.

The law says:

"Develop a State accountability system that is based on test scores, graduation rates, another academic indicator for elementary schools, English proficiency, and another indicator of school quality or student success of the State's choosing."

Test scores and the other academic indicators need have "substantial" weight in that system.

But the law leaves up to the State what "substantial" means. And the Secretary is prohibited from prescribing "the weight of any measure or indicator used to identify or meaningfully differentiate schools."

Your regulation basically says that once a school is identified for improvement, you have to improve on the tests and other academic indicators or you cannot move out of identification.

So federally mandated tests and academic indicators are once again the primary means used to determine whether a school is succeeding or not.

You also place several new requirements on any non-academic indicator a State may choose to include in its accountability system which severely limit what a State may include, when the law was clear we wanted States to have flexibility to include indicators they wanted to.

This also reinforces the importance of tests and academic indicators.

We have seen the results of a heavy focus on tests from the Federal level before, and it created an explosion of over-testing as schools and teachers prepared for these high-stakes tests.

Don't you agree we need to change that? How does your proposed regulation move away from such a heavy focus on tests?

Answer. The proposed regulations, like the statute, would require the use of indicators in the accountability system that go beyond test scores to promote a more well-rounded education for students, something we believe is important. As is required by the statute, our proposed regulations would require States to adopt at least one indicator of School Quality or Student Success while providing the flexibility to determine how many and which such indicators would be appropriate for each State's own context and needs. Our proposed regulations build on the statutory requirements by including critical guardrails that ensure that all of the indicators included in a State's system advance the statutory purpose of the accountability system overall.

To give States flexibility to develop systems that reflect their priorities, the proposed regulations do not prescribe or suggest specific percentages for any of the indicators, or a range for weights. Instead, the proposed regulations would add clarity to what "substantial" and "much greater" mean by focusing on how the indicators come together and impact school differentiation and identification.

The proposed regulations do not require a State to base identification solely on test scores and graduation rates—all indicators would be taken into account in differentiating schools, but they must be taken into account in a way that is consistent with the statutory requirements for weighting. For example, the proposed regulations would ensure that, together, academic achievement, graduation rate or academic progress, and ELP are given "much greater weight" than indicators of School Quality or Student Success by providing that performance on one or more School Quality or Student Success indicator alone could not prevent a school from being identified for support and improvement unless the school made significant progress (determined by the State) on at least one of the "substantial" indicators, too. Further, the proposed regulations do not require a State to establish exit criteria for identified schools that are based solely on test scores and graduation rates. Provided that the school no longer meets the State defined criteria for identification, under the proposed regulations, a State would have discretion to examine a myriad of other student outcomes in the school to determine whether improvements are sufficient for a school to exit status, consistent with the statutory purpose of school improvement plans to "improve student outcomes."

As you know, the proposal was out for 60 day public comment, which recently closed on August 1, 2016. The Department will take all feedback and suggestions received under consideration as we finalize the regulation.

SENATOR ENZI

*Question 1.* I have heard from many individuals in my home State of Wyoming that they believe the U.S. Department of Education is attempting to supersede the clear intent of the Every Student Succeeds Act through the regulation process. More specifically, it has become apparent to me and many of my constituents that the Department of Education is attempting to assert more control over State Educational Agencies than what the bipartisan Every Student Succeeds Act clearly intended. What are you doing as Secretary to address these concerns?

Answer 1. Education is, and should remain, primarily a State and local responsibility. What we do at the Federal level is support States and school districts to improve opportunity for all students, invest in local innovation, research and scale up what works, and protect our students' civil rights, providing guardrails to ensure educational opportunity for all children. The Every Student Succeeds Act provides greater flexibility for local communities and States to provide equity and excellence for all students. However, since the U.S. Department of Education was first established, it has played an essential role in protecting the civil rights of all students, especially our low-income students, students of color, students with disabilities, and English learners. The Department will continue to work with States and districts to implement their authority under the new law so we can all ensure that every child in this country, regardless of background or circumstance, has access to an excellent education that prepares her or him for college and career.



*Question 2.* Is the growing trend of offering “guidance” in lieu of promulgating rules a deliberate practice of your Department? What force and effect does guidance have? Why is guidance being used instead of rules? The most recent guidance on bathroom policies and gender equity in Career and Technical Education come with associated threats to affect Federal funding streams if not followed. How is this consistent with ESSA and the clear intent of Congress to give States more flexibility with Federal funds?

Answer 2. Consistent with the Administrative Procedure Act, the Department has issued guidance documents, across multiple Administrations, in order to assist States, school districts, schools, and other stakeholders in understanding the Department’s policies and practices and interpretations of the statutes and regulations it administers and enforces. The Department does not issue guidance in lieu of promulgating regulations, but rather, elects to issue additional types of written materials as authorized by Federal law. The guidance documents themselves do not have the force and effect of law.

SENATOR COLLINS

*Question.* During the reauthorization process, I worked with the junior Senator from Vermont and others to develop and improve an innovative assessment pilot program to give States and school districts the opportunity to move away from standardized tests and toward assessments that can measure learning competency and proficiency. This pilot program is one way to address concerns about over testing and could support those States, like Maine, Vermont, and others, that want to focus on what students are learning and how well they are applying that knowledge, not just how well they can take a test. We hoped these regulations would have come out in May, but they did not.

When will the Department be issuing regulations or guidance on the Innovative Assessment Pilot?

Answer. The Department, as laid out in the Administration’s Testing Action Plan, is committed to ensuring that all assessments students take are high-quality, fair, and worth the time students spend taking them. Critically, assessments must also provide valuable information on student learning and progress to parents, educators, and students themselves. States have made significant strides in recent years to improve the quality of their assessment systems, incorporating more complex question types and writing, measuring a broader range of skills and knowledge, and using technology to improve how assessments are administered and scored. However, we know that there is still more we can do to improve the testing experience—today, in too many schools, redundant and ineffective tests continue to consume valuable instruction time.

We believe that innovation in the design and delivery of large-scale State assessment systems is one way in which States can build on the work that has already been done, and ESSA’s innovative assessment demonstration authority under title I, part B supports this idea by giving selected States time to pilot innovative assessments before implementing them statewide. These pilots can also help develop evidence for new high-quality assessment models that can be replicated in other States, moving the entire field of assessments forward through innovation.

On July 11, the Department published an NPRM in the *Federal Register* that promotes and helps operationalize this new flexibility for statewide assessment systems in the law. The public comment period on these proposed regulations closes September 9, after which the Department will address the comments we receive and develop the final rules.

Separately, on August 5 the Department released an invitation for States to apply for Enhanced Assessment Grants, which included a competitive priority for States who wish to develop, evaluate and implement innovative assessment types and design approaches.

SENATOR HATCH

*Question 1.* In ESSA, we spelled out three ways to resolve payment for extra transportation costs between child welfare agencies and districts. If there are additional costs, the child welfare agencies can reimburse the district for extra costs, the districts can agree to pay the extra costs, or the two can reach an agreement about how to split these costs. The proposed regulations appear to put the districts on the hook as a default payer if no agreement can be reached, which I believe could undermine a good faith collaborative process between districts and child welfare agencies. Can you explain how this is consistent with statutory language?

Answer 1. With the enactment of ESSA, title I, part A of the Elementary and Secondary Education Act (ESEA) now includes vital new protections to support children

in foster care in achieving educational stability and success in school. The new foster care provisions in title I are intended to minimize disruptions for children in foster care by requiring SEAs and LEAs to collaborate. Specifically, under section 1112(c)(5) of the ESEA, an LEA that receives title I funds must assure in its local plan that it will develop and implement clear written procedures, in collaboration with the State or local child welfare agency, governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of a child's time in foster care. The statute further provides three options, as outlined in the question, that child welfare agencies and school districts may agree to in order to pay for any additional transportation costs. The statute, however, does not address how to pay for additional transportation costs if the child welfare agency and the school district do not agree to any of the statutory options. The Department published an NPRM to implement provisions of ESSA regarding school accountability, data reporting, and consolidated State plans on May 31, 2016, including proposed regulations regarding the transportation costs for students in foster care. We will review public comments we receive on this issue and will clarify our position in the final rule, taking into consideration the public comments.

*Question 2.* To followup on my previous question, the guidance you recently released on foster care youth seems to offer a different option than the regulations or the law. Question 28 of the guidance mentions developing a local or State dispute process for resolving agreement issues. It seems counterintuitive to have a local dispute procedure in place if the local entities could not originally reach an agreement. Can you elaborate more on how you envision this working, and explain why you think this is consistent with the proposed regulations?

*Answer 2.* On June 23, 2016, the Department of Education and the U.S. Department of Health and Human Services released joint guidance on ensuring educational stability for children in foster care, which addresses the new foster care provisions in title I. Non-regulatory guidance creates no new requirements beyond what is in the statute.

Question 28 of the guidance, as highlighted in the question, contains an explanation of the statutory requirements pertaining to the LEA transportation procedures, developed in collaboration with the State or local child welfare agency (e.g., that even if the two agencies cannot reach agreement, their procedures must still ensure that a child in foster care promptly receives transportation to his or her school of origin); it also provides suggestions and recommendations for SEAs, LEAs, and child welfare agencies to consider, based on stakeholder feedback and current practices in the field. One of these recommendations is that SEAs and LEAs work with child welfare agencies to establish State or local dispute resolution procedures, in the event that they face difficulty reaching agreement regarding how transportation costs will be funded. For example, if an LEA and child welfare agency cannot reach agreement on any of the three options for transportation cost payments in the statute, the State or local dispute resolution procedures could include a process that the LEA and child welfare agency would follow in order to reach agreement or the procedures could specify a default position for how costs will be covered, if no agreement can be reached (such as that the two agencies must split the costs equally).

We will review the public comments on the issue of transportation costs that we received in response to our NPRM published on May 31, 2016, and will clarify the requirement in the final rule, based on the public comments.

*Question 3.* In the guidance, you mention that title IV-E funds may be used by the child welfare agency to pay for transportation costs. It is my understanding that there is still some confusion in the field about the best way to draw down these funds for this purpose. It would also be helpful to highlight how these funds could be used with other Federal funds, provided by districts, to create collaborative cost-sharing agreements for transportation. Can you or your staff provide more detail on best practices for how to do this?

*Answer 3.* The Departments of Education and Health and Human Services are holding a technical assistance webinar series in July through early September to walk through the new foster care guidance and to help SEAs, LEAs, and child welfare agencies successfully implement the ESSA foster care provisions by December 10, 2016. One of the webinars, currently scheduled for the week of August 29, will specifically address the transportation requirements in the statute, the provisions in the guidance, and promising practices from the field on developing joint transportation procedures. Additionally, the Department of Health and Human Services recently released a *letter to the field* on the title I foster care provisions under ESSA. The letter states that the Department will release an Information Memorandum on

child welfare agencies' role in ensuring educational stability for children in foster care later this summer. Specific questions about the use of funds under title IV-E of the Social Security Act for transportation should be addressed to the Department of Health and Human Services for potential inclusion in the Department's upcoming Information Memorandum.

SENATOR SANDERS

*Question 1.* I supported the Every Student Succeeds Act (ESSA) because it continues the civil rights mission of the Elementary and Secondary Education Act (ESEA) to ensure all students have access to a high-quality education. I also strongly supported ESSA because it overhauled the flawed, blame and shame approach of the No Child Left Behind Act, which reduced schools and students to test scores.

Under NCLB, Vermont had to label every single one of its schools as "in need of improvement." It is of the utmost importance that implementation of ESSA reflect congressional intent and the public desire to break away from the overly prescriptive, one-size-fits-all NCLB, while maintaining strong Federal guardrails.

I am concerned that some of the draft regulations mark a continuation rather than a break from NCLB. I am hoping that you can address the following concerns and if necessary make changes to the regulations that comport with congressional intent and Vermont's commitment to equity, quality, and continuous improvement.

1. As we move away from the broken No Child Left Behind Act it is essential that in implementing the Every Student Succeeds Act that we do not repeat the same test and punish approach. I was proud to work to both lower the high stakes attached to tests and help schools reduce the amount of time dedicated to testing and test perpetration.

A key part of moving away from test based compliance and toward deeper learning, is how we assess what students have learned and know. That is why I worked with my colleague, Senator Susan Collins, to include the innovative assessment pilot in this reauthorization. This pilot will allow States to create their own assessments that can be imbedded with instruction and assess deeper knowledge. This would be a much needed move away from the isolating test experience and a move away from multiple choice tests. This new frontier can only be accomplished if the regulations allow States to actually innovate, while ensuring the tests produced are of high-quality.

Can you give a status update as to where the innovative assessment pilot is in terms of regulations? In addition to this pilot, what is the Department doing to reduce over-testing and lowering the high-stakes nature of testing?

Answer 1. The Department, as laid out in the President's Testing Action Plan, is committed to ensuring that all assessments students take are high-quality, fair, and worth the time students spend taking them. Critically, assessments must also provide valuable information on student learning and progress to parents, educators, and students themselves. States have made significant strides in recent years to improve the quality of their assessment systems, incorporating more complex question types and writing, measuring a broader range of skills and knowledge, and using technology to improve how assessments are administered and scored. However, we know that there is still more we can do to improve the testing experience—today, in too many schools, redundant and ineffective tests continue to consume valuable instruction time.

We believe that innovation in the design and delivery of large-scale State assessment systems is one way in which States can build on the work that has already been done, and ESSA's innovative assessment demonstration authority under title I, part B supports this idea by giving selected States time to pilot innovative assessments before implementing them statewide. These pilots can also help develop evidence for new high-quality assessment models that can be replicated in other States, moving the entire field of assessments forward through innovation.

Under ESSA, statewide assessment systems under title I, part A also allow students taking advanced mathematics courses in eighth grade in States that offer end-of-course tests in high school mathematics to avoid unnecessary, redundant testing by allowing those students to take the assessment typically administered to high school students enrolled in the course; and allow States to permit a district to use a single, locally selected, nationally recognized high school assessment across the district in place of the statewide high school assessment.

On July 11, the Department published two notices of proposed rulemaking in the *Federal Register* that promote and help operationalize these new flexibilities for statewide assessment systems in the law. The public comment period on these proposed regulations closes September 9, after which the Department will work to address the comments that are received prior to issuing final rules later in the year.

Separately, on August 5 the Department released an invitation for States to apply for Enhanced Assessment Grants, which included a competitive priority for States who wish to develop, evaluate, and implement innovative assessment types and design approaches.

*Question 2.* The regulations as proposed would result in Vermont making accountability decisions for the 2017–18 school year, based of old data from schools operating under NCLB in the 2016–17 school year. It is not fair to link a new accountability to an old system that did not work for Vermont’s students, educators, and parents. Is the Department of Education (ED) going to properly align new accountability systems with data collected under these new systems, by allowing States to make their first accountability decisions from data accumulated during the 2017–18 school year, to inform decisions for the 2018–19 school year?

Answer 2. In order to provide time for an orderly transition to the new ESSA accountability systems and to ensure that there is not a gap in supports for students in the lowest-performing schools, the proposed regulations would require that all States identify schools for comprehensive and additional targeted support for the 2017–18 school year (consistent with the effective date for the majority of the provisions in the ESSA), with annual identification of schools with consistently underperforming subgroups for targeted support beginning in the 2018–19 school year.

We know that States and districts are eager to move to new, multi-measure accountability systems as quickly as possible, but we also want to ensure that there is sufficient time to meaningfully engage stakeholders in developing each State’s accountability system and system of supports for low-performing schools. As proposed, the regulations would allow States to add new measures or replace measures over time as they gather new data.

As I’ve said many times, we are eager to get feedback from a wide variety of stakeholders on the proposed regulations, including on the timeline for implementation, and we will consider that feedback in developing the final regulations.

*Question 3.* I want to ensure that as States go through the process of submitting their ESSA plans that they have ample time for community input and feedback. The deadlines of March 6 or July 5, set by the Department may be unworkable for schools—occurring during summer break or into the academic year. From the feedback I have received from educators in Vermont, there seems to be a need to adjust the submission dates or shorten the review process to ensure that States receive feedback at a time that allows for appropriate community input. What changes is the Department willing to make changes to the submission date and or process for State plans?

Answer 3. As with all of the issues contained in the Notice of Proposed Rule-making (NPRM) that the Department published on May 31, 2016, we look forward to considering those public comments related to the submission date and process for consolidated State Plans. Specifically on the topic of stakeholder engagement, the Department is very concerned that States have sufficient time to meaningfully engage with a wide and diverse group of stakeholders during the development and implementation of their consolidated State Plans. Thus, the feedback that the Department receives will help us set the actual submission dates. In addition, on June 23, 2016, I issued a *Dear Colleague Letter* highlighting the importance of stakeholder engagement. Given this emphasis on stakeholder engagement, the Department is mindful of the need to establish submission dates for the consolidated State Plan that support State efforts to conduct meaningful stakeholder engagement.

*Question 4.* I support the Department’s attempt to set a floor for the size of grants made to schools identified for Comprehensive and Targeted Support and Improvement. Unfortunately, the minimum grant amounts of \$500,000 for schools identified for Comprehensive Support is too large for many Vermont schools—exceeding the total school budget for 14 districts and is completely unworkable for the 26 other districts with budget’s less than a million dollars. The Department needs to set multiple options for States in establishing minimum grant sizes for Comprehensive and Targeted Improvement Schools, and allow for a process of minimal burden for States that must set different minimum grant sizes that meet their unique needs. How will the Department amend its minimum grant size regulation for Comprehensive and Improvement Schools so that it works for small and rural States like Vermont?

Answer 4. We are eager to support all States, including those with many small or rural schools, in implementing the statutory and final regulatory requirements for schools identified for Comprehensive Support and Improvement. In order to ensure that these schools receive adequate funding to implement at least one evidence-based intervention and to support all students, the proposed regulations would clarify that States must prioritize funding available under section 1003(a) of the ESEA

for these schools and award no less than \$500,000 per school per year, unless the State determines that a district needs an amount of funding smaller than the minimum award in order to implement its school improvement plan. This would allow States to make grants below \$500,000 as they deem appropriate to meet local needs while still ensuring sufficient resources to implement the selected interventions. We look forward to reviewing public comment on this issue and will consider the comments received in promulgating final regulations.

*Question 5.* I am happy to see that section 200.3(a) of the proposed regulations offers increased transparency on demographic and academic achievement data for charter schools. In addition, we should have transparency about the management status of these schools. Is the Department open to amending this regulation to give the public more information noting if a charter school has a management organization, and if it does, whether that management organization is a non-profit or for-profit entity?

*Answer 5.* We look forward to reviewing public comment on the proposed regulations and will consider those comments as we work toward promulgating the final rule. ED recently began collecting information on charter school authorizers, including authorizer type, such as State department of education, State board of education, public charter school board, local educational agency, university, community college, not-for-profit organization, and non-educational government entity. Going forward, ED will work toward ensuring public access to this information.

RESPONSE BY SECRETARY JOHN KING TO QUESTIONS OF  
SENATOR WARREN

I. STUDENT LOAN SERVICING RE-COMPETE

*Question 1.* In April, the Department's student loan bank, the Office of Federal Student Aid (FSA), released a solicitation to procure services to develop a new student loan servicing platform to improve customer service and assist borrowers in distress. Prospective firms seeking to work with FSA would need to demonstrate experience "servicing a large number of student loan borrowers successfully and converting a large volume of borrower accounts from another student loan servicing solution onto the offeror's solution."<sup>1</sup>

This performance requirement suggests that only firms currently in the business—including those who have provided poor service to the Department—would qualify to compete.

a. Does the bank believe there were non-incumbent companies (companies that do not currently have contracts with the Department) that could have reasonably submitted a competitive bid during Phase I of the re-compete? Please provide a list of examples.

b. Three offerors advanced to Phase II. Each of these offerors includes one or more incumbent servicers. Does the Department plan to re-open the competition to ensure that new players can enter this broken market?

c. In 2014, the bank released a Request for Information related to student loan servicing. Which servicers replied to this request? Please provide their submissions.

*Answer 1.* The Department continues efforts to advance a new loan servicing vision that puts the needs of borrowers at the center. In this effort we are focused on driving strong outcomes for borrowers by ensuring a consistent set of servicing expectations, providing transparency in whether those expectations are being met, establishing strong oversight and accountability for vendors, and leveraging opportunities for multiple partners to compete in providing high-quality service to borrowers. That's why the Department's leadership has directed Federal Student Aid (FSA) to evaluate Phase II solicitation applicants in part on their plan to deploy a team of vendors with successful experience in counseling student loan borrowers on the best repayment plan or other benefit—such as loan forgiveness or loan discharge—appropriate for their individual circumstances.

Specifically, we have encouraged vendors to form teams that combine the benefits of experience and existing infrastructure with cutting edge approaches to technology and customer care. Two of the three successful Phase I proposals included non-incumbent team members, and all offerors have the opportunity to expand their teams in Phase II to address the detailed requirements, including the provisions of the July 20, 2016, policy memo. We also plan to issue another solicitation [given budget constraints it is unlikely we will be able to do this within 12 months of award—

<sup>1</sup> [https://www.insidehighered.com/sites/default/files/files/Federal\\_Aid\\_Servicing\\_Solution\\_-\\_Solicitation\\_Statement\\_of\\_Objectives.pdf](https://www.insidehighered.com/sites/default/files/files/Federal_Aid_Servicing_Solution_-_Solicitation_Statement_of_Objectives.pdf).

we can't do the second solicitation until we have the solution in place with the original team so we will know the technical requirements; at this point we do not expect to have 2017 funding to support this effort—I think this is addressed in question 2 so I would not address timing here] to supplement the work of the contract to ensure participation of additional vendors.

The Department received 27 responses to the 2014 Request for Information; the full lists of respondents, along with the submissions, are provided in the attachments to this response. A great share of the responses were from public policy and consumer protection organizations rather than from servicers and have contributed to our understanding of the common challenges borrowers face in servicing and that are addressed in the Department's policy direction to FSA.

*Question 2.* What is the Office of Federal Student Aid's (FSA) expected timeline for Phase II of the re-compete? What is the timeline for subsequent phases of the re-compete, including subsequent re-compete processes to hire additional entities and/or sub-contractors?

*Answer 2.* The Department expects to issue a Phase II solicitation later this year. We expect the timing of subsequent procurements to follow approximately 12 months after the contract award, subject to availability of funds to support implementation efforts under the initial award. Each phase allows for participation of additional entities and/or sub-contractors in key aspects of improving servicing for borrower.

*Question 3a.* For each current TIVAS servicer (FedLoan/PHEAA, Navient, Great Lakes, Nelnet), please provide data regarding the proportion of delinquent borrowers (borrowers between 7–90 days delinquent) that have been contacted by the servicer regarding Income-Driven Repayment (IDR) programs during the last year.

*Answer 3a.* Our servicers attempt to contact all delinquent borrowers at multiple touchpoints when a payment is first missed through day 90 of delinquency. These outreach attempts involve one or more communication methods, including phone calls, e-mail, and traditional mail, and most include information regarding income-driven repayment. (Under the current servicing contracts, which were structured to foster competition based on performance, outreach methods and content vary across vendors.) The actual number of borrowers contacted varies, given the validity of address or other contact information.

*Question 3b.* For each current TIVAS servicer (FedLoan/PHEAA, Navient, Great Lakes, Nelnet), please provide data regarding the proportion of delinquent borrowers that have enrolled IDR programs during the last year.

*Answer 3b.*

Servicer code	Servicer name	Proportions (In percent)
578 .....	Navient .....	5.9
579 .....	Pheaa .....	6.3
580 .....	Nelnet .....	6.3
581 .....	Great Lakes .....	5.4

For each current TIVAS servicer (FedLoan/PHEAA, Navient, Great Lakes, Nelnet), please provide data regarding the proportion of delinquent borrowers who were previously enrolled in an IDR program but have not recertified into such a program during the last year.

*Answer 3c.*

Servicer code	Servicer name	Proportions (In percent)
700578 .....	Navient .....	2.4
700579 .....	Pheaa .....	2.3
700580 .....	Nelnet .....	.05
700581 .....	Great Lakes .....	4.0

*Question 4.* With respect to Phase II, I appreciate your 30th directive to FSA Chief Operating Officer, Jim Runcie, directing the bank to make past performance

“the most important noncost factor in the evaluation.”<sup>2</sup> In adhering to this directive, how, specifically, will FSA:

- a. consider past investigations, lawsuits, and settlements for violations of State or Federal consumer protection laws or laws meant to protect students and members of our armed services, including evidence of wrongdoing compiled by State and Federal law enforcement agencies;
- b. consider servicers’ failure to pay existing fines for past sanctions;
- c. evaluate servicers’ previous record of enrolling distressed borrowers into alternative repayment or debt relief plans, including the sampling or data points FSA plans to use; and,
- d. evaluate servicers’ previous rates of IDR recertification?

Answer 4. The Department is currently preparing the Phase II solicitation, which will include the criteria to be used in evaluating proposals. In accordance with the Secretary’s directive, past performance will be the most important non-cost factor and will be considered at two different phases of the selection process. Generally, an offeror’s past performance is an indicator of its ability to perform a new contract successfully and will first be used by the evaluators to assess the risks associated with how the offeror would perform the contract. Consistent with Federal Acquisition Regulations, after the initial evaluation is completed, the Contracting Officer must consider the prospective contractor’s performance record, among other factors, in order to make an affirmative determination of whether that firm is responsible. Only responsible firms may receive an award.

Both evaluators and the Contracting Officer, in their respective assessments, will consider past performance data for an offeror including that which indicates the offeror has violated State or Federal consumer protection laws, engaged in wrongdoing in its loan servicing activities, failed to pay fines for past sanctions, or performed poorly in enrolling distressed borrowers in repayment or debt relief plans or in recertifying participants in Income-Driven Repayment (IDR) programs.

Evaluators have discretion in applying their judgment in the evaluation of an offeror’s past performance and their work is subject to important legal constraints. Under the law, Federal agencies must also give every offeror the opportunity to comment on adverse past performance information being considered which the offeror has not previously had a chance to address.

The specifics of how evaluators are to consider certain past performance information (e.g., rating schemes they may use, internal guidance they may consult, evaluation forms they may fill out) is confidential source selection information. As such, it must be protected from unauthorized disclosure in accordance with the Procurement Integrity Act, 41 U.S.C. 2102, and implementing regulations, to ensure the integrity of the evaluation process and the fair treatment of all participants.

*Question 5.* Each of the three offerors that have been advanced to Phase II includes a market participant (Navient, Nelnet, and PHEAA) that has been caught up in the “9.5 percent scandal” that plagued the student loan industry. The Department’s Inspector General issued reports on each of these firms and how they over-billed the Department.<sup>3</sup>

a. How will FSA consider the 9.5 percent scandal in its evaluation of past performance?

b. Has the Department recovered the \$22 million in excess payments billed by Navient, as noted by the Inspector General and the Department’s own investigation?

Answer 5. The Department will consider this type of information in its evaluation of past performance and when making a responsibility determination on a prospective contractor. Consistent with Federal Acquisition and Regulations, the agency will assess whether the potential vendor has a satisfactory record of integrity and business ethics. Please refer to the response to Question 4 above for more information on how past performance information may be used.

At this time, the Department has not recovered any of the excess payments from Navient. On July 27, 2016, FSA received Navient’s appeal of FSA’s Final Audit Determination related to the Office of Inspector General’s report that Navient over-billed the Department for special allowance payments in the amount of \$22 million.

<sup>2</sup> <http://sites.ed.gov/ous/files/2016/06/John-King-servicer-past-performance-memo.pdf>.

<sup>3</sup> <http://www2.ed.gov/about/offices/list/oig/auditreports/fus009/a03i0006.pdf>.

*Question 6.* In response to allegations that it violated the Fair Credit Reporting Act, one of the Department's largest servicers, PHEAA, asserted "sovereign immunity" from this law.<sup>4</sup>

a. Does the Department believe it is appropriate to retain contractors that believe they do not need to follow Federal consumer financial protection laws?

b. Will the Department require, by contract, that contracted servicers may not assert sovereign immunity on allegations or claims related to its actions on Federal student loans?

Answer 6. In evaluating offers and selecting contractors, the Department focus is each offeror's ability to perform the work as required; that includes ensuring compliance with required Federal laws and regulations. The Department is currently preparing the Phase II solicitation, which will include detailed requirements, driven by the policy direction outlined in the Department's recent memo to FSA. It is expected that among those requirements will be a requirement to comply with Federal consumer financial protection laws. If an offeror is unable or unwilling to successfully carry out the requirements of the contract, that information would be considered by Department procurement officials in the evaluation and in selecting the awardee. A failure to commit to important work requirements could lead to disqualification of an offeror.

As to PHEAA's claim of sovereign immunity in past and current litigation, that in and of itself would not prejudice it in the evaluation of past performance. The Comptroller General has indicated that in evaluating past performance agencies may not penalize offerors simply for asserting their legal rights. To the extent there is evidence that any offeror's claims or assertions of rights were frivolous, were asserted in bad faith, or had an adverse impact on contract performance, or if there is evidence of abusive use of litigation, then evaluators may weigh this information in the assessment of past performance.

*Question 7.* In evaluating past performance, how, specifically, will the Department analyze a sample of servicers' loan portfolios to:

- a. compare and assess the proportion of delinquent borrowers;
- b. compare and assess what proportion of delinquent borrowers have been contacted regarding IDR programs;
- c. compare and assess what proportion of delinquent borrowers have enrolled IDR programs; and,
- d. compare and assess what proportion of delinquent borrowers who were previously enrolled in an IDR program, but have not recertified into such a program?

Answer 7. Success in helping borrowers avoid delinquency and default will be an element of the past performance evaluation. Details on how these factors will be assessed are still under development, but will likely include the elements outlined in your question.

*Question 8.* In evaluating past performance, does the Department's student loan bank plan to require companies involved in the bidding for contracts to disclose any pending civil investigative demands, subpoenas, lawsuits, or settlements relating to their servicing practices prior to awarding a contract?

Answer 8. FSA is currently preparing the Phase II solicitation, which will include instructions to offerors on the information to be provided in their proposals. While those instructions are not yet finalized, it is expected that offerors will be requested to provide information regarding any pending civil investigative demands, subpoenas, lawsuits, or settlements relating to their servicing practices.

*Question 9.* The Department has said that it intends to create mandatory servicing standards. How will you ensure that these standards are privately and publicly enforceable?

a. Specifically, will the Department create a third party beneficiary right for borrowers in the contracts?

b. Will the Department insert the enforceable standards in the promissory notes that students sign?

c. If not, how else would the Department ensure enforceability?

Answer 9. Generally, Federal agencies may enforce the requirements in their contracts by asserting a claim against the contractor for breach-of-contract damages and/or other remedies available under the contract. This may include a claim for failure to comply with service standards that have been incorporated into the con-

<sup>4</sup><http://www.scotusblog.com/wp-content/uploads/2016/02/pele-op-below.pdf>.



tract. The Contract Disputes Act establishes the procedures and requirements for asserting such Government claims and for resolving related disputes.

Even in the absence of enforcement actions by the Department or by private plaintiffs, the Department believes that it can effectively ensure a high rate of compliance with servicing standards through a number of contract administration measures. They include:

1. Financial incentives built into the compensation structure of the servicing contracts that would adjust compensation based on the quality of customer service achieved by the contractor;
2. Formulae for allocation of accounts to customer service providers that take into account the quality of the provider's customer service during current or past periods of performance;
3. Reports on the quality of the contractor's customer service submitted to the Contractor Performance Appraisal Reporting System (CSPARs). CPAR reports are available to, and are frequently consulted by, contracting officers across the Federal Government;
4. Docking or withholding of the contractor's compensation due to defective performance, including through the application of liquidated damages or administrative remedies clauses, subject to applicable procedures and legal requirements;
5. Customer feedback mechanism established under the contract for the resolution of customer complaints; and,
6. Initiation of suspension or debarment proceedings should there be adequate grounds to suspend or debar based on the contractor's failure to perform.

The Department is considering these and related measures as it finalizes the Phase II Solicitation. After award, as part of its enhanced monitoring and oversight activities, the Department is committed to applying every available measure vigorously and invoking its enforcement rights when appropriate, in order to ensure the highest quality of customer service for borrowers.

*Question 10.* Where, in addition to the contracts, will the standards be available? For example, will there be a handbook or manual? If so, how will this differ from the standards in the contracts? Will the contracts and standards be public?

*Answer 10.* Standards and contracts will be available to the public. Published standards will not differ from those included in the contracts.

*Question 11.* How does the Department intend to adopt the Treasury Department's recommendations on best practices in performance-based contracting, and build these recommendations into the Department's incentive model?<sup>5</sup>

*Answer 11.* Consistent with the Treasury Department's recommendations, we are structuring the servicing re-compete to incorporate a compensation structure that incentivizes servicers to meet or exceed clearly defined service levels tied to ensuring borrowers receive the information and assistance they need to effectively manage their loans. In addition, we have established a Customer Feedback System that creates a standardized complaint process for borrowers who have issues regarding their interactions with their servicer. Last, we are expanding our oversight, monitoring, and vendor management processes to better assess compliance with contractual requirements.

*Question 12.* Is the Department planning to create new financial incentives for the new servicing contracts? If so, which elements of the current metrics is the Department planning to keep and which will the Department change or improve? How does the Department plan to compensate specialty servicers? Has the Department evaluated the performance or effectiveness of the current specialty servicers and are these evaluations public? Please send my office the specialty servicer contracts.

*Answer 12.* The Department is considering a broad range of approaches to create financial incentives that encourage accountability and high performance. In general, we expect that the new contract will include much more detailed and specific requirements and accompanying performance expectations, with incentives and disincentives tied to the vendor's success in meeting or exceeding those expectations.

The requested evaluation and contract materials related to TEACH Grant, Public Service Loan Forgiveness, and Total and Permanent Disability Discharge processing, are provided in the attachments to this response.

*Question 13a.* Which specific offices within the student loan bank and the Department will be involved in the review of prospective bidders? According to public information sources, the Department's student loan bank's Deputy Chief Operating Offi-

<sup>5</sup> <https://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf>.

cer, Matthew Sessa, formerly worked at PHEAA. Has the Department's ethics office specifically prohibited Mr. Sessa from participating in any discussion related to student loan servicing?<sup>6</sup>

Answer 13a. Staff from a number of offices will participate in the review, including primarily FSA's Acquisitions, Finance, Technology, and Business Operations offices.

Currently, Mr. Sessa is precluded from participating in any particular matters involving PHEAA.

*Question 13b.* How many other employees at the bank are barred from participating in decisionmaking related to student loan servicing and the re-compete, due to their personal financial interests or recent employment history?

Answer 13b. When particular matters are identified, such as the evaluation of proposals, FSA screens every individual proposed to participate in the evaluation for conflicts of interest. Individuals found to have a conflict of interest are not selected. None of the employees selected to participate in the evaluation of the loan servicing proposals was found to have a conflict of interest due to a personal financial interest, recent employment history, or otherwise.

*Question 13c.*

Answer 13c.

*Question 13d.* How will the Department ensure that employees at the bank are barred from participating in decisionmaking related to student loan servicing and the re-compete, due to their personal financial interests or recent employment history?

Answer 13d. The Department is committed to ensuring the highest standards of ethics and integrity. Guidance documents are shared with employees specific to seeking employment, including post-employment rules. These documents are distributed by the Department's Ethics Division. As you will see from the documents, the April 15, 2014 document provides guidance on specific laws and regulations that govern employment matters. The second document provides employees information in a conversational tone to help ensure the technical aspects of the laws and regulations are understood. Both documents make clear that there are certain restrictions on Federal employees, particularly those that have been involved in procurement activities. Compliance with ethical standards and other rules applicable to procurement is promoted through training and ongoing outreach efforts to employees at all levels. The Department thus ensures that employees are well-versed in the conflict of interest requirements as they relate to their job duties and responsibilities.

Where an evaluation team is organized for procurements above the Simplified Acquisition Threshold (SAT) (currently greater than \$150,000) the following steps are taken:

1. At the time the evaluation teams are empaneled, evaluators are advised regarding avoiding conflicts of interest, protecting confidential information and other rules of conduct applicable during the competition. Any individual who is concerned about potential conflicts of interest (COI) is referred to OGC for vetting. None of the individuals involved in the Phase I evaluation had any COI due to recent employment history. The Phase II evaluators will be subject to similar screening and rules of conduct.

2. Each participant is required to complete a Non-Disclosure statement which requires reporting of COI, prohibits release of source selection information outside the panel and explains that only the Contracting Officer and the head of the agency may release proposal information or source selection information about the procurement.

3. Information about ongoing procurements is closely held and only individuals with an actual need to know are provided information not available to the public.

4. Vendors are likewise informed about COI and all Department contracts contain COI provisions compelling vendors to report COIs including any associated with Department employees.

## II. GENERAL STUDENT LOAN SERVICING

*Question 14a.* A November 2015 Government Accountability Office (GAO) report found "weaknesses in the processes for selecting calls to be monitored and for documenting results." Specifically, the GAO found that "FSA monitors far fewer outbound than inbound calls, even though one servicer said it makes 60 times more

<sup>6</sup><https://www.linkedin.com/in/matthew-sessa-13b5a44>.

outbound calls than it receives inbound calls, and outbound calls are often made to borrowers who are delinquent and at risk of default.”<sup>7</sup>

Does the Department and FSA plan to increase the number of full-time employees monitoring calls made between servicers and borrowers? If so, how many FTE’s will be allocated?

Answer 14a. Yes. Over the last 9 months, FSA has increased its Call Monitoring Capacity by 55 percent. Additionally as a point of clarification, inbound calls generally equate to a conversation with the borrower, where as numerous outbound call attempts are required to yield a conversation.

We will continue to evaluate resource needs and expect to bring on additional staff, provided funding is available.

*Question 14b.* How do the Department and FSA currently determine which phone calls to monitor?

Answer 14b. Each servicer is required to provide a listing of calls of varying lengths from the previous month with fully identifiable information for each call. The servicer is required to send information regarding inbound general servicing calls, outbound collection calls and all of the specialty line calls (which would include military specific lines). We should note that the vast majority of outbound calls are an attempt to make contact with a borrower that may not result in an actual contact with the intended party. FSA selects a random sample to review.

*Question 14c.* How has Department and FSA addressed this weakness found by the GAO?

Answer 14c. The Department has taken a number of steps to address GAO’s recommendations. Each month, calls are sent to the servicer for review on a monthly report. These reports include calls that have been escalated throughout the month of review as well as any other calls that did not meet the passing standard. The servicer is provided with feedback and allowed a subsequent response. Following the response from the servicer, the final report will be produced to be archived and sent to the appropriate internal FSA entities.

Escalated call reviews are sent to the servicer if there is a specific reason for immediate escalation/resolution. The servicer is expected to respond to the escalation as soon as possible, generally within 2 days. The response is then recorded and archived for use in trending and analysis for any further occurrences that may need to be escalated further or brought to management’s attention.

In addition, we have enhanced our new Call Monitoring Tool, which now allows monitors to more thoroughly analyze reporting to identify areas in need of improvement.

*Question 14d.* What is the process for ensuring that servicers implement the necessary changes when deficiencies are found? Has the Department or FSA discovered instances of servicers failing to implement changes? If so, what steps did the Department or FSA take as a result, and how will these past deficiencies factor into FSA’s evaluation of past performance?

Answer 14d. When deficiencies are found with call selection (i.e. call quality), servicers are notified of the deficiency and are required to address the deficiency within 5 business days of receipt of the notification. The servicer is asked to address each failure or escalation reported with a written response including what corrective action they will take to address the deficiency. FSA is informed when corrective action steps are completed and necessary changes are implemented. FSA then monitors the servicer’s calls providing the servicer with feedback as to whether there is improvement in the area of deficiency where changes were made. To date we have not found instances of servicers failing to implement changes.

*Question 15.* The same GAO report found that FSA has failed to provide servicers with clear guidance on how to apply over or under payments. Is there an updated timeline on when FSA will provide such guidance to ensure that borrowers receive consistent servicing practices as they repay their student loans?<sup>8</sup>

Answer 15. We have met with servicers to discuss the need for a comprehensive approach to payment allocation that minimizes customer confusion and improves the transparency of the process. Having a common approach to payment allocation will provide common and consistent customer messaging on allocation. Changes to payment allocation logic require system changes and revisions to customer interfaces (e.g. website and IVR), call specialist training, and letters, statements, and disclosures. Given the scope and cost of such a change across the nine current

<sup>7</sup> <http://www.gao.gov/products/GAO-16-196T>.

<sup>8</sup> *Id.*

servicers, the Department has deferred any redesign pending the servicer re-compete.

*Question 16.* A June 2016 GAO report discovered that borrowers may have difficulties with contacting servicers through their call centers due to where they live and the hours of operation at call centers. Specifically, Department officials stated that they “have no minimum standard for call center hours and each servicer sets its own.”<sup>9</sup> What steps has the Department taken to address this concern?

*Answer 16.* As directed by the Under Secretary in his recent Policy Memo, borrowers can expect to be able to reach their Servicer during and after normal business hours, including availability after 5 p.m. in all continental U.S. time zones and some weekends and as such, call center hours that align with this expectation have been included in Phase II of the Loan Servicing Solicitation requirements.

*Question 17.* This same 2016 report also found that,

“no performance metrics relate to compliance with program requirements, servicers with more compliance errors experience no reduction in assigned loans, even as their borrowers may experience servicing problems.”<sup>10</sup>

Does the Department plan to incorporate this as a metric moving forward, both with the re-compete and single servicing platform? If so, how does the Department plan to incorporate and weight this metric?

*Answer 17.* As noted in our response to Question 12, the Department is considering a broad range of approaches to create financial incentives that encourage accountability and high performance against program requirements. Final decisions will in part be a function of the structure of the winning proposal; as such, we are not able to specify which, if any, elements of the current metrics will be included in future contracts. In general, we expect that the new contract will include much more detailed and specific requirements and accompanying performance expectations, with incentives and disincentives tied to the vendor’s success in meeting or exceeding those expectations.

*Question 18.* Will the Department or FSA regularly release findings from examinations of its contracted servicers and subcontractors?

*Answer 18.* The Department does not plan to release formal Past Performance reporting (PPIRS), consistent with governmentwide practice and applicable regulations. We are considering what level of reporting is appropriate for other servicer reviews.

*Question 19.* Please provide all Internal Review Reports of contracted servicers and debt collectors over the past 5 years.

*Answer 19.* The requested reports are enclosed.

### III. STUDENT LOAN PORTFOLIO DATA

*Question 20.* I understand that the Department produces a number of documents on a recurring basis for evaluating the health of the loan portfolio and the performance of student loan servicers. This includes things like the Operations Services Reports.

Describe each of these document types, their use, and their recurrence, including the student loan servicer performance reports that FSA leadership receives to assess the performance of their loan portfolios. Please provide copies of these documents to my office. Will the Department release these documents to the public?

*Answer 20.* FSA relies on one report to evaluate servicer performance, the Operations Services Portfolio Report. The Operations Services Portfolio Report (attached) produced monthly, provides an overview of the entire portfolio at a glance, and includes the volume of borrowers in various repayment statuses (non-defaulted, defaulted, current, delinquent, etc.). The report also tracks categories of interest including the breakdown of the portfolio by school type and payment plan type, the percentage of borrowers in various stages of delinquency, and it identifies possible issues such as duplicate disbursements. Key statistics are illustrated in a variety of charts and graphs.

Copies of the requested material have been submitted to your office. As part of its commitment to increasing transparency, Federal Student Aid proactively publishes information relating to the Federal student loan portfolio on the FSA Data Center at <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>. This

<sup>9</sup> <http://www.gao.gov/products/GAO-16-523>.

<sup>10</sup> *Id.*

series of reports is updated quarterly and includes information pertaining to the breakdown of the outstanding portfolio by program type, loan type, servicer, loan status, repayment plan, and delinquency status.

*Question 21.* Will the Department publish quarterly data on the number of borrowers certified into Public Service Loan Forgiveness, or other programs intended to benefit borrowers to allow me and other policymakers, as well as the public, to understand their effectiveness?

Answer 21. Although no borrower will be eligible to receive forgiveness under the Public Service Loan Forgiveness Program until October 2017, borrowers interested in PSLF are encouraged, but not required, to submit an Employment Certification Form (ECF) annually or whenever they change jobs to help track their progress toward meeting the PSLF eligibility requirements. *On August 19, 2016, Federal Student Aid released information about the Public Service Loan Forgiveness program,* including the number of borrowers who have submitted Employment Certification Forms and the status of those forms. In addition, the Administration is working to enhance the program's effectiveness by simplifying the process of applying for PSLF. The United States Digital Service is partnering with FSA to digitize the PSLF application so that eligible borrowers do not struggle with paper processes to have their loans forgiven.

*Question 22.* I understand that the Department has received requests from researchers to access anonymized NSLDS and other data and that the requests are on hold. Can you explain why the requests are on hold and what your timeline is to resolve any delays?

Answer 22. FSA has received requests for datasets that remove data elements such as Social Security Number, name, and date of birth. Even without these identifying data elements, other data elements in the requests could constitute personally identifiable information, especially in combination with each other and other publicly available data. FSA is committed to safeguarding the privacy of students and their families. As such, FSA is currently researching ways of providing truly de-identified data to the public while complying with all relevant laws governing data privacy and use.

In addition, FSA is launching a pilot of its Advanced Insights through Data (AID) effort, which seeks to provide federally affiliated researchers with access to FSA data that has not been anonymized in a secure environment that protects student privacy. For additional details of this effort, please see response to question 23.

*Question 23.* Earlier this year the White House announced ED would start a process for granting researchers access to Federal student aid data through the Advancing Insights through Data (AID) Project. What is the status of AID? How many individuals have been granted access, what is the process for granting access, and where can individuals learn about how to apply?

Answer 23. The AID initiative is an effort to provide federally affiliated researchers with secure onsite access to student aid data while protecting student privacy. The effort is currently in a pilot phase with a single research effort. The pilot is helping inform broader requirements around privacy, security, technology, resources, and other issues needed to ensure a successful and valuable full-scale research program. Beginning in 2017, all eligible researchers will have an opportunity to participate by submitting a formal research proposal. We are actively working on the pilot phase of the program with the Federal Reserve Board. Partially based on what we learn from the pilot program, we expect to publish additional information about how individual researchers can participate next year.

#### IV. ENTERPRISE COMPLAINT SYSTEM

*Question 24.* Will the Department or FSA release annual reports on complaints submitted to the new complaint system? If so, will these reports identify the number of complaints submitted by servicer and nature of the complaint?

Answer 24. FSA will release annual reports submitted to the FSA Feedback System, as required by the Student Aid Bill of Rights. Although the Student Aid Bill of Rights requires FSA to publish its initial report in October 2017, FSA plans to publish its initial report in November 2016. FSA does expect these reports to include data on the number of complaints submitted by servicer, as well as the nature of such complaints.

*Question 25.* Will FSA ensure that every single complete complaint gets immediately sent to the Federal Trade Commission's Sentinel?

Answer 25. FSA is working with the Federal Trade Commission (FTC) to finalize the process by which complaints are sent to the FTC's Consumer Sentinel system.

*Question 26.* How will FSA ensure that servicers, debt collectors, schools, and other Department contractors are resolving complaints and are accountable to students and borrowers? What is FSA's quality assurance process?

Answer 26. FSA staff has access to all correspondence between complainants and servicers, debt collectors, and other Department contractors. This provides an unprecedented level of oversight over the complaint resolution activities of such entities.

System management teams perform quality assurance on all lines of business within the feedback system, including review of correspondence, categorization, routing, and resolution for adherence to quality standards. Responses or resolutions that do not meet quality standards are re-opened for a second resolution, and action is taken regarding the responsible party—whether an FSA employee or a contractor—as warranted.

The newly created Enforcement Unit will regularly monitor complaints against IHEs in furtherance of investigations of possible violations of the title IV regulations.

*Question 27.* Will the complainant have direct access to all correspondence and information associated with his or her complaint through the system? Will the complainant be able to read a servicer, debt collector, or school's response and associated information?

Answer 27. During case submission, complainants are asked whether they prefer to be contacted via email or via phone. Correspondence with the complainant is managed according to the complainant's preference.

Servicers and debt collectors may respond directly to complainants regarding complaints; as a result, complainants are able to directly read responses from these organizations to them. Schools do not respond directly to complainants regarding complaints; they respond to employees within FSA's Program Compliance unit. In this case, the Program Compliance team relays the information to the complainant.

*Question 28.* Will FSA ensure that all complainants are asked whether they are satisfied with the resolution of their complaints, and will complaints from unsatisfied borrowers be reviewed by staff? Will complaints be kept open until they are resolved and the complainant is satisfied?

Answer 28. Complainants who log in with their FSA ID are asked whether they are satisfied with the resolution of their complaint, and to rate their complaint satisfaction on a 1–5 scale. Any complainant (FSA ID-authenticated or not) who responds to the email detailing their case resolution triggers a flag for an FSA employee to review their case, who is able to re-open or provide additional information if warranted.

*Question 29.* Will students and borrowers who file complaints know exactly what to expect from the Feedback system? Does FSA plan to release a public guide to detail the life cycle of complaints and suspicious activity reports, and who is responsible at what stage?

Answer 29. Students and borrowers who file complaints are provided information regarding exactly what to expect from the Feedback System. For example, they are told that FSA expects to respond to complaints within 15 days and resolve complaints within 60 days in most cases, a timeframe in alignment with Federal best practices.

*Question 30.* Will the Department or FSA release annual reports on complaints submitted to the new complaint system? What information and will be contained in FSA's October 2016 report about the Feedback system? If so, will these reports identify the number of complaints submitted by service and nature of the complaint?

Answer 30. FSA is currently designing the October 2016 report. The report will include the number of complaints submitted by servicer, as well as the nature of such complaints.

#### V. OTHER ISSUES

*Question 31.* What is the Department's current practice regarding public access to servicing contracts? Specifically, does the Department make public the contracts and guidance, as well as any modifications to contracts? Please provide a copy of the contract or contractual modification with MOHELA to provide borrower defense assistance, including a description of the parameters, requirements of this contract,

financial incentives, and whether these documents are public. If these documents are not public, then please explain why not. Please provide a copy of the guidance.

Answer 31. Servicing contracts and major modifications are posted publicly at: <https://www.fbo.gov/spg/ED/FSA/CA/FSA-TitleIV-09/listing.html>.  
<https://www.fbo.gov/spg/ED/FSA/CA/NFP-RFP-2010/listing.html>.

Given the large volume of modifications and guidance issued, much of which is administrative in nature and all of which would need to be reviewed and redacted prior to posting, that information is not typically shared with the public.

*Question 32a.* Institutions of higher education are required to meet certain standards of financial responsibility. The Department determined that Corinthian Colleges had a financial composite score of 0.9 for fiscal year 2011, which fell below the minimum required financial composite score. However, the Department's student loan bank did not require any letter of credit to protect against losses to the taxpayers. Why did the Department decline to order Corinthian to produce a letter of credit? Please provide all documents and memoranda related to this decision.

Answer 32a. CCI failed its financial composite score in fiscal year 2011, and ED required an LOC; however, over the subsequent year, CCI appealed this score, delaying the remittance of an LOC. At the conclusion of this appeal, ED determined CCI failed in fiscal year 2011, but registered a passing score in fiscal year 2012, which would have released any LOC back to CCI. Specifically, on October 31, 2012, the Department notified Corinthian Colleges (CCI) that its fiscal year 2011 audited financial statements indicated a failing composite score. That triggered the requirement to remit a Letter of Credit to the Department in the amount of \$175 million within 75 days of the date of the correspondence (see Department correspondence dated October 31, 2012). CCI requested in correspondence dated November 2, 2012, and November 12, 2012, that the institution be permitted additional time to make a determination on the LOC request. Furthermore, CCI requested a meeting to discuss the basis for the financial determination and referenced letters from two financial experts essentially disputing the manner in which the department treats "goodwill impairment" in its financial composite scores (see CCI correspondence dated November 2, 2012 and November 12, 2012). To fairly consider the claims made by CCI and ensure the veracity of the Department's approach, the Department contracted with an accounting firm (Deloitte) to independently evaluate its methodology for conducting financial analysis and the treatment of items in the composite score ratios such as "goodwill impairment."

During the period of contract award and Deloitte's subsequent analysis and recommendations (see "Deloitte" attachments)—spanning December 2012 through May 2013—the Department and CCI continued to discuss the request for a LOC request dated October 31, 2012. In a letter dated December 11, 2012, the Department noted that while it was considering the issues CCI raised in its November 2012 letters, the LOC remission date would be extended to essentially 10 days after the Department's official response to the November 2012 letters from CCI (see Department correspondence dated November 11, 2012). In addition, the Department requested additional information on various matters related to CCI's financial status which resulted in the institution's response dated December 24, 2012 (see CCI correspondence and attachments dated December 24, 2012).

On August 16, 2013, the Department's Chief Compliance Officer, Robin Minor issued correspondence to CCI executives upholding the determination that CCI had failing financial composite score of 0.9 for fiscal year 2011 but passing composite score of 1.5 for fiscal year 2012 (see Department correspondence dated August 16, 2013). The August 2013 correspondence rendered any LOC remitted for a failed composite score for fiscal year 2011 irrelevant in this case. This is due to the fact that any LOC remitted in relation to the failed composite score for fiscal year 2011 would have had to be relinquished due to the passing score calculated for fiscal year 2102.

*Question 32b.* Who at the Department's student loan bank made the final decision not to order the letter of credit?

Answer 32b. FSA's Program Compliance Office, FSA's Chief Operating Officer, and the Department's Office of the General Counsel were involved in these decisions.

*Question 32c.* How much does the Department expect taxpayers in closed school discharge and borrower defense claims because the bank failed to order a letter of credit from Corinthian?

Answer 32c. The June 29, 2016, release from Joseph Smith, Special Master for Borrower defense (BD), reported that the Department had approved 3,787 BD claims by former CCI students, with an aggregate loan amount of \$73,110,502. In

addition, as of June 24, 2016, closed school loan relief has been granted to 7,386 CCI students, with an aggregate outstanding principal of \$97,613,625. The Department has calculated that its potential exposure to CCI closed school discharge claims is approximately \$200 million. The total amount of borrower defense relief that may be granted to former CCI students depends on the total number of applications from eligible borrowers. As we reported in the last Special Master report, the Department has granted more than \$73 million in borrower defense relief. We are continuing to receive more applications from CCI students, and we are continuing our outreach to potentially eligible students.

*Question 33a.* With respect to borrower defense, is the Department planning to publicly issue guidance regarding how FFEL borrowers can apply for borrower defenses? If so, what is the timeline and how will this guidance be made public?

*Answer 33a.* Yes. In the coming months, the Department will provide additional guidance on its Web site to clarify that a FFEL borrower can apply for borrower defense upon consolidating their FFEL loans into Direct Consolidation Loans. The Department will further explain that prior to consolidation; the Department will provide FFEL borrowers with the opportunity to obtain a pre-determination with respect to whether they are eligible for relief under the Direct Loan borrower defense regulations.

*Question 33b.* Do you believe guidance for FFEL loan holders to grant forbearances to FFEL borrowers who apply for defense to repayment is necessary or can FFEL loan holder currently grant forbearances?

*Answer 33b.* While FFEL loan holders have discretion in determining when to grant forbearance, the Department is developing guidance to clarify that loan holders can grant forbearance to borrowers who apply for relief based on a borrower defense claim. The Department will provide such guidance in the form of a Dear Colleague Letter. This guidance will clarify that the Department will contact FFEL loan holders to request that they grant forbearance to FFEL borrowers with pending defense to repayment claims. Moreover, the proposed borrower defense rule published in June would also provide that FFEL loan holders will be required to place loans in forbearance when the Department makes such a request.

*Question 33c.* Do you plan to issue guidance on this topic?

*Answer 33c.* Yes, the Department will issue guidance in the above-referenced Dear Colleague Letter in the coming months.

*Question 34.* In my February 2016 Questions for the Record, I asked you to “please provide the guidance that the Department currently gives student loan servicers regarding borrower defense discharges, closed school discharges, and other student loan discharges.” You said your staff would “be pleased to further discuss our guidance to student loan servicers” in a meeting with my staff. Months later, my staff has never seen such guidance. Does the Department provide guidance to student loan servicers regarding borrower defense discharges? If not, then why not? If so, then please provide the guidance.

*Answer 34.* On June 1, 2015, the Department notified all servicers of an impending announcement (subsequently issued on June 8, 2015) regarding Borrower defense to Repayment. This announcement explained that under law certain borrowers would be eligible for full or partial discharge of their student loans based on different scenarios involving the school they attended. Servicers were informed that borrowers could begin this process by providing information directly to the Department, that a call center would be prepared to provide support, and that servicers would be asked to apply administrative forbearances to borrower accounts while the Department completed the review process. Such forbearances were to be non-interest capping, applied to the borrower’s account within 5 days, and designed to cover any existing delinquency, plus a period covering the next 12 months. Information regarding the borrower defense program was also posted on the [studentaid.ed.gov](http://studentaid.ed.gov) Web site and we prepared servicers to assist borrowers with closed school loan discharges.

Servicers were also provided with an internal guide entitled “Borrower defense in a Nutshell,” which was designed to explain the history of borrower defense, prepare servicers for a significant increase in applications from borrowers seeking relief, and outline various resources available to borrowers to assist them in the application process. Further, the Department provided a Question and Answer document (with multiple updates) for servicers to share with their customer service representatives to assist them in correctly responding to borrower questions on borrower defense. Copies of these documents are provided in the attachments to this response.



The Department established a dedicated Web site as the primary location for borrowers to obtain information on debt relief and apply for administrative forbearances. This Web site was located at: <https://studentaid.ed.gov/sa/about/announcements/corinthian>.

In addition, a borrower defense “Hotline” was set up to help borrowers understand and exercise their options. Servicers were advised of the hotline number—(855) 279-6207—and the hours of availability (Monday-Friday from 8 a.m. to 8 p.m. Eastern time). One of the Department’s Federal servicers was then selected to operate the call center and also set up a Web site to receive forbearance requests from borrowers who attended CCI.

Specific to CCI, as schools were closing the Department provided prompt closure notifications to servicers and required them to implement customary closed school procedures, which includes proactively reaching out to impacted borrowers to assist them in completing closed school discharge requests. To track the volume of closed school applications and borrower defense inquiries, the Department required servicers to submit a weekly report with information specific to CCI students, which enabled the observation of trends, assisted in the development of initiatives, and also informed decisions related to CCI and borrower defense.

More broadly, we have instructed servicers to refer borrowers inquiring about borrower defense to our Web site or instruct them to e-mail the Department. The servicers send the Department borrower applications or correspondence indicating the student was harmed by actions or failures to act by a school. That is the case whether or not the inquirer uses the exact terms “borrower defense” or “defense to repayment.”

In addition, the Department took the lead in notifying CCI students of their potential eligibility for discharge by initiating a borrower defense email campaign. More than 325,000 CCI students received these messages, which encouraged them to apply for discharge through the [studentaid.ed.gov/Corinthian](https://studentaid.ed.gov/Corinthian) Web page, contact FSA’s Hotline, or review information contained on ED’s blog post “For Corinthian Colleges Students: What You Need to Know about Debt Relief.”

*Question 35.* What is the status of the PCA contracts, and how do these contracts interact with the servicing re-compete (if at all)?

*Answer 35.* Proposals under the PCA solicitation are still under review; this process is completely separate from the servicing solicitation.

See the solicitation notice here: [https://www.fbo.gov/index?s=opportunity&mode=form&id=2fc9caba34a9c5f65fb9eb37550df06a&tab=core&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&id=2fc9caba34a9c5f65fb9eb37550df06a&tab=core&_cview=1).

*Question 36a.* Last year, my office published a report detailing its investigation of the flawed reviews conducted by the Department’s student loan bank. I am pleased that the Department is prohibiting the bank from conducting the review and is instead retaining an independent firm.<sup>11</sup> What error rate would exceed the Department’s tolerance level and lead to termination of the contract?

*Answer 36a.* The Department signed a contract on August 19, 2016, with an external vendor to conduct the audit. The review does not establish a specific error rate as the Department believes it is not prudent to pre-determine a specific threshold. Rather, the Department believes it is important to be able to determine the specific elements of the violations to determine if action should be taken.

*Question 36b.* Will the Department publicly release this error rate prior to conducting the review?

*Answer 36b.* The Department expects to release the results of the findings of the independent auditor.

*Question 36c.* Will the Department’s student loan bank’s executives be prohibited by the Secretary to determine any sanctions?

*Answer 36c.* Senior management within the Department, including representation from the Acquisitions Office, will be involved in determining any appropriate actions.

**[Editor’s Note: Due to the high cost of printing and the large volume of supplemental materials submitted, the materials are maintained on cd’s in the committee file.]**

<sup>11</sup> [http://www.warren.senate.gov/files/documents/SCRA\\_ED\\_Report\\_August2015.pdf](http://www.warren.senate.gov/files/documents/SCRA_ED_Report_August2015.pdf).

[Whereupon, at 11:49 a.m., the hearing was adjourned.]

